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JAMES FANT *v.* STATE OF ARKANSAS

CR 73-69 498 S.W. 2d 332

Opinion delivered September 4, 1973

R. Gary Nutter and *Smith, Stroud, McClerkin, Conway & Dunn,* for appellant.

Jim Guy Tucker, Atty. Gen., by: *Charles A. Banks,* Asst. Atty. Gen., for appellee.

CARLETON HARRIS, Chief Justice. On February 3, 1972, James Fant, appellant herein, entered a plea of guilty to the charge of grand larceny and was given a ten year sentence by the Miller County Circuit Court. The court suspended the sentence conditioned upon good behavior and "leaving alcohol alone", making the following pertinent remarks at the time.

> "Your problem apparently is drinking, and then you don't leave other people's stuff alone. *** A man with a wife and six children, and a woman—the mother of those children, who has had cancer, and then, times

> as hard as they are around your house—it has to be. *** And you don't have any money in that dollar at all to buy any kind of hooch. When you take one drop of anything, you are taking a piece of bread out [of] one of those kid's mouth, and they are going to have to live on wind pudding. If they do, you are not going to be here to see it. *** Let me tell you one other thing. I am going against the recommendation of the law enforcement officials by giving you a suspended sentence. I may make a mistake in your case one time. I don't plan on making it twice."

The matter of Fant's refraining from the use of alcohol was mentioned forcefully several times and appellant apparently fully understood, stating, "I can leave alcohol alone. I guarantee that I can." Subsequently, on July 26, appellant was arrested in Texas by Officer Dale Hampton of the Texas Highway Patrol and charged with driving while intoxicated, following an automobile accident. On August 31, a hearing was conducted by the Miller County Circuit Court as a matter of determining whether the suspended sentence given Fant should be revoked. Officer Hampton testified that following the accident, he administered a breathalizer test, and after stating his qualifications for giving the test, stated that Fant checked 0.18 which, under Texas law, established that he was under the influence of alcohol.[1]

The officer also said:

> "He was definitely intoxicated. He acted intoxicated; he was unsteady on his feet; and in my opinion, he was in an intoxicated condition.
>
> BY THE COURT: Did you smell any intoxicants on him?

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[1]In *Jarvis* v. *Alcoholic Beverage Control Board,* 253 Ark. 724, 488 S.W. 2d 709, Officer Jim McClure testified relative to intoximeter tests given to persons arrested for drunkenness. From the opinion:

> "McClure explained the procedure in giving the tests and said that the final reading on Arlis Lee was .18%. The witness explained that .10% supports a charge of driving while intoxicated and a .15% or over is public drunkenness."

THE WITNESS: Yes, sir, I could smell intoxicants on his breath."

On cross-examination, Hampton testified that Fant told him that he had had "one beer and one drink of whiskey." Appellant testified that a friend gave him a drink of whiskey, stating to him that "just one drink won't hurt you" and that he had also had "two beers"; that he had "chunked the beer out—the last can out" about five minutes before the accident occurred. At the conclusion of the hearing, the court revoked the suspended sentence, stating:

"This is the third occasion that you have been brought back in here for a revocation, and because of your children and your wife, I have given you two additional chances. You have been in trouble before, and I told you after you had advised me that your troubles always came after you drank; that for you not to take one drop of alcohol, didn't I? *** And after the last petition, and there was evidence that you had been drinking, I told you I would give you one other chance, didn't I?

THE WITNESS: Yes, sir.

THE COURT: And then you go out and get liquor and beer when you know what it does to your system. Alcohol to your system is just exactly like strychnine is to other people.

Therefore, you are hereby sentenced to the Arkansas Department of Corrections for ten years, and the clerk will put on his commitment that there were three petitions for revocation; that you were given two additional chances, but the third chance after a suspension, it was revoked, ***."

On this appeal from the revocation, two points are relied upon, viz., that the revocation was an abuse of discretion by the trial judge, and second, that the appellant was unlawfully returned from the State of Texas to this state for the revocation hearing, contrary to his rights under the United States Constitution.

Appellant concedes that the action of the court in revoking the suspended sentence will not be reversed on appeal unless there has been a gross abuse of the trial court's discretion. *Calloway* v. *State,* 201 Ark. 542, 145 S.W. 2d 353. It is then asserted that the revocation occurred "because of the fact that the appellant consumed one drink of whiskey and two cans of beer." We cannot agree with this assertion; rather, it appears that the suspension was revoked because of evidence that Fant was intoxicated, such evidence being presented in court at a hearing, and appellant being represented by counsel. In *Spears* v. *State,* 194 Ark. 836, 109 S.W. 2d 926, Spears had pleaded guilty to grand larceny, the court, however, suspending sentence "during good behavior." Subsequent thereto, the suspension was revoked and *inter alia,* Spears asserted that the evidence was insufficient to justify the revocation. We disagreed, stating:

> "Here, the evidence was sufficient to justify the court in exercising the discretion it did as the evidence on the part of the state was to the effect that appellant was drunk, was cursing in a public place, and had a fight with one Jack Fulmer."

In addition, it will be noted that the court mentioned that this was the third occasion that a revocation had been sought by the State, and that the court had refused to earlier revoke the suspension, giving appellant additional opportunities to properly conduct himself.[2]

It is apparent that the trial court had, contrary to appellant's allegations, been rather lenient with Fant, and we certainly find no abuse of discretion in revoking the suspended sentence.

Nor do we find any merit in appellant's second contention. It is asserted that there is no evidence in the record that Fant consented to being removed from the State of

[2]On June 14, the prosecuting attorney's office had filed a petition asking for revocation of the suspension on the basis of the fact that Fant had been involved in a fight and jailed for aggravated assault in Texarkana, Texas. The field report of the probation officer reflected that the complaint had been filed by Fant's wife, Fant and her brother having engaged in a fight, and Mrs. Fant being cut and stabbed on the arm and in the side by appellant when she tried to break up the fight. The recommendation was that probation be revoked but the court, as stated, did not enter such an order at that time.

Texas to the State of Arkansas, and that there was no extradition proceeding initiated and followed by this state. Of course, on the other hand, though appellant testified, there is no evidence that he was returned to this state against his will, nor was any such contention advanced at the hearing. The subject does not appear in any manner in the trial court. No authority is cited in appellant's brief, and only three paragraphs are devoted to this point. Even if there were evidence that Fant's return to this state was involuntary or accomplished by force, it would not appear there is merit in the contention. As early as 1885, this court held contrary to appellant's contention. See *Elmore* v. *State,* 45 Ark. 243. In *United States* v. *Vicars,* 467 F. 2d 452 (1972), Cert. denied March 5, 1973, the United States Court of Appeals for the Fifth Circuit, in denying a similar contention, stated:

> "Even if, as Gonzales claims, he was illegally arrested in the Panama Canal Zone and brought to the United States, this is not grounds for requiring that the trial court release and discharge him without trial. E. g., *Frisbie* v. *Collins,* 342 U.S. 519, 522, 72 S. Ct. 509, 511, 96 L. Ed. 541, 545 (1952) ('This Court has never departed from the rule . . . that the power of a court to try a person for crime is not impaired by the fact that he has been brought within the court's jurisdiction by reason of a "forcible abduction." '); *Stamphill* v. *Johnston,* 136 F. 2d 291, 292 (9th Cir.) cert. denied, 320 U.S. 766, 64 S. Ct. 70, 88 L. Ed. 457 (1943) ('The personal presence of a defendant before a District Court gives that court complete jurisdiction over him, regardless of how his presence was secured, whether by premature arrest . . . wrongful seizure beyond the territorial jurisdiction of the court . . . false arrest . . . or extradition arising out of an offense other than the one for which he is being tried.'); United States ex rel. *Voigt* v. *Toombs,* 67 F. 2d 744 (5th Cir. 1933), petition for cert. dismissed, 291 U.S. 686, 54 S. Ct. 442, 78 L. Ed. 1072 (1934) ('It is well settled in the courts of the United States that jurisdiction once acquired in a criminal case is not impaired by the manner in which the accused is brought before the court.').''

Affirmed.

DANIEL INGRAM, JR. ET AL. *v.* STATE OF ARKANSAS

CR 73-39 498 S.W. 2d 862

Opinion delivered September 4, 1973
[Rehearing denied October 8, 1973.]

Harold L. Hall, Public Defender, by: *Garner L. Taylor Jr.,* Dep. Public Defender, for appellants.

Jim Guy Tucker, Atty. Gen., by: *O. H. Hargraves,* Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. The three appellants, Daniel Ingram, Jr., Raymond Pruitt, and Willie Stovall, were tried jointly, convicted of rape, and sentenced to thirty years imprisonment. We find no merit in their four contentions for reversal.

On the night of July 18, 1972, Mr. and Mrs. Danny McCulley, both 19 years old, were hitchhiking in Pulaski county on their way back to their home in Florida. They were picked up by the three appellants, residents of

Pulaski county, who promised to take the McCulleys to Memphis. Instead, the appellants drove to an isolated spot outside North Little Rock, where they locked McCulley in the trunk of the car and successively raped Mrs. McCulley. Upon releasing McCulley the appellants took his watch, which was a Seiko "week-dating" watch with a cracked crystal. When the appellants drove off, the McCulleys made their way to a farmhouse and called the police.

Within a day or two the sheriff's department, apparently acting upon the McCulleys' description of the appellants' car, arrested the three appellants. All three men signed confessions, which the trial judge, after a *Denno* hearing, found to have been voluntary. The McCulleys identified the three men. The McCulleys also testified that when the appellants first stopped their car at the scene of the crime and pretended to be looking for some sort of mechanical trouble, the McCulleys handed them a book of matches. The officers found in the appellants' car a book of matches advertising the McCulleys' bank in Florida. The defendant Stovall led the officers to the place where he had thrown McCulley's watch, which was recovered. The McCulleys identified the matches and the watch.

The appellants first argue that the trial court should not have allowed the State to prove that the appellants robbed McCulley of his watch, it being contended that the robbery was a separate crime having no bearing upon the charge of rape. The testimony about the robbery, however, must be considered along with the proof that Stovall assisted the officers in finding the watch. The proof was clearly relevant, as tending to show that the appellants were the perpetrators of the rapes. *Stone* v. *State,* 162 Ark. 154, 258 S.W. 116 (1924).

The appellants' second and third points have to do with the prosecuting attorney's use of Ingram's confession in the course of cross-examining Ingram himself. This is the background for the appellants' present contentions: The three confessions had been introduced by the State as part of its case in chief, but in each confession all references to the other defendants by name had been

deleted in an effort by the State to comply with our holding in *Mosby* v. *State,* 246 Ark. 963, 440 S.W. 2d 230 (1969). Later on each defendant took the stand and testified in his own defense. Each one denied his participation in the rapes and, with supporting witnesses, testified that he was somewhere else at the time the offenses were supposedly committed. Each defendant also testified that his own confession, although admittedly signed by him, had been obtained by police brutality and was not true.

The prosecuting attorney, in cross-examining Ingram, was permitted to read from Ingram's original confession rather than from the modified version in which the names of Pruitt and Stovall had been deleted. The trial judge, in allowing that procedure, instructed the jury that the confession was to be considered only with respect to Ingram's credibility and was not to be considered as evidence against the other two defendants.

We find no error. The original unexpurgated confessions were at first inadmissible only because they were evidence implicating the codefendants without affording the latter their constitutional right of cross-examination. But that objection disappeared when all the defendants elected to testify, submitting themselves to cross-examination. *Jackson* v. *State,* 253 Ark. 1116, 491 S.W. 2d 581 (1973). We are not impressed by the appellants' insistence that the *Jackson* case is to be distinguished on the ground that there the codefendant testified favorably to the complaining appellant, while here the codefendants testified favorably only to themselves. In effect each appellant stated on oath that the McCulleys and the police officers had all testified falsely. We fail to see how that testimony can be regarded as being either unfavorable to the codefendants or restrictive of their right of cross-examination.

The appellants also argue, without citation of authority, that the prosecuting attorney should not have been allowed to use Ingram's original confession for impeachment purposes, because it was not introduced in evidence. A complete answer to that argument is that Ingram's confession, as we have said, became admissible when he took the stand. Had there been any request by the defendants that it then be introduced in evidence, that

request would doubtless have been granted. There was no such request, nor is there any indication that the court's procedure was prejudicial to the defendants.

Finally, the appellants contend that the trial court should have granted their motions for separate trials. Whether the defendants in a non-capital case (as this one now is) are entitled to a severance rests in the sound discretion of the trial court. *Perkins* v. *State,* 217 Ark. 252, 230 S.W. 2d 1 (1950). Inasmuch as all three of the appellants denied their participation in the offenses and sought to establish alibis, there was no essential conflict in their defenses. We are unable to say that the trial judge abused his discretion in requiring the appellants to be tried together.

Affirmed.

JAMES P. WILLIAMS *v.* STATE OF ARKANSAS

CR 73-76 498 S.W. 2d 335

Opinion delivered September 4, 1973

Cearley and Gitchel, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Charles A. Banks,* Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. In the Little Rock Municipal Court the appellant was found guilty of

driving a motor vehicle while under the influence of drugs. Ark. Stat. Ann. § 75-1026.1 (Supp. 1971). This appeal is from the circuit court's affirmance of the municipal court judgment.

The appellant is correct in his contention that there is no proof that he was under the influence of drugs at the time of his arrest. He was suffering from hypoglycemia, an affliction that may cause dizziness or unconsciousness. A state policeman arrested Williams upon finding him unconscious in a sitting position at the wheel of a car which was standing on a public highway with its motor running. According to the officer, there was a strong odor of alcohol upon Williams' breath. Williams' intractable conduct upon his return to consciousness, together with the presence of certain pills upon the dashboard of the car, led the officer to charge Williams with driving under the influence of drugs. However, the undisputed testimony, including that of Williams' doctor, shows that the pills were prescribed tranquilizers which could not have caused the condition in which Williams was found. Williams himself admitted that he had drunk beer before his arrest, but his testimony that he had not taken either the tranquilizers or any other drug is uncontradicted. Thus there is no proof to sustain an essential element of the charge.

Reversed and dismissed.

BILLY RAY PATRICK ET AL *v.* STATE OF ARKANSAS

CR 73-59 498 S.W. 2d 337

Opinion delivered September 4, 1973

Robert F. Morehead, for appellants.

Jim Guy Tucker, Atty. Gen., by: *James W. Atkins,* Asst. Atty. Gen., for appellee.

LYLE BROWN, Justice. The appellants, Billy Ray Patrick, Lonnie Ray Randolph and James Jackson were convicted of burglary and grand larceny in connection with the burglary of Fong's Grocery Store in Eudora. Appellants attack the propriety of their confessions being admitted into evidence. Also, they contend that the trial court erred in admitting exhibits consisting of some dollar bills, silver certificates, quarter wrappers and an empty cartridge box, all of which purportedly came from the victim's safe.

The first point concerns the admissibility of Lonnie Ray Randolph's statement. It is pointed out that Randolph was incarcerated for five days; that the jail cell was leaky; that he was questioned several times by five officers; and that he was fifteen years of age at the time. No evidence was introduced that any of the recited circumstances contributed to coercion. Randolph's main argument is that the taking of a statement from a fifteen year-

old boy is violative of his constitutional rights. We have held to the contrary in a case involving a boy of the same age. In *Mosley* v. *State,* 246 Ark. 358, 438 S.W. 2d 311 (1969) we said:

> By the great weight of authority a minor is capable of making an admissible voluntary confession, there being no requirement that he have the advice of a parent, guardian, or other adult. The cases are anaylzed at length in *People* v. *Lara,* 62 Cal. Rptr. 586, 432 P. 2d 202 (1967), and need not be re-examined here.

Randolph also contends that no statement should have been taken from him because of his age. He cites Ark. Stat. Ann. § 45-224 (Repl. 1964). That statute provides that a person under eighteen years of age, who is arrested without a warrant, shall forthwith be taken before the county juvenile court and the case examined to determine whether he is dependent or neglected. That statute is directory and not mandatory. We have so held with respect to a similar statute, Ark. Stat. Ann. § 43-601 (Repl. 1964). That statute provides that any person arrested without a warrant shall be forthwith carried before a magistrate. We have held § 43-601 to be directory and not mandatory; further, we have many times recited that the failure to comply with that statute does not void a confession. *Moore* v. *State,* 229 Ark. 335, 315 S.W. 2d 907 (1958); *Paschal* v. *State,* 243 Ark. 329, 420 S.W. 2d 73 (1967).

All three appellants gave confessions. Those instruments were introduced in toto. Each confession implicated the other two appellants. Appellants argue here—and made it known in the trial court—that it was error to introduce cross-implicating confessions. (None of the appellants testified.) The point is well taken. We faced the same problem in *Mosby and Williamson* v. *State,* 246 Ark. 963, 440 S.W. 2d 230 (1969). There we said:

> It now appears that the use of the cross-implicating confessions in the case at bar is not permissible in a joint trial because of being in violation of the confrontation clause of the federal Sixth Amendment.

> The answer to the problem seems to be to delete any offending portions of the admissions with reference to a codefendant, if such deletion is feasible and can be done without prejudice, or to grant separate trials.

To the same effect see *Byrd, et al* v. *State,* 251 Ark. 149, 471 S.W. 2d 350 (1971); *Grooms* v. *State,* 251 Ark. 374, 472 S.W. 2d 724 (1971).

Because of a possible second trial we treat one other point. That concerns the introduction by the State of some dollar bills, silver certificates, quarter wrappers, and an empty cartridge box. The dollar bills had an unusual fold so that they might fit into a very small Chinese envelope. The prosecuting witness identified the bills by the folds and we think that evidence was admissible. The silver certificates, quarter wrappers, and the empty cartridge box bore no particularly identifying marks and therefore should not have been introduced.

Reversed and remanded.

FLOYD E. CLARK *v.* STATE OF ARKANSAS

CR 73-83 498 S.W. 2d 657

Opinion delivered September 4, 1973

[redacted]

Nicholas Bierwirth, for appellant.

Jim Guy Tucker, Atty. Gen., by: *James W. Atkins,* Asst. Atty. Gen., for appellee.

JOHN A. FOGLEMAN, Justice. Appellant was arrested on the 29th day of September, 1970, and charged with the rape of his eight-year-old stepdaughter. On February 5, 1971, Mr. Henry Wilkinson was appointed to represent the appellant. On February 16, 1971, appellant, having previously entered a plea of not guilty, changed that plea to guilty. A jury impaneled to fix the punishment returned a verdict fixing the sentence at 75 years. The prosecuting attorney, pursuant to an agreement with defense counsel, had waived the death penalty. Appellant's first petition for relief under Criminal Procedure Rule 1, filed on April 22, 1971, was summarily denied. This motion was amended on August 14, 1972. The amended motion was denied after an evidentiary hearing held October 6, 1972. Appellant seeks reversal of the order denying this relief, relying upon the following points:

I. That appellant did not enter the plea of guilty at his trial with full knowledge of the consequences of the plea and should have been granted relief.

II. That the court erred in finding that appellant knowingly, intelligently and voluntarily waived his constitutional rights during the pretrial interrogation stage.

III. That the lower court erred in finding that appellant was effectively represented by counsel.

IV. That appellant was denied due process by the failure of the court to appoint counsel to represent appellant until four months after his arrest and the filing of the information.

V. That the court's instructing the jury on the law of parole prior to any request for such information denied appellant due process of law.

We shall discuss these points in the order stated.

I.

Appellant contends that he was misled by his appointed counsel so that he believed that if he entered a plea of guilty, he would receive a sentence that would make him eligible for parole in not more than two years. He also complains the trial court took no steps to advise him of the actual consequences of the plea he entered. He contends that this alleged ignorance of the true consequences of his plea rendered it impossible that his plea was entered knowingly, intelligently and voluntarily. In support of this argument he calls our attention to the facts that he only completed the fifth grade in school, that his ability to read and write was very limited and that he had a long history of alcoholism.

The trial court found that: the guilty plea was not the result of any deception or coercion by either the deputy prosecuting attorney or appellant's court-appointed attorney; appellant entered his guilty plea with full knowledge of the impact thereof; at no time did appellant's court-appointed attorney threaten him with the death penalty but only advised appellant that this was a possible punishment, without undue emphasis thereon; and appellant chose to plead guilty of his own free and voluntary will to avoid the possible imposition of such a penalty.

Appellant testified that between the time Wilkinson was appointed and the time of the trial, he saw Wilkinson on a very regular basis, and Wilkinson led appellant to believe he was going to defend appellant strongly, but later informed appellant that there was nothing appellant could do to avoid being found guilty and that if he did not plead guilty he was certain to get the death penalty. Appellant further testified that on the last day before his trial, he decided he was not going to get any help and, since Wilkinson had told him that he could get a lighter sentence which would allow him to apply for parole in no more than two years, he decided to change his plea to guilty.

On the other hand, Wilkinson, called as a witness by appellant, testified that he told Clark that the offense

with which he was charged carried a penalty ranging from a minimum of 30 years to the death penalty as a maximum. According to his testimony, when the prosecuting attorney offered to waive the death penalty if Clark entered a plea of guilty, Wilkinson immediately advised Clark, telling him that, in the event he entered a plea of guilty, his punishment would range from 30 years to life imprisonment. He denied threatening Clark with the death penalty or telling him that a plea of guilty would result in his receiving a very light sentence on which he could be paroled in no more than two years. Wilkinson also testified that he informed Clark that the prosecuting attorney would try to get a life sentence upon a plea of guilty and that Wilkinson would try to get a 30-year sentence. According to Wilkinson, appellant's decision to plead guilty was reached several days after communication to appellant of the state's offer.

The case came on for trial prior to our acknowledgment in *O'Neal* v. *State,* 253 Ark. 574, 487 S.W. 2d 618, that the decision of the United States Supreme Court in *Furman* v. *Georgia,* 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), rendered administration of the death penalty under our existing statutes unconstitutional. The entry of a plea of guilty in order to avoid the possibility of a death penalty is not, in and of itself, an involuntary plea. *North Carolina* v. *Alford,* 400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970); *Brady* v. *United States,* 397 U.S. 742, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970). The question here is whether the guilty plea was entered intelligently and voluntarily with the advice of competent counsel. Insofar as the advice of counsel is concerned, the burden was upon appellant to show that the advice he received from counsel was not within the range of competence demanded of attorneys in criminal cases. *Horn* v. *State,* 254 Ark. 651, 495 S.W. 2d 152; *Tollett* v. *Henderson,* 411 U.S. 258, 93 S. Ct. 1602, 36 L. Ed. 2d 235 (1973). There was ample basis for a finding by the trial court that appellant had failed to meet his burden of overcoming the presumption of competence of counsel. We are certainly unwilling to say that the circuit judge was not justified in accepting the version of appointed counsel over that of appellant in finding that appellant was fully informed as to the impact of his plea of guilty and its potential

consequences. The record discloses that appellant affirmatively answered his attorney's open-court inquiry whether his plea to the charge was guilty. It would certainly be the better practice for the trial judge, upon the entry of a plea of guilty, to address inquiries to the defendant himself in order to establish beyond doubt that the plea is knowingly, intelligently and voluntarily made and to inform the defendant of the possible consequences of such a plea. His failure to do so in a particular case does not render the plea and the sentence thereon subject to collateral attack for constitutional infirmities, if the record otherwise affirmatively discloses or it is otherwise shown that the plea was entered understandingly and voluntarily.

II.

Appellant contends that a statement given by him to the deputy prosecuting attorney and police officers as a result of pretrial interrogation was involuntary because he had not knowingly, intelligently and voluntarily waived his constitutional guaranties against self-incrimination and of right to counsel. His argument is based largely upon his contention that his waiver could not have been knowingly and intelligently made because he did not understand, and was not capable of understanding, the explanation of these rights. He contends that he was unable to understand because of his deep distress resulting from the accusation made against him, his inability to read or write and his affliction with alcoholism for a great period of time prior to his arrest. Appellant argues that his alcoholism so affected his mental processes that he was not able to understand or appreciate the meaning of what was taking place around him.

In support of this allegation, Clark testified that he was half drunk when arrested and taken to the jail, where he was interrogated by Mr. Fletcher Long, Jr., deputy prosecuting attorney and Sgt. Billy Joe Baker, a state police investigator. He admitted having signed two papers, which he said were not explained to him. Clark said he was led to believe that he was helping himself by giving a statement of events of which he knew, that Mr. Long was the best lawyer he could have, that the signing of the waiver of his rights was just a technicality. He admitted

that the waiver was read to him, but testified that he was not told that he had a right to remain silent, that anything he said could be used against him in court or that he had a right to advice of counsel before interrogation. He expressed the belief that he signed the statement before he signed the waiver, but professed inability to remember who explained the waiver to him and attributed his memory difficulties to his drinking problem. He explained his failure to raise any question about the truth or the voluntary nature of his statement to advice he claimed that his lawyer had given him to keep his mouth shut unless he wanted to get the death penalty. He admitted that he understood the content of the statement. His mother testified that Clark called her from the jail and "told me he did it."

Clark's testimony was contradicted by Long who testified that he read and explained all of the constitutional rights recited in Clark's waiver to Clark and expressly asked Clark if he understood what had been read. According to Long, Clark responded that he wanted to sign the waiver and to talk about what had happened. Thereafter, Long said, Clark told a totally exculpatory story but when confronted with evidence found in his automobile and the fact that this statement failed to account for a period of an hour and a half, Clark then told the story contained in the statement. Long attributed to clerical error the recording of the time of the signing of the waiver as five minutes later than the commencement of the statement.

Although there was no pretrial hearing to determine the voluntariness of Clark's confession, the record of the trial, introduced as an exhibit by Clark, discloses that Baker testified that he read the waiver to Clark after it had been explained to him by the deputy prosecuting attorney and before it was signed or any statement of Clark was taken.

This question could and should have been presented to the court during the course of the trial. See *Ballew* v. *State,* 249 Ark. 480, 459 S.W. 2d 577; *Cox* v. *State,* 243 Ark. 60, 418 S.W. 2d 799. Wilkinson's version of the failure to do so is based upon his conclusion that the statement could not be excluded after he had interviewed the deputy

prosecuting attorney and the officers who knew the circumstances under which it was taken. Of course this statement was offered in evidence after the appellant had decided to enter a plea of guilty. When we consider this factor along with the disclosure from the record of trial that Clark elected to testify and, instead of repudiating his confession, attributed his conduct to his drinking, it appears that the circuit court was justified in finding against appellant on this point. Furthermore, a plea of guilty is not rendered subject to collateral attack merely because the accused's attorney may have, on retrospective consideration, erroneously concluded that a confession was admissible in evidence, if the attorney's advice was within the range of competence demanded in criminal cases. *McMann* v. *Richardson,* 397 U.S. 759, 90 S. Ct. 1441, 25 L. Ed. 2d 763. See also, *Tollett* v. *Henderson,* supra.

III. and IV.

Appellant first argues that the assistance of counsel was ineffective because a lawyer was not appointed to represent him until approximately four months after his arrest. The record discloses that soon after his arrest, appellant was committed to the Arkansas State Hospital for observation. Although we feel that it would be much the better practice for the court to appoint counsel for an indigent defendant upon his first appearance before the trial court, appellant has not pointed out any prejudice that resulted from the lapse of time between his arrest and the appointment of counsel for him. His suggestion that he was prejudiced and deprived of due process of law by his commitment to the State Hospital for examination as to his mental competency and legal responsibility for his acts is wholly without merit.

In support of point III, Clark contends that Wilkinson told him so frequently that he was certain to receive the death penalty that he became intimidated by the possibility, and that Wilkinson assured him if he did plead guilty he would receive a sentence permitting parole after two years. He also asserts that: no attempt was made by Wilkinson to prevent the introduction of the alleged confession; Wilkinson made no request that rags found in

Clark's automobile be analyzed to determine the exact nature of substances thereon which were said to have been blood and semen; Wilkinson assured him that he would not be cross-examined when he took the stand to testify; Wilkinson prejudiced his cause by examining appellant about his history of alcoholism when he testified; Wilkinson failed to cross-examine the alleged victim when she testified and ignored his desire that a prospective juror be peremptorily challenged because of some previous trouble between him and the prospective juror.

In addition to the recitations of testimony set out in discussions of other points, it should be noted that Wilkinson explained his waiver of cross-examination of the young victim. He said that after he observed that her detailing of the particulars of the offense had produced a reaction by the jurors adverse to Clark, he felt that Clark's best interests were served by permitting the child to leave the witness stand and to be taken out of the vision of the jury as soon as possible. He also attributed his failure to challenge some of the evidence to the fact that Clark had entered his plea of guilty and had, before the offer of waiver of the death penalty was made, admitted to Wilkinson that he had raped the girl and had confessed to it. The record also discloses that Wilkinson exercised all the peremptory challenges appellant was allowed.

Insofar as the trial procedures are concerned, the most that could have been said of counsel's actions, if appellant's version were accepted, was that there were errors, omissions, mistakes, improvident strategy or bad tactics. None of these will suffice even to require an evidentiary hearing on an allegation of ineffective assistance of counsel, much less justify postconviction relief from a sentence. *Leasure* v. *State,* 254 Ark. 961, 497 S.W. 2d 1. All of the matters asserted in support of this point, except that pertaining to intimidation or coercion, are matters which are ordinarily within the realm of counsel's judgment in the conduct of his client's defense and therefore inappropriate bases for postconviction relief for ineffective assistance of counsel. *Leasure* v. *State,* supra. We have heretofore treated the matter of coercion by counsel. We find no error in the court's finding that appellant's right to the effective assistance of counsel had been fully

protected, and that his rights were fully protected before, during and after his trial. A charge of this sort can prevail only if the acts or omissions of the attorney result in making the proceedings a farce and a mockery of justice, shocking the conscience of the court, or if the representation is so patently lacking in competency or adequacy that it becomes the duty of the court to be aware of and correct it. *Leasure* v. *State,* supra. Nothing in this record indicates that any such state of affairs prevailed.

While we deem allegations in appellant's petition not argued here to have been waived, we note that the attorney explained his failure to subpoena character witnesses suggested to him by appellant by stating he found these persons themselves were of questionable reputation and very vulnerable to attack as character witnesses so that their testimony would be detrimental rather than advantageous. Furthermore, no request of appellant to Wilkinson to appeal the case has been pointed out to us and, in view of the strong case against appellant, we are persuaded that the idea of appeal is a post-confinement afterthought, which may have been prompted by the fact that the death penalty was no longer a hazard.

V.

Appellant's contention that the court's instructing the jury on the law of parole denied him due process of law is also totally without merit. Criminal Procedure Rule 1 is not devised as a substitute for appeal or as a method of review of mere error in the conduct of the trial. It is designed solely to afford a method for collateral attack upon a judgment and sentence upon grounds specified in the rule. *Thacker* v. *Urban,* 246 Ark. 956, 440 S.W. 2d 553. Furthermore, the procedure followed by the trial court in giving the instruction in question was not disapproved by this court until well after the date of this trial. *Andrews* v. *State,* 251 Ark. 279, 472 S.W. 2d 86. In that case, decided some time after appellant's trial, we reviewed previous decisions approving such instructions. We concluded that we would no longer give approval to this procedure, but not on the grounds of violation of due process or other constitutional grounds. We had just such cases as this in mind when we said:

> We recognize that appeals may presently be pending where the court, in following previous opinions, may have violated the present admonition. We therefore state that the matter last discussed in this opinion, being only a matter of procedure, shall not be retroactive, but shall become effective when this opinion becomes final.

It should also be noted that when a criminal defendant has entered a plea of guilty after he has had the advice of counsel, he may not thereafter even raise claims relating to deprivation of constitutional rights prior to the guilty plea, except by showing that his plea was not voluntarily and intelligently entered because the advice he received from counsel was not within the range of competence demanded in criminal cases. *Tollett* v. *Henderson,* supra. Appellant, as previously indicated, has failed to make the required showing.

Since we find no basis for reversal on the grounds argued here, the judgment is affirmed.

LARRY WAYNE BURKS *v.* STATE OF ARKANSAS

CR 73-67 498 S.W. 2d 336

Opinion delivered September 4, 1973

James R. Howard and *Howard, Howard & Howard,* for appellant.

Jim Guy Tucker, Atty. Gen., by: *Richard Mattison,* Asst. Atty. Gen., for appellee.

FRANK HOLT, Justice. Appellant was found guilty of robbery by the trial court, sitting as a jury, and a 10-year penitentiary sentence was imposed. When the state rested its case, the appellant offered no testimony and moved for a directed verdict of not guilty which the court refused. On appeal appellant's only contention, through court appointed counsel, is that the court erred in its denial of the motion. We hold that the court was correct.

The thrust of appellant's argument is primarily directed toward insufficient identification. The victim of the robbery, a 72-year-old semi-retired mechanic, testified that the appellant and a companion came into his garage and asked for some bolts for a mechanical unit. On direct examination the victim identified the appellant as the one who "shoved the gun in my side" and demanded his money. Appellant then struck him with the gun and removed his billfold and its contents ($100-$120) from his pocket. The robber and his companion fled and were apprehended a few minutes later in the vicinity by the police. On cross-examination the victim testified that, although he could not "make a positive identification," the appellant resembled the individual who robbed him since he was the same size and height. The victim further answered that he had previously identified appellant in a lineup procedure on the afternoon of the robbery. The appellant admitted in his own uncontradicted handwritten statement that he was present at the scene of the alleged offense, although he denied being a participant.

It is a well established rule that a directed verdict is proper only when no fact issue exists and on appeal we review the evidence in the light most favorable to the appellee and affirm if there is any substantial evidence. *Parker* v. *State,* 252 Ark. 1242, 482 S.W. 2d 822 (1972). In the case at bar a factual issue existed and the evidence is amply substantial to support the verdict.

Affirmed.

RICHARD EASLEY *v.* STATE OF ARKANSAS

CR 73-75 498 S.W. 2d 664

Opinion delivered September 10, 1973

C. Joseph Calvin, for appellant.

Jim Guy Tucker, Atty. Gen., by: *O. H. Hargraves,* Deputy Atty. Gen., for appellee.

CARLETON HARRIS, Chief Justice. According to appellant's statement of the case, on November 17, 1970, in the Holly Island Community, a few miles from Rector, an automobile occupied by four men was seen entering and leaving the driveways of several homes, and a resident of the community approached the car and, observing sev-

eral items in the back seat, inquired as to their business. After an argument, the men left and the Clay County Sheriff's Office was notified. About ten minutes later, Deputy Sheriff Liddell Jones, who had received the earlier call, received another from a resident of the community stating that several items of property were missing from his home. The Dunklin County Police Department (Kennett, Missouri) was sent a general description of the car, make, model, license number, and number of persons occupying the vehicle, and about thirty minutes later, the police located an automobile fitting the description parked at a grocery store in Kennett, the occupants, including appellant, at the time eating sandwiches. All four were arrested and the car was driven by an officer to the county courthouse. Deputy Jones from Clay County arrived about twenty minutes later, and with a member of the Missouri State Police, conducted a warrantless search of the car. Several items of personal property later established as stolen property were found on the front and back seat, and other items were found in the trunk after a search was made while the car was parked at the courthouse. Thereafter, the Prosecuting Attorney of the Second Circuit in Arkansas charged Richard Easley, appellant herein, with burglary and grand larceny of the property of Birtlee Statler (who had advised Deputy Sheriff Jones of the missing items), unlawful possession of that stolen property, along with grand larceny and unlawful possession of property allegedly belonging to Charles Grimes. A bench warrant was issued and Easley was extradited from the State of Missouri, pleaded not guilty, and was tried before a jury. He was found guilty on all four counts and was sentenced to a term of ten years in the Arkansas State Department of Correction.[1] On September 17, 1972, appellant filed a motion for relief under Criminal Procedure Rule 1, and several amendments were subsequently added. The Clay County Circuit Court, on the basis of the record in the case, denied relief to the petitioner, and from such denial appellant brings this appeal. Seven alleged errors are asserted, though not all are here argued, and it is admitted that some are of doubtful merit.

The principal asserted error is that there was no probable cause to warrant a search of the Easley automobile.

[1]A second sentence of ten years was to be suspended upon restitution and good behavior.

Prior to trial, the court heard, in chambers, a motion filed on behalf of appellant to suppress the evidence obtained during the search, and this motion was denied. It is contended by appellant that the court erred in finding that probable cause existed for the search, but even if there was probable cause at that time, the warrantless search of the car at the station was improper and illegal. As to probable cause, the Missouri officers had been notified by Clay County Deputy Sheriff Jones of the burglary, a description of the automobile, including the license number, and information concerning certain items of stolen property. Some of these items were visible in the back seat and back floorboard. Certainly, there was probable cause for believing that the occupants of the car had committed a felony and appellant recognizes that the case of *Carroll* v. *United States,* 267 U.S. 132 stands for the proposition that an officer can search a motor vehicle without a warrant if probable cause exists to believe the vehicle contains that which by law is subject to seizure. Appellant states, however, that if "exigent" circumstances existed at the time of the arrest (while the car was parked at the grocery store), such "exigency" justifying a warrantless search ceased after the men were there arrested and the car driven to the courthouse. Accordingly, the search conducted at the latter location, says appellant, could only have been authorized by obtaining a proper search warrant.

We do not agree. In *Cox* v. *State,* 254 Ark. 1, 491 S.W. 2d 802, decided on March 12 of this year, the facts were similar, and the identical arguments were made. In that case, there was a comprehensive discussion of federal cases relating to search of automobiles and seizure of evidence therein and we pointed out that *Coolidge* v. *New Hampshire,* 403 U.S. 443, 29 L. Ed. 2d 564, a case relied upon by appellant in the present litigation, was not controlling, but rather that the key case was *Chambers* v. *Maroney,* 399 U.S. 42, 26 L. Ed. 2d 419 (1970), and we quoted from *Chambers* as follows:

> " 'In terms of the circumstances justifying a warrantless search, the Court has long distinguished between an automobile and a home or office. In *Carroll* v. *United States,* 267 U.S. 132 (1925), the issue was the admissibility in evidence of contraband liquor seized

in a warrantless search of a car on the highway. After surveying the law from the time of the adoption of the Fourth Amendment onward, the Court held that automobiles and other conveyances may be searched without a warrant in circumstances that would not justify the search without a warrant of a house or an office, provided that there is probable cause to believe that the car contains articles that the officers are entitled to seize.' "

The court held that where the police are justified in stopping and searching an automobile as in *Carroll,* they may also seize and search it later at the police station. The court, in *Coolidge* v. *New Hampshire, supra,* did hold as unconstitutional a warrantless police station search of an automobile under circumstances very dissimilar to those in *Chambers,* but pointed out continuing approval of *Chambers* by stating:

"There is no suggestion that, on the night in question, the car was being used for any illegal purpose, and it was regularly parked in the driveway of his house. The opportunity for search was thus hardly 'fleeting.' The objects that the police are assumed to have had probable cause to search for in the car were neither stolen nor contraband nor dangerous. (403 U.S. at 460).

"Since *Carroll* would not have justified a warrantless search of the Pontiac at the time Coolidge was arrested, the later search at the station house was plainly illegal, at least so far as the automobile exception is concerned. *Chambers, supra,* is of no help to the State, since that case held only that, where the police may stop and search an automobile under *Carroll,* they may also seize it and search it later at the police station (403 U.S. at 463).

"It is true that the actual search of the automobile in *Chambers* was made at the police station many hours after the car had been stopped on the highway, when the car was no longer movable, any 'exigent circumstances' had passed, and, for all the record shows, there was a magistrate easily available. Nonetheless, the analogy to this case is misleading. The rationale of *Chambers* is that *given* a justified initial intrusion,

there is little difference between a search on the open highway and a later search at the station. Here, we deal with the prior question of *whether* the initial intrusion is justified. For this purpose, it seems abundantly clear that there is a significant constitutional difference between stopping, seizing, and searching a car on the open highway, and entering private property to seize and search an unoccupied, parked vehicle not then being used for any illegal purpose."

In *Chambers,* as mentioned in *Cox* v. *State, supra,* a warrantless search of an automobile was made after the car had been taken to a police station, but the court noted that it could have been searched on the spot where it was stopped since there was probable cause to search, and it was a fleeting target for a search. The court added that the probable cause factor was still in existence at the station house and that in terms of practical consequences, there was little to choose between an immediate search without a warrant, and immobilizing the car until a warrant was obtained. "Given probable cause to search, either course is reasonable under the Fourth Amendment." See also the recent case (January 2, 1973) of *Gomez* v. *Beto,* 471 F. 2d 774, decided by the United States Court of Appeals for the Fifth Circuit. Appellant's argument is without merit.[2]

Point II is covered by our previous discussion.

Point III sets out that the petitioner was arrested without a warrant and was not advised of his rights, but that point is not argued. We have already made clear that the arrest was justified without a warrant and the testimony reflects that appellant was advised of his rights.

Point IV refers to Easley's allegation in his petition "That petitioner's attorney did not defend his client to the fullness of his ability" and "petitioner's attorney did in fact state that he wouldn't go any further for lack of money." Before discussing this point, it might be stated that it appears that Easley did not actually desire a new hearing before the trial court. On November 2, 1972, appellant addressed a letter to the circuit judge, complying with the court's request that he be more spe-

[2]There was also testimony that Easley consented to the search of the automobile.

cific in his allegations of inadequate representation by counsel. Easley closed the letter by saying:

> "Petitioner asked the court that in view of the fact that Petitioners Constitutional Rights have been violated that the court act on Petitioners original motion on amendments to that motion. Petitioner asked that if the court can not make a decision *on evidence already given* [our emphasis] that the court allow Petitioner to move his (Petitioners) motion on to the higher courts in the Arkansas State Supreme Courts."

Easley had two retained attorneys and upon the trial court's direction to be more specific asserted that on the day of trial one of these attorneys was sick and unable to attend and he (Easley) asked the other attorney to endeavor to get the case postponed. This was not done and Easley also asserted that the attorney who was ill had other witnesses to present to the court. Of course, the allegation that the attorney stated he "wouldn't go any further for lack of money" is rather puzzling since appellant was represented by this retained attorney throughout the trial, and the statement apparently has reference to an appeal to this court, since the appeal on the denial of relief under the Rule 1 Petition was brought to this court by appointed counsel. Of course, the names of other witnesses could have been furnished to counsel by appellant himself, and there is no allegation that the names of witnesses were given to counsel trying the case, and the attorney refused to call them. Frequently, attorneys do not call all the witnesses whose names they have, either because they do not feel the testimony would add anything to the defense, or because they think the witnesses would make a bad impression. Let it be remembered that this is no attack upon court-appointed counsel, but an attack upon Easley's own retained counsel, who incidentally has practiced law in that area for many years. It has been frequently said that "Effective assistance does not equate with success." See *Mitchell* v. *Stephens,* 353 F. 2d 129, and cases cited therein. The evidence against Easley, as shown by testimony in the hearing to suppress, was rather overwhelming, and the failure to obtain an acquittal certainly does not denote incompetence. In *Poole* v. *United States of America,* 438 F. 2d 325 (1971), Poole appealed from an order denying without hearing

his motion to vacate sentence. It was alleged that he was denied the Sixth Amendment right for assistance to counsel in that his court-appointed counsel failed to subpoena one Richard Curtis Apgar, also a co-defendant, to testify and it was asserted that the district court erred in denying him a full evidentiary hearing. The United States Court of Appeals, Eighth Circuit, in an opinion by Chief District Judge McManus, held the contention to be without merit though Apgar had signed an affidavit supporting Poole's allegation that he (Poole) had been forced by Apgar to commit the robbery. The court stated:

> "There is a presumption of the competency of court appointed counsel. *Slawek* v. *United States,* 413 F. 2d 957 (8th Cir. 1969). A charge of inadequate representation can prevail 'only if it can be said that what was or was not done by the defendant's attorney for his client made the proceedings a farce and a mockery of justice, shocking to the conscience of the Court. *Hanger* v. *United States,* 428 F. 2d 746, 748 (8th Cir. 1970).'
>
> "The calling or not calling of witnesses is a matter normally within the realm of the judgment of counsel. [Citing cases]. We hold that the requirement of the Sixth Amendment has been met here since Appellant's counsel's judgment not to call Richard Curtis Apgar neither made a mockery of justice, nor shocks the conscience of the Court.
>
> "The District Court did not err in denying the Appellant a full and fair evidentiary hearing since we feel that an 'examination of the motion and the records and files of the case conclusively shows a hearing would serve no useful purpose.' *Cardarella* v. *United States,* 375 F. 2d 222, 230 (8th Cir. 1967).
>
> 'If a movant under Section 2255 makes no allegations of ineffectiveness or incompetence of counsel, save in matters normally within the realm of counsel's judgment, he is not entitled to a hearing. *Mitchell, supra,* 259 F. 2d at 794.' "

Previous discussion has covered Point V, though the point is simply stated, and no argument advanced.

Point VI asserts that the "commitment papers are not in order", but the point is not argued and the sentence appears to be in accord with the verdict.

Finally, is it asserted that the petition should have been passed upon by a different judge rather than the same judge who presided at the trial; that this was "inherently prejudicial and a denial of due process of law". Appellant recognizes that we have held this contention to be without merit, but insists that we should reconsider that ruling. In *Meyers* v. *State,* 252 Ark. 367, 479 S.W. 2d 238 (1972), we said:

> "We have recognized the need for a different presiding judge when the one who originally heard the case is biased or, for want of a record of the first hearing, must appear as a witness. *Elser* v. *State,* 243 Ark. 34, 418 S.W. 2d 389 (1967); *Orman* v. *Bishop,* 243 Ark. 609, 420 S.W. 2d 908 (1967). In the case at hand, however, the petitioner asserts no factual basis for his insistence that the assignment of a new judge is constitutionally mandatory. We find nothing in the record to suggest that Judge Enfield was disqualified from acting upon the postconviction petition. To the contrary, he appears to have treated the petitioner with courtesy and fairness in every particular. The present contention is therefore without merit."

There is no suggestion of prejudice in the petition filed by appellant, nor is there any indication from the record that such prejudice existed. We hold the allegation to be without merit.

Affirmed.

FOGLEMAN, J., not participating.

ELBERT LEE JOHNSON *v.* STATE OF ARKANSAS

CR 73-87 498 S.W. 2d 651

Opinion delivered September 10, 1973

Lohnes T. Tiner, for appellant.

Jim Guy Tucker, Atty. Gen., by: *James W. Atkins,* Deputy Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. The appellant, charged with the theft of a tractor-trailer, was found guilty of grand larceny and was sentenced to imprisonment for three years. His only assignment of error is that the State failed to prove that the stolen property was worth more than $35.

The owner of the tractor-trailer testified, in March, 1973, that he paid $3,300 for it "about two weeks before Christmas," which would have been less than three months before the theft on February 15, 1973. The proof also shows that the rig was in operating condition and had apparently just been driven to Arkansas from North Carolina with a load of furniture.

We find the testimony sufficient to support the jury's verdict. The case is unlike *Rogers* v. *State,* 248 Ark. 696, 453 S.W. 2d 393 (1970), cited by appellant, for there the State offered no testimony to indicate the value of the stolen car, in dollars and cents. Here the State showed what the owner had recently paid for the stolen rig, which is a permissible factor for the jury to consider in determining market value. *Williams* v. *State,* 252 Ark.

1289, 482 S.W. 2d 810 (1972); Jones on Evidence, § 4.54 (6th ed., 1972). The jury, upon the uncontradicted proof in this case, could reasonably have concluded that the tractor-trailer combination was worth more than $35 on the date of the theft. In fact, the opposite conclusion would have been wholly unreasonable.

Affirmed.

HARRY BAILEY *v.* STATE OF ARKANSAS

CR 73-77 498 S.W. 2d 859

Opinion delivered September 10, 1973

[Rehearing denied October 8, 1973.]

Donald Poe, for appellant.

Jim Guy Tucker, Atty. Gen., by: *O. H. Hargraves,* Deputy Atty. Gen., for appellee.

LYLE BROWN, Justice. Appellant Harry Bailey was convicted of murder in the second degree in connection with the shooting death of W. R. Johnson. After a brief recitation of the evidence we shall enumerate and discuss the four points advanced for reversal.

Appellant owned, and resided on, a small farm in the Weeks community in western Scott County. He rented an adjoining eighty acre tract which was being occupied by W. R. Johnson as a tenant. Johnson moved out of the house but left some of his personal belongings and kept the key. When appellant found need for the house he went to see Johnson about the key and that meeting resulted in a heated encounter. Appellant testified that he was unable to get the key; that Johnson struck appellant in the face; and that Johnson threatened to kill appellant. The next confrontation of significance between the two men was on the day of the shooting, July 17, 1972. Appellant went to Stinson's Garage in Weeks to pick up some personal items. He had a rifle in his pickup truck. Appellant transacted his business at the garage and just as he was getting in his truck, Johnson drove up and stopped. Johnson got out of his truck and walked toward appellant's truck. Appellant testified that he thought Johnson was intending to kill him, so, in fear of his life, appellant shot and mortally wounded Johnson.

The State offered the testimony of three eyewitnesses to the shooting. They testified that Johnson was unarmed; that as Johnson approached appellant's truck appellant said: "Johnson, I thought I told you to get out of the country"; that Johnson replied: "Well, go ahead and shoot. I'm not afraid of your gun"; and that appellant thereupon fired the fatal shot. Appellant insisted that he fired the shot because he feared for his life, although he conceded that Johnson displayed no weapon.

On appellant's behalf, Richard Aldridge testified that on the day of the encounter at the farm, the witness heard Johnson tell appellant that he would kill appellant the next time he saw him. Other evidence and trial procedure pertinent to the case will be recounted as the points for reversal are discussed.

POINT I. *The trial court erred in failing to provide a 1973 jury selection to try the case in January 1973.* In Scott County, January falls within the November term of court. The panel from which the jury was selected was chosen for the November 1972 term. If appellant desired to challenge the panel, a motion to that effect should have been made before his jury was empanelled and sworn. He did not do this. In *Carruthers* v. *Reed,* 102 F. 2d 933 (1939) the Eighth Circuit Court of Appeals said:

> Under the law of Arkansas a challenge to the panel or motion to quash must be promptly made and it is too late if the jury has been empanelled and sworn. *Brown* v. *State,* 12 Ark. 623 (See 35 C.J. 377). If no objection was made at the trial, it is too late to urge it for the first time after verdict.

POINT II. *The court erred in denying the proffered psychiatrist's testimony.* Appellant called as a witness a duly licensed medical doctor specializing in psychiatry. Appellant had consulted the doctor after the shooting and the doctor would have, according to the proffered testimony, given an opinion of the state of mind of appellant at the time of the shooting. We emphasize that appellant was not interjecting the issue of insanity. Appellant's attorney stated that he would prove by Dr. Chambers that the doctor had visted and consulted with appellant and that in the doctor's opinion, appellant fired the fatal shot through fear generated by the first confrontation at or near the tenant house. "As a general rule, the opinion of experts is not received if all the facts can be ascertained and made intelligible to the jury, or if the matter is such as men in general are capable of comprehending." 2 Wharton's Criminal Evidence § 502 (1955). The jury was furnished with a history of the background encounter between the parties; they had the testimony of three eye witnesses to the shooting;

and they had a history of the shooting as viewed by the appellant. Any testimony given by the psychiatrist as to the cause of the shooting would have been cumulative and also would be based on the version of the shooting as recited to the doctor by appellant. The trial court did not err in refusing to admit the testimony of the psychiatrist.

POINT III. *The court erred in giving its instructions and refusing the requested instructions of appellant.* The specific argument on appeal with respect to instructions is that the court erred in giving court's instructions 16 and 18. Instruction 16 is the same as instruction S-9, discussed and approved in the case of *Lamb* v. *State,* 218 Ark. 602, 238 S.W. 2d 99 (1951). It was there held that the cautionary instruction (S-9) was appropriate when the case goes to the jury on the theory of self-defense. Instruction 18 is lifted from *Tatum* v. *State,* 172 Ark. 244, 288 S.W. 904 (1926). In *Tatum* the instruction was numbered 15. In the case at bar appellant made the single objection that the instruction did not inform the jury that they could conclude that appellant may not have had the requisite intent to commit murder.

POINT IV. *The court erred in permitting the State to bring in rebuttal evidence after both sides rested, and further erred in refusing appellant the right to rebut the rebuttal witness.* As to the first facet of the point, the court permitted the State, after both sides had rested, to produce the testimony of Walter Sussex. The purpose of the Sussex testimony was to rebut the defense testimony to the effect that the deceased Johnson had a bad reputation for being peaceful and law-abiding. The action of the trial court was within the province of its discretion. *Rochester* v. *State,* 250 Ark. 758, 467 S.W. 2d 182 (1971). After the testimony of Sussex, appellant asked permission to recall a number of witnesses in surrebuttal. They were all character witnesses and the court apparently perceived that they had related all they knew about the reputation of the deceased for turbulence and violence. At least we cannot say the court abused its discretion in denying appellant the right to recall them.

Affirmed.

HAROLD E. FORTNER *v.* STATE OF ARKANSAS

CR 73-92 498 S.W. 2d 671

Opinion delivered September 10, 1973

James H. Pilkinton, for appellant.

Jim Guy Tucker, Atty. Gen., by: *O. H. Hargraves,* Deputy Atty. Gen., for appellee.

LYLE BROWN, Justice. This appeal of Harold E. Fortner is from the revocation of a suspended sentence. The two points for reversal are (1) that the court erred in permitting an officer to testify as to statements made to the officer by appellant, and (2) that the court abused its discretion.

The charge for which a suspended sentence was imposed was for forgery and uttering. Several months thereafter appellant was charged with burglarizing Phillips Used Cars and taking, among other things, a pistol. On the day set for trial the latter charge was dismissed and a petition to revoke the suspended sentence was filed. An immediate hearing was held on the petition and revocation was ordered.

We summarize the evidence in the light most favorable to the State. On March 16, 1973, appellant went home around 10:00 p.m. He said he had been to Texarkana with two companions and drank some beer; that on his way home he had car trouble with a car he had bought in Texarkana for $50.00; that he hitch-hiked to Hope and the driver sold appellant a pistol for $10.00; and that he bought a hamburger and went home to eat it. The Fortner family occupied a room at Mrs. Fortner's grandmother's house. The grandmother testified that she heard a commotion in the Fortners' room and that shortly Mrs. Fortner came out saying appellant had a gun and threatened her. Mrs. Fortner testified that appellant did not pull a gun "but he said he had one and patted his pocket". She said appellant threatened to shoot her "if I kept smarting off". Appellant called her, so she said, a whore, and cursed her. She said she could smell alcohol on appellant and she thought his antagonism on the occasion was caused by appellant's drinking.

A pistol was found in a trash barrel used by the grandmother, and Harry Phillips identified it as having been stolen from his office on the same night. A car which was taken from the Phillips lot was found abandoned about two blocks from where appellant resided.

The evidence we have summarized came from an officer who interviewed appellant at the jail, the grandmother, and appellant's wife. Appellant elected not to testify.

In a conclusionary statement made from the bench, the court remarked that the suspended sentence had been granted conditioned on appellant's good behaviour. He commented on the facts that appellant had consumed beer, had threatened his wife, and was carrying a gun. The court concluded that the recited matters could not be overlooked and based his revocation upon those actions of appellant. We conclude that the trial court did not abuse its discretion. We have a host of precedents for the proposition that the question of revocation addresses itself to the discretion of the trial court. To cite only a few, *Burt* v. *State,* 241 Ark. 798, 410 S.W. 2d 387 (1967); *Kinard* v. *City of Conway,* 241 Ark. 255, 407 S.W. 2d 382 (1966); *Smith* v. *State,* 241 Ark. 958, 411 S.W. 2d 510

(1967). There must be a gross abuse of discretion before we will overturn a trial court's revocation. *Barnes* v. *State,* 254 Ark. 404, 494 S.W. 2d 711 (1973).

Appellant argues that it was error to permit Officer Ward to testify about a conversation the officer had with appellant while he was in jail awaiting trial. The simple answer is that appellant was first advised of his constitutional rights. It is true Officer Ward was investigating the Harry Phillips burglary and did not advise appellant that his statements could be used against him in a revocation hearing. But that advice was not necessary so long as Officer Ward advised appellant—which Ward said he did—that his statements could be used against him in a court of law.

Appellant points out that the burglary charge was dismissed and that the evidence does not show he had stolen property in his possession. The proof required for a conviction and for a revocation is different. As stated in *Smith,* supra, the degree of evidence required as a basis of revocation does not have to show proof of guilt beyond a reasonable doubt.

Finally, appellant says the consumption of beer occurred in his home and should therefore not be held against him. That is not the proof. He related to Officer Ward that he drank the beer in Texarkana.

Affirmed.

LEONARD D. SHEPPARD *v.* STATE OF ARKANSAS

CR 73-93 498 S.W. 2d 668

Opinion delivered September 10, 1973

Harold L. Hall and *Garner L. Taylor Jr.,* for appellant.

Jim Guy Tucker, Atty. Gen., by: *Philip M. Wilson,* Asst. Atty. Gen., for appellee.

JOHN A. FOGLEMAN, Justice. Appellant was convicted of possession of stolen property, and, as an habitual criminal, was sentenced to 21 years in the penitentiary. No appeal was taken, but appellant filed his original petition for postconviction relief on the sole ground that he was denied effective assistance of counsel at his trial. The primary bases upon which he argues that he was entitled to relief upon his original and amended petitions were that he was ill-prepared for trial because his attorneys misled him into believing that if the prosecuting witness expressed a desire to drop the prosecution, there would be no trial, and that his attorneys failed to call alibi witnesses of whom he had informed them. This is the latest in an epidemic of cases in which a convicted felon has sought a retrospective evaluation of the effectiveness of his trial counsel, based largely upon disappointing trial results. We find no more merit in this petition than we have in most such post-imprisonment longings for a judicial test of the competence of counsel from the perspective of hindsight, because of speculation that some course of action different from that taken during the trial might have produced a result more favorable to the petitioner.

In denying appellant's petition, the trial judge made specific findings that trial counsel did not tell appellant that if the prosecuting witness would sign a letter recommending dismissal of the charges there would be no trial and that, on every point, appellant was adequately represented by counsel. We find ample evidentiary support for these findings by the trial judge who was the same judge who presided over appellant's trial. We accord more than usual weight to such findings under the circumstances prevailing here. *Leasure* v. *State,* 254 Ark. 961, 497 S.W. 2d 1.

The appropriate test in such cases, regardless of whether counsel is retained or appointed, has been stated by us in previous cases. In short, the question is whether the petitioner has shown by a preponderance of the evidence that acts or omissions (or both) of his attorney result in making the proceedings a farce and a mockery of justice, shocking the conscience of the court, or that petitioner's representation by counsel was so patently lacking in competence or adequacy that it becomes the duty of the court to be aware of and correct it. See e.g., *Leasure* v. *State,* supra; *Davis* v. *State,* 253 Ark. 484, 486 S.W. 2d 904; *Franklin and Reid* v. *State,* 251 Ark. 223, 471 S.W. 2d 760. See also, *Easley* v. *State,* 255 Ark. 25, 498 S.W. 2d 664, decided today.

Both of appellant's attorneys were called as witnesses by petitioner. One of them, Omar Greene, stated categorically he did not tell appellant that there would be no trial if the prosecuting witness did not wish to prosecute, and that the defendant did not request that the case be appealed.[1] The other attorney, Alan Nussbaum, could not recall having advised appellant that the trial court would dismiss the charge if the prosecuting witness signed a letter stating he did not wish to prosecute appellant. Neither could he recall appellant having given the names of alibi witnesses. This attorney also told of extreme difficulty encountered by both attorneys in getting in touch with appellant during the period of approximately two months intervening between their retention[2] and

[1]According to the trial judge, appellant was advised of his right to appeal at the time of sentencing.

[2]There is a conflict in the testimony as to whether the attorneys for appellant were appointed or retained, but we deem that question immaterial in this case.

his trial. This attorney said he came to the conclusion that appellant was guilty of the charge on the basis of the facts related by appellant himself and obtained an offer from the prosecuting attorney to recommend a five-year sentence and to drop another charge pending against appellant upon appellant's entry of a plea of guilty. He added that appellant refused to so plead in spite of advice that, upon conviction after trial, he could receive a minimum sentence of 21 years, because of his previous record.

Appellant contradicted the testimony of these attorneys in regard to representations made by them to him, the giving of names of prospective witnesses and his expression of a desire to take an appeal. He also produced a witness, George Lee Champ, also a convicted felon, who stated he told one of the attorneys he knew where appellant was on the day of the crime and outlined facts that would have tended to establish an alibi. Melissa Hawkins, a friend and next door neighbor of appellant, testified to facts which tended to show that appellant was, indeed, in the company of Champ on the day in question. While her identity was known to one or the other or both of appellant's attorneys, there is no proof that either was informed of her potential testimony. The attorney to whom Champ claimed to have told his story recalled talking to Champ but denied that either Champ or Sheppard ever intimated to him that Champ knew anything about the case or appellant's whereabouts on the day the offense was said to have been committed. This attorney also stated he was familiar with Champ's record and felt certain that Champ would have been discredited in the eyes of any jury. The lawyer also said he only knew of Melissa Hawkins as a person to contact in trying to reach Sheppard, but denied that he knew she was a possible witness. This witness stated he told appellant he could not prosecute an appeal in appellant's behalf, and wanted nothing further to do with the case, advising Sheppard at the same time that he should write to the judge and ask for the appointment of an attorney. This witness explained counsel's failure to call one Isom Burnett Kelley (subpoenaed by the state) as a witness because he was familiar with Kelley's statement to the police incriminating appellant, and knew that, if Kelley testified otherwise, he would be impeached by the statement.

It should be noted that L. B. Robinson, the prosecuting witness, not only signed a statement declining to prosecute Sheppard and requesting dismissal of the charges, but one of the attorneys stated that Robinson testified to the same effect at the trial. No witnesses were called at the trial on behalf of appellant, who testified that he was not deprived of his right to testify, but that he did not take the witness stand because his attorneys advised him not to do so because of his criminal record (three prior convictions).

The trial court was justified in resolving conflicts in the testimony against appellant because of his greater interest in the matter and his previous convictions, if for no other reason. It is possible that both appellant and his attorneys were overconfident about the effect of the assistance of the prosecuting witness. The most that could possibly be said, however, when the evidence is viewed in the light most favorable to the state, as it must be, is that, in retrospect, counsel may have been guilty of errors, omissions, mistakes, improvident strategy or poor tactics, which is insufficient basis for postconviction relief. *Leasure* v. *State,* supra. We cannot say that any acts or omissions of appellant's attorney reduced the trial to such a farce or mockery of justice or that his representation was so patently lacking in competency or adequacy that it was the duty of either the trial court or this court to be aware of it or take corrective action. Most of the matters complained of by appellant relate to trial tactics and strategy involving the exercise of the trial attorneys' discretion and competence and upon which competent counsel might honestly disagree, especially from the excellent vision of hindsight. These matters cannot afford the basis for a finding of incompetence or ineffective assistance of counsel. *Leasure* v. *State,* supra; *Credit* v. *State,* 247 Ark. 424, 445 S.W. 2d 718.

We deem appellant's assertion that he was denied the right of appeal through nonfeasance of his attorneys to have been abandoned, or to have been an afterthought. It was not alleged in his Rule 1 petition and has not been argued here in any way. According to the testimony of Nussbaum, he viewed an appeal as non-meritorious and felt there was no way he could properly represent appellant on an appeal. Since it appears that this attorney

advised appellant of appropriate steps to take in order to appeal the case, the right to appeal seems to have been lost by appellant's own inaction.

We find no reversible error and affirm the judgment denying postconviction relief.

BYRD, J., not participating.

JAMES EATON *v.* STATE OF ARKANSAS

CR 73-85 498 S.W. 2d 648

Opinion delivered September 10, 1973

Ike Allen Laws Jr., for appellant.

Jim Guy Tucker, Atty. Gen., by: *Philip M. Wilson,* Asst. Atty. Gen., for appellee.

J. FRED JONES, Justice. James Eaton was charged on information filed by the prosecuting attorney with delivering to Johnnie Rivers a quantity of marijuana in excess of one ounce with the intent to unlawfully deliver and cause same to be unlawfully delivered to other persons. He was convicted at a jury trial and was sentenced to five years in the penitentiary with four years suspended.

On appeal to this court Eaton contends that the trial court erred in not directing a verdict of acquittal

or in not granting his motion for a new trial on the ground that the only evidence against the defendant was an uncorroborated oral statement made to police officers in the course of investigation. We agree with the appellant that his conviction must be reversed and the cause remanded for a new trial.

It appears from the record that in the course of investigating the marijuana traffic among students at Arkansas Polytechnic College at Russellville, six bags or "lids" of the substance were found in the possession of Tommy Gooch. Gooch implicated Johnnie Rivers as the person from whom he obtained the marijuana. Rivers entered a plea of guilty to a charge of selling to Gooch and apparently Rivers implicated Eaton as the person from whom he obtained the marijuana. Eaton was arrested and his house was searched by the police officers and he was subsequently charged as above set out.

The record indicates that the state intended to use Rivers as a witness against Eaton and in corroboration of statements made by Eaton to the police officers but, at the trial, Rivers denied that he had ever told the prosecuting attorney or anyone else that he acquired marijuana from Eaton. At some point in the proceedings Rivers' parents employed Eaton's attorney to represent Rivers and when Rivers was asked the direct question as to whether he had in fact purchased marijuana from Eaton, he refused to answer the question on advice of his and Eaton's attorney as in violation of his constitutional right against self-incrimination.

Detective Jerry Snow was then called as a witness for the state and the prosecuting attorney requested an exclusionary hearing in chambers. At the in-chambers hearing Detective Snow testified that after Eaton was arrested, Eaton stated in his presence that he had sold ten lids of marijuana to Rivers for $10 per lid, but that Eaton refused to say from whom he obtained the marijuana. Detective Snow said he reduced the statement to writing but that Eaton refused to sign the written statement without his attorney being present. The full statement as written out by Detective Snow appears as follows:

"James Eaton. About a week and a half ago—I don't

remember the exact date— I sold Johnnie Rivers ten lids of Marijuana. I sold it to Rivers for $10.00 a lid. Rivers didn't pay me then, but he was to pay me later. I figured he was going to sell it, but I didn't know who. I would rather not say who I bought the marijuana from."

The record of the in-chambers hearing then becomes somewhat confusing and appears as follows:

"MR. LAWS: I think it is obvious he refused to sign the statement right at the time. It is not a voluntary statement.

THE COURT: The Court will admit it. Save your exceptions.

MR. LAWS: For the purpose of the record and without waiving my client's rights, this is an exclusionary hearing we are in, and I can ask him questions without waiving any of my rights.

THE COURT: Let's cross one bridge at a time please.

MR. LAWS: Are you going to refuse to allow me to have my client explain the circumstances surrounding this statement?

THE COURT: No, sir. If he denies the statement, and I am assuming that is what he is fixing to do.

MR. LAWS: No, he is not going to deny the statement, but I have a right to show whether or not the statement is voluntary and have something for the Court to pass on.

THE COURT: Do you want me to do it out here?

MR. STREETT: I thought you were denying it. We have no objections to putting it on.

THE COURT: If it is a denial, let's go. If it is something for the Court to pass on, let's go.

MR. LAWS: It is a question whether or not this was a voluntary statement.

THE COURT: That's a question for the jury.

MR. STREETT: We have no objections to the Court passing on whether or not it was voluntary.

THE COURT: I have admitted the statement.

MR. LAWS: Are you going to admit the statement without testimony?

THE COURT: I have admitted the statement. From here on out then if there is something to show it was involuntary, it is a question of fact.

MR. STREETT: We have no objections. I thought he was denying making the statement. If he makes a statement it was under coercion, or —

MR. LAWS: We feel like the facts surrounding the confession it is whether or not the Court—especially due to the fact that the law requires the Court to look at a signed confession, and —

THE COURT: All right.

MR. LAWS: Without waiving rights, other than the circumstances not surrounding the confession, I would like to call my client."

James Eaton then testified at the in-chambers hearing and denied making the statement at all. He said he was shocked and confused at his arrest; that the officers advised him it would be better for him if he would "come clean"; that they threatened to "hang him from the highest tree" and make an example of him. On cross-examination Eaton testified in part as follows:

"Q. You did make the statement that has been referred to here?

A. If I did—

Q. Did you?

A. No, sir, I did not.

Q. You didn't? Are you saying that under oath today? That you didn't make the statement that has been referred to here?

A. No, sir.

Q. Do you recall having your rights read to you?

A. Yes, but I didn't understand them.

Q. What was it you didn't understand?

A. I didn't understand any of it really.

Q. You said at the time you did, did you not, that you understood?

A. I don't recall saying it."

At the close of the in-chambers hearing the trial court ruled as follows:

"The Court is going to admit the statement. Save your exceptions. The whole thing in chambers here becomes a question of fact for the jury to determine. It is a question of fact whether they took it or didn't take it."

Detective Snow then testified in open court in part as follows:

"Mr. Eaton stated that he had sold ten lids of marijuana to Johnnie Rivers, that Johnnie Rivers had not paid him for this marijuana, that it was to be paid for later, that he did not know what he was going to do with it, or where he was going to sell it, that he would rather not tell us where he had obtained it himself."

Detective Sergeant William Briscoe also testified in corroboration of Detective Snow's testimony as to the statement made to them by Eaton. The appellant James Eaton did not testify before the jury.

It is clear from the record before us that the prosecuting attorney was taken by surprise at Rivers' denial of

having previously implicated Eaton as the one from whom he purchased marijuana and by his refusal to testify under advice from his and Eaton's attorney as to whether he had made such purchase from Eaton. The record is not clear as to the basis for Rivers' fear of self-incrimination by testifying as to whether he purchased marijuana from Eaton. Rivers had been convicted on a guilty plea of selling marijuana to Gooch and his and Eaton's attorney explained Rivers' refusal to testify in the following language:

> "First of all, after Mr. Rivers' parents and Mr. Streett had a little misunderstanding the other day they came to me, as an attorney, and asked me to represent them. As such, they gave me information and asked me whether or not their son had the right to take the Fifth Amendment. He pled guilty and was convicted in Pope County of selling part of this marijuana *he got from my client.*
>
> THE COURT: This man was convicted of selling?
>
> MR. LAWS: He wasn't charged with purchasing from Eaton. He was charged and convicted of selling a part of it to somebody else." (Emphasis added).

The record indicates that other pertinent evidence would have been available to the state had the state's attorney known that Rivers would refuse to testify on advice of his and Eaton's attorney. But as the record now stands, there was no evidence presented connecting Eaton with the sale or delivery of marijuana to Rivers except the testimony of Detective Snow and Briscoe that Eaton had told them he had made such sale.

Ark. Stat. Ann. § 43-2115 (Repl. 1964) reads as follows:

> "A confession of a defendant, unless made in open court, will not warrant a conviction, unless accompanied with other proof that such an offense was committed."

In the case at bar there was no evidence that marijuana was sold or delivered to Rivers by anyone. The

judgment of the trial court is reversed and this cause remanded for a new trial.

Reversed and remanded.

REMBERT LEE HUNT *v.* STATE OF ARKANSAS

CR 73-73 498 S.W. 2d 654

Opinion delivered September 10, 1973

Carpenter, Finch & McArthur, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Philip M. Wilson,* Asst. Atty. Gen., for appellee.

CONLEY BYRD, Justice. Appellant, Rembert Lee Hunt, to reverse a felony conviction for assaulting an officer with a deadly weapon, Ark. Stat. Ann. § 41-2802 (Supp. 1971), contends that the evidence is insufficient and the trial court erred in refusing to admit a glass into evidence.

The record shows that Officer Larry Dill, in street dress, and two other uniformed officers of the Little Rock Police Department went to a club to arrest two black female suspects. After the females were taken into custody, appellant, according to some of the witnesses, made inquiry of the officers as to where they were taking the sus-

pects. Appellant then assaulted Officer Dill with a drink glass which was broken during the assault. Officer Dill suffered a cut behind his ear requiring several stitches. Some of the witnesses described the glass used by appellant as an eight ounce glass. At the trial the court refused to permit appellant to introduce a four ounce glass into evidence.

In *Jackson* v. *State,* 214 Ark. 194, 215 S.W. 2d 148 (1948), we held that any object likely to produce death or great bodily harm could be a deadly weapon. We find no merit in appellant's contention that the evidence is insufficient.

Neither can we find merit in the contention that the trial court erred in refusing to permit the four ounce glass to be introduced into evidence. We cannot say that it was sufficiently identified as being similar to the glass used in the assault.

Affirmed.

ERNEST E. STANDRIDGE *v.* STATE OF ARKANSAS

CR 73-105 498 S.W. 2d 663

Opinion delivered September 10, 1973

James M. Simpson, for appellant.

Jim Guy Tucker, Atty. Gen., by: *James W. Atkins,* Asst. Atty. Gen., for appellee.

CONLEY BYRD, Justice. Appellant Ernest E. Standridge was given a life sentence in 1952 for the murder of his wife. In 1966 he was given a post conviction hearing

on the identical issues now raised. On March 5, 1973, the trial court gave him a second post conviction hearing upon his allegation that three persons hostile to him were permitted to go into the jury room during the jury's deliberation. Appellant's testimony about the alleged occurrence was not corroborated by any witness. R. C. Warren who served on the jury testified positively that no one entered the jury room during the deliberation. The trial court denied appellant any relief both on the merits and because the issue had become res judicata. We agree for both reasons.

Affirmed.

FLORENCE EUBANKS, ET AL *v.* FRED J. ZIMMERMAN, ET AL

73-44 498 S.W. 2d 655

Opinion delivered September 10, 1973

Thompson & Thompson, for appellants.

Marvin H. Robertson and *Hugh L. Brown,* for appellees.

FRANK HOLT, Justice. The appellants, Florence Eubanks, individually and as guardian of the person of James Huey Eubanks, and the First National Bank, as guardian of his estate, appeal from an adverse holding in a tax redemption suit initiated by them. The issue on appeal appears limited to whether three distinct disabilities can be connected (tacked) so that the guardian of the incompetent can redeem land, once held in a co-tenancy (with the personal guardian) by the incompetent, some 25 years after a tax forfeiture sale.

In 1945 Mrs. Eubanks purchased a 40 acre tract of land in her name and another 40 acre tract in the joint names of herself and her two-year-old son, James. James entered the army at the age of 17 in 1960. He remained in the army until discharged in May, 1968, as a result of injuries received in Viet Nam which rendered him permanently mentally incompetent. As we understand appellants' argument on appeal, it appears to be limited to the right of redemption as to the 40 acre tract held jointly by her and her son. She had sought recovery of the 40 acre tract owned by her individually.

The land in question had been forfeited for failure to pay taxes. Fred J. Zimmerman, now deceased, bought both tracts of land at a tax sale in 1948, took possession, and received a deed on the lands from the state in 1952. He continued to live there, approximately 21 years or until his death in 1969. As a defense to appellants' tax redemption action, the appellees asserted adverse possession and payment of taxes under color of title.

On March 10, 1972, the appellants brought this tax redemption action. Appellants contend that the applicable statutes of limitations were tolled against James, Mrs. Eubanks' son and co-tenant; i.e. either the three year statute of limitations under Ark. Stat. Ann. § 37-101 (1962 Repl.) (the adverse possession statute), or a two year period for bringing suit under Ark. Stat. Ann. § 84-1201 (1960 Repl.) (the tax redemption statute). Their theory rests upon connecting (tacking) three unrelated disabilities: minority, the Soldiers and Sailors Relief Act,

50 U.S.C. § 525, and mental incompetency. The chancellor rejected this theory and we agree.

We have held that one co-tenant can redeem for both when land has been forfeited for non-payment of taxes. *Smith* v. *Pettus,* 205 Ark. 442, 169 S.W. 2d 586 (1943). However, in the past this court has shown no favor towards the tacking of disabilities. The rationale is that tacking distinct disabilities keeps title uncertain for too great a length of time and defeats the purpose of the statutes of limitations. The law favors early vesting of a title. In *Reed* v. *Money,* 115 Ark. 1, 170 S.W. 478 (1914), the court refused to allow a woman to tack the disabilities of non-age and coverture against an adverse possessor. In *Carter* v. *Cantrell,* 16 Ark. 154 (1855), the court refused to tack infancy and coverture, holding that no disability can be utilized unless in existence at the time the cause of action accrued. The rule is longstanding and the policy reasons remain sound.

In the instant case the cause of action in question arose during James' disability of minority. However, when James attained the age of majority, or the removal of his minority disability, he was in the army and under the shelter of the Soldiers and Sailors Relief Act, which tolls a statute of limitations for a cause of action during the period of military service. Even though our cases do not permit tacking, of course, our statutes of limitations cannot run counter to the federal legislation. However, the shelter of the Soldiers and Sailors Relief Act is removed upon the discharge from military service. *Diamond* v. *U.S.,* 344 F. 2d 703 (1965).

In the case at bar, inasmuch as tacking is not permissible, upon James' discharge in 1968, the statutory period began to run even though he was under a new disability of mental incompetency. This cause of action was not brought until three years and ten months after his discharge. The statutory period had then expired under either the tax redemption statute, § 84-1201, or the adverse possession statute, § 37-101 (which we note expressly prohibits cumulative disabilities).

Affirmed.

MATTIE LOUISE HAMMOND *v.* STATE OF ARKANSAS

CR 73-74 498 S.W. 2d 652

Opinion delivered September 10, 1973

Walker, Kaplan & Mays and *A. T. Goodloe,* for appellant.

Jim Guy Tucker, Atty. Gen., by: *O. H. Hargraves,* Deputy Atty. Gen., for appellee.

FRANK HOLT, Justice. The appellant was convicted by the trial court, sitting as a jury, of using abusive language in violation of Ark. Stat. Ann. § 41-1412 (1964 Repl.) and violating Ark. Stat. Ann. § 41-2801 (1964 Repl.) by resisting arrest. Her punishment was assessed at $50 and

costs and 30 days in jail on each offense with the jail sentences suspended. Appellant first attacks the constitutionality of § 41-1412 (breach of peace statute) as being violative of the federal First and Fourteenth Amendments.

Appellant asserts that the statute is overbroad, vague, unconstitutional in its application and cannot be given a narrow construction to limit abusive language to "fighting words." § 41-1412 reads in pertinent part as follows:

> "If any person shall make use of any profane, violent, vulgar, abusive or insulting language toward or about any other person in his presence or hearing, which language in its common acceptation is calculated to arouse to anger the person about or to whom it is spoken or addressed, or to cause a breach of the peace or an assault, shall be deemed guilty of a breach of the peace...."

Appellant's contentions as to the constitutionality of this statute were determined adversely in our very recent case of *Lucas* v. *State,* 254 Ark. 584, 494 S.W. 2d 705 (1973). There we considered various federal cases including *Gooding, Warden* v. *Wilson,* 405 U.S. 518 (1972), upon which appellant also relies. In *Lucas,* in upholding the constitutionality of our breach of the peace statute, we construed and restricted its application as to abusive language to "fighting words" and, therefore, our statute met the standard required in *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1941), from which we quoted at length. There it was held that not all speech is constitutionally protected and included among these categories are "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." Fighting words must be of such a nature as "likely to provoke the average person to retaliation, and thereby cause a breach of the peace." *Chaplinsky* v. *New Hampshire, supra.* Appellant admits that the right of free speech is not an absolute guarantee by our federal First Amendment. *Schenck* v. *United States,* 249 U.S. 47 (1919), and *Whitney* v. *California,* 274 U.S. 357 (1927).

It appears clear from Chaplinsky that any statute punishing or regulating the use of abusive language must be limited to fighting words. If the statute appears vague

and unclear on its face, it can be preserved by the courts when restricted in its application to "fighting words" as defined by *Chaplinsky*. In other words, only that vile or abusive language which arouses anger to the extent likely to cause retaliation—fighting words—are within the meaning of the statute. With this standard or test in mind, we now turn to the evidence in this case.

A local policeman went to appellant's residence for the purpose of arresting a relative of appellant on a charge of possessing stolen property. When the officer attempted to effect the arrest, the appellant called the officer "pig, son-of-a-bitch, mother f-----." She also called him "a jive white ass punk." She was asked to "hush" and be "quiet;" however, she continued to repeat the epithets after another officer arrived. Appellant only denied that she called him a pig and son-of-a-bitch. She "guessed" that it was her purpose to make the officer "mad."

It is unnecessary to show or prove that abusive language caused a fight—it is only necessary that the abusive words were likely to cause a fight or retaliation. Furthermore, the court can take judicial notice that abusive language used by the addressor constitutes fighting words. In *Chaplinsky, supra,* the court recognized that:

> "Argument is unnecessary to demonstrate that the appellations 'damned racketeer' and 'damned Fascist' are epithets likely to provoke the average person to retaliation, and thereby cause a breach of the peace."

Likewise, we are of the view that argument is unnecessary to demonstrate the language or epithets used by appellant in the case at bar were likely to provoke an average person to retaliate and cause a breach of the peace. We cannot conceive that the First Amendment, which guarantees freedom of speech, was formulated with the view that such insulting, vulgar and inflamatory language as used by the appellant in the case at bar, supposedly to arouse anger, was envisioned as being within the bounds of freedom of speech.

Appellant next asserts that the evidence as a matter of law is insufficient to support the finding by the trial court. Without reiterating the language used, we think

the evidence amply sufficient and substantial to support the trial court's finding that the appellant violated § 41-1412 (breach of the peace). As to § 41-2801 (resisting arrest), the state adduced evidence that when the officer attempted to arrest appellant she resisted, struck him with a phone, and it became necessary for the officer to have the assistance of a fellow officer. This evidence is substantial and we affirm whenever there is any substantial evidence to support the trial court's finding.

Affirmed.

JAMES DUNCAN FUDGE *v.* STATE OF ARKANSAS

CR 73-97 498 S.W. 2d 873

Opinion delivered September 17, 1973

Gene Worsham, for appellant.

Jim Guy Tucker, Atty. Gen., by: *James W. Atkins,* Asst. Atty. Gen., for appellant.

CARLETON HARRIS, Chief Justice. James Duncan Fudge, appellant herein, was charged with the crime of second degree murder in the alleged slaying of his wife, Dorothy Fudge. During the trial, the court reduced the charge to involuntary manslaughter, and the jury returned a

verdict of guilty, fixing appellant's punishment at three years imprisonment. From the judgment so entered, Fudge brings this appeal. For reversal, it is asserted that the trial court erred in permitting the State to impeach its own witness by proof of a prior contradictory statement.

Lela Mae Bell, a witness on behalf of the State, testified that around 10:30 P.M. on the evening of July 28, 1972, she was playing cards with Mrs. Fudge, and two other women at the Fudge home, when appellant came in with a box of chicken. The witness stated that the wife took a piece of chicken and remarked to appellant, "James, your woman called." No answer being given, the statement was repeated, and Fudge answered, "So she did." Fudge then stated that "The game is over, no more playing cards here at the house," walked back into his bedroom and, according to the witness, "When he come out, well, he come out shooting. ***And he shot four bullets in the floor. He shot four times in the floor. Well, she was standing up by the table and the fifth bullet, well, when he shot that, the fifth bullet, well, I don't know where it hit her but, anyway, when he shot the fifth bullet, he turned around and went back in the bedroom. When he went back in the bedroom, well, she fell. Well, she called Pearl's name. She said 'Pearl', said, 'James shot me now you'll,' so Gladys was standing up in the middle door and I was backed against the wall."

Mrs. Bell then stated that Fudge walked from his room, said, "Lord have mercy, I done shot my wife," picked her up and "carried her to the hospital." On cross-examination, the witness testified that all five shots were fired into the floor, and on redirect examination, Mrs. Bell said that apparently he did not know that he hit his wife until he came back out of the room. She also said that Mrs. Fudge had told her not to "bother him, let him shoot, let him shoot me one time." The State claimed surprise at the testimony of the witness and sought permission to impeach her testimony. The matter was taken up in chambers and it developed that on the morning after the killing, Mrs. Bell had given the police a statement in which she said she was in

another room at the time of the shooting, heard the shots, and on going into the room where the shooting occurred, observed Fudge standing over his wife. On the same morning, she gave to the officers a second statement in which she said she was present in the room where the shooting occurred and observed Fudge go to his bedroom, return with a pistol in his hand, and fire four shots into the floor. Mrs. Bell had then said that she (the witness) begged Fudge not to shoot his wife; that Mrs. Fudge had said, "Don't beg him, let him shoot me one time", and that appellant then fired the last shot which struck the wife in the chest area. Mrs. Bell was the only witness who purportedly observed the shooting, and the State had placed her on the stand for the purpose of establishing malice on the part of appellant. Her testimony was thus essential to the charge of second degree murder. Obviously, the prosecutor had expected Mrs. Bell to testify in accordance with her second statement; it developed that her testimony was not wholly in accord with either statement, but more or less a part of one and a part of the other. The court finally announced that it would permit the State to inquire of the witness if she made a statement "that she wasn't in the room and didn't see it and did she make another statement that she was in the room and did see it and that she saw James shoot her." Back in the courtroom, the prosecutor interrogated Mrs. Bell, and while the witness admitted her signature, she denied some of the matters included in the statement; for instance, she denied that she had stated that she was in another room, heard three or four shots, went back into the room (where the shooting occurred) and saw appellant standing with a gun in his hand and Mrs. Fudge lying on the floor. She also denied making the statement that Fudge had walked into the room, shot four times into the floor, and that she (the witness) had begged him not to shoot Mrs. Fudge.[1]

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[1]From the record:

"Q. Do you recall giving a statement to Detective Bobby Thomas on that same morning in which you said that James Fudge came in, went in the bedroom and came back with a pistol in his hand and fired four shots in the floor, you begged him not to shoot Dorothy, she said 'don't beg him, Lela, let him shoot me one time,' he then fired the gun and the bullet struck Dorothy in the chest area; she was standing up and fell down by the couch

Appellant contends that the court erred in permitting the State to impeach its own witness; that the State could not have been surprised because appellant had already given two versions of events occurring, before she ever testified.

It does not appear necessary to discuss this contention, for even if error occurred, we find no prejudice. Of course, we do not reverse unless prejudicial error is shown. *Keathley* v. *Yates,* 232 Ark. 473, 338 S.W. 2d 335. Assuming, without deciding, that the court erred in permitting the State to attempt to impeach the testimony of its own witness, we cannot see how Fudge was prejudiced. At the conclusion of the testimony, appellant moved to dismiss and the court granted the motion to dismiss the charge insofar as murder in the second degree was concerned, reducing the charge to involuntary manslaughter. That offense is defined by Ark. Stat. Ann. § 41-2209 (Repl. 1964) as follows:

> "INVOLUNTARY MANSLAUGHTER DEFINED. —If the killing be in the commission of an unlawful act, without malice, and without the means calculated to produce death, or in the prosecution of a lawful act, done without due caution and circumspection, it shall be manslaughter."

Even if we look at the testimony from the standpoint most favorable to appellant, there was ample and sufficient evidence for the jury to find that he had committed the crime of involuntary manslaughter. In fact, appellant's own statement to the officers (and it is not contended here that such was involuntarily made) is potent evidence to support the reduced charge. From the statement:

> "Last night I had been over to my aunts house where I had drank ½ of ½ pint of whisky and I drank one

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and a lot of blood was coming from Dorothy; Dorothy then said to you and Pearl Butler, 'Help me. James done shot me,' and then James left the room and in a minute he came back and he didn't have the gun and at that point he picked Dorothy up and carried her out the front door. Do you remember giving that statement to the Little Rock Police Department?

A No. That wasn't my statement. I don't remember."

> can of beer. I got home about a quarter of one and my wife was giving a card game. I walked in and said yall break the card game up. My wife then told me that I never let her have any fun. I told her for them to break it up right now. I said to myself that I know how to break it up and I went to my bed room and loaded my gun and came back and shot either 4 or 5 times into the floor. After I shot 4 or 5 times in the floor people started moving around. My wife told them that they didn't have to go cause I wouldn't shoot nobody she said I was only trying to scare her. I then shot one shot into the middle of the table or I though[t] I shot the table and my wife fell to the floor and said 'Oh you shot me.' "

We hold that no prejudicial error was committed and that the evidence was sufficient to support the jury verdict.

Affirmed.

MAHLON DOUGLAS REED *v.* STATE OF ARKANSAS

CR 73-99 498 S.W. 2d 877

Opinion delivered September 17, 1973

Henry S. Wilson, for appellant.

Jim Guy Tucker, Atty. Gen., by: *James W. Atkins,* Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. Reed was convicted of burglary and grand larceny and was sentenced to 15

years in prison upon each charge. For reversal he contends that his confession should not have been admitted in evidence, because the officers who obtained the confession did not fully inform him of his constitutional rights.

That contentiom must be sustained. Before questioning Reed one of the officers read a statement of rights from a printed form, which included this declaration: "You have the right to consult an attorney before making any statement or answering any question, and you may have him present with you during questioning." Reed was also told that the court would appoint an attorney for him if he could not afford one, but the officer readily admitted that by the latter statement he merely indicated to Reed that if he did not have an attorney before he went to trial the court would appoint one for him.

The officer's statement of Reed's rights was fatally defective in that it failed to inform Reed that he was entitled to the services of an appointed attorney at the time of the interrogation. That precise point was carefully explained in *Miranda* v. *Arizona,* 384 U.S. 436 1966):

> In order fully to apprise a person interrogated of the extent of his rights under this system then, it is necessary to warn him not only that he has the right to consult with an attorney, but also that if he is indigent a lawyer will be appointed to represent him. Without this additional warning, the admonition of the right to consult with counsel would often be understood as meaning only that he can consult with a lawyer if he has one or has the funds to obtain one.
>
> * * * *
>
> This does not mean, as some have suggested, that each police station must have a "station house lawyer" present at all times to advise prisoners. It does mean, however, that if police propose to interrogate

> a person they must make known to him that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him prior to any interrogation.

See also *Moore* v. *State,* 251 Ark. 436, 472 S.W. 2d 940 (1971).

Reversed.

VERNON RAY TAYLOR *v.* STATE OF ARKANSAS

CR 73-100 498 S.W. 2d 876

Opinion delivered September 17, 1973

Charles W. Atkinson, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Philip M. Wilson,* Asst. Atty. Gen., for appellee.

LYLE BROWN, Justice. Appellant, along with his codefendant, was convicted of robbery with a firearm and each was sentenced to serve fifteen years. After some delay in procedure an appeal was granted appellant. In the meantime, appellant having been committed to the penitentiary, asked for and was granted a Rule I hearing. The latter hearing was conducted, the Rule I petition was denied, and the trial court granted an appeal both from the judgment of conviction and from the adverse finding on the Rule I petition. Appellant advances three points for reversal, namely, (1) that his Rule I petition should have been granted and a new trial ordered, (2) that a motion for severance should have been made in his behalf, and (3) that instruction number seven was erroneous.

As to the Point I, we think the trial court did not err in refusing to grant a new trial. The point is based on the testimony of the codefendant at the Rule I hearing to the effect that appellant had nothing to do with the robbery. Appellant implicated himself at that hearing because he testified: "I was aiding and abetting is what I'd call it... that's what my job was". That was exactly the theory of the State at the trial—that the codefendant went inside the liquor store with the gun and that appellant was on the lookout just outside the store. That testimony corresponded with the testimony of the codefendant to the effect that appellant had on a halloween mask.

Appellant classified his codefendant's testimony at the Rule I hearing as newly discovered evidence. His codefendant made an affidavit prior to the Rule I hearing which corresponded with the codefendant's testimony at the hearing. That affidavit was executed some nineteen months after the original trial. In other words, notwithstanding these two men were in the penitentiary together, the so-called newly discovered evidence did not come to surface for nearly two years and just prior to the Rule I hearing. Furthermore, even appellant concedes that the affidavit did not entirely exonerate him. In fact, the affidavit put appellant at the scene of the crime wearing a mask. Finally, it is hardly believable that the codefendant would have testified at the original trial in the same manner as he did at the Rule

I hearing; his position at the time of trial was that he had nothing whatsoever to do with the crime.

Appellant's second point—that a motion for severance should have been granted—is likewise without merit. Appellant contends that he asked his court-appointed attorney, just prior to the trial, to seek a severance from his codefendant. Appellant's codefendant said he heard no such conversation. The trial court remarked that appellant's attorney asked for a continuance and it was granted. The trial court further stated that no mention was made to him of a severance. The trial court apparently rejected the veracity of appellant on this point and we cannot say it was error. Additionally, just what advantage could have resulted in a severance is hardly perceivable under the state of the record.

Appellant's insistence that instruction seven was erroneous is likewise without merit. The instruction told the jury that the defendants could not be convicted on the testimony of an accomplice; that in addition there must be substantial evidence to corroborate that testimony. (The court was referring to the testimony of a young woman who was arrested as an accomplice.) It is true the court did not define the term "accomplice" but on the other hand there was no request for such a definition. Additionally, there was no objection made to the instruction given.

Affirmed.

WALLACE D. HURLEY, JR. *v.* NANCY B. HURLEY

73-33 498 S.W. 2d 887

Opinion delivered September 17, 1973

Gaughan, Laney, Barnes, Roberts & Harrell, for appellant.

No brief for appellee.

JOHN A. FOGLEMAN, Justice. Appellant contends the chancery court erred in refusing to reduce his alimony payments on the basis of changed circumstances. He relies principally upon the fact that, since he and appellee were divorced, she has obtained employment from which she earns substantial income. We are unable to say the chancellor's holding was clearly against the preponderance of the evidence.

There is little dispute about the basic facts. The parties entered into a separation agreement on August 10, 1971, about three weeks after appellee filed suit for divorce against appellant. Under its terms, appellant was to pay appellee $750 per month—$375 as alimony and $125 for the support of each of the three minor children of the parties, who were to be in her custody. There was also a provision for a trust fund to be established and maintained by appellant for the purpose of providing a college education for the children. Appellee was required to maintain a homeowner's insurance policy on the family residence, which went to her under the agreement, and on any other residence she might buy or rent for occupancy by her and the three children. The agreement encompassed a complete division of property. It contained the statement that it was to be merged in any ultimate divorce decree and not to create a separate cause of action.

Decree of divorce was entered September 14, 1971. In it, the court approved the agreement between the parties, except for deletion, by agreement of the parties, of a requirement that appellee sell the family dwelling house and that appellant lend her $100 per month until it was sold. It recited that the provisions pertaining to alimony were merged in the decree and did not create a separate cause of action. The petition for modification was filed July 17, 1972. In it, appellant alleged that the alimony payments were based upon the understanding that appellee would not be employed, that her expenses had decreased and that there had been a change in appellant's employment.

Appellant testified that his salary at Hurley Company, Inc., and Hurley Press was $18,000 at the time of the agreement, had been raised to $18,500 and would be increased to $19,000[1] on August 7, 1972. He owns only 2% of the stock in Hurley Company, in which his parents are majority stockholders. He has borrowed $2,200 for the payment of debts. He related Mrs. Hurley was not working and had stated to him that she had no plans to work at

[1]The transcript actually recites this amount as $19,500, but appellant asserts that this is a typographical error and the correct amount is that stated above.

the time the agreement was being negotiated. He also said a clause in a proposed agreement between the parties providing for reduction of alimony whenever appellee went to work was stricken at her request. He stated he had been unable to make the required monthly payment of $100 into the trust fund for education of his children. He also said he had resigned as president and chief executive officer of the Hurley Company on September 3, 1971, and was off the payroll for three weeks. He was then re-employed under the same salary agreement, except for the elimination of a 2% bonus. Other fringe benefits are unchanged. Mr. Hurley would not say his resignation was voluntary, but said he felt that he had been fired, even though neither his father nor the company board of directors requested the resignation. Although appellant called his father, who was both his predecessor and successor as president of the company, as a witness, the abstract of the senior Hurley's testimony sheds no light whatever on this subject.

Mrs. Hurley was employed as a school teacher by the Camden school system in 1971-2 at a salary of $6,300 to be increased to $6,950 for 1972-3. She neither signed a contract nor discussed her employment with any school employee prior to the signing of the separation agreement. According to her, she reached an agreement with the superintendent of schools on August 20, which was formalized into a contract approved by the school board on September 9, 1971. She will be required to attend summer school for two years.

At the time of the hearing, appellee had contracted to pay $26,000 for a smaller house for herself and the children. She expected to use the $8,000 to be realized as proceeds of the sale of her equity in the existing residence for a down payment and to effect a reduction in monthly home mortgage payments by approximately $42 per month. She said she is diabetic and that her health insurance excludes, for one year, expenses attributable to this condition. Mrs. Hurley gave estimates of total monthly expenses for herself and the three children totalling $1,095, which she said would provide no better standard of living than they enjoyed before the divorce. Her estimate of expenses did not include any costs of enter-

tainment or vacations, automobile license, school books or supplies. She said her total monthly income from salary, alimony and child support totalled $1,110. While she admitted having saved $1,800, she stated she would have to use substantial amounts of this for additional taxes, insurance and closing costs attendant upon the sale of one house and the purchase of another, and her anticipated purchase of an automobile to replace the 1968 Ford she had.

It is noted that both appellant's resignation and appellee's contract for employment preceded the entry of the divorce decree which approved the agreement between the parties. It is also noted that one of the children of the parties was 17 years of age at the time of the hearing (August 1, 1972) and a senior in high school, who would enter college in the fall of 1973. The agreement provides that while he is attending college appellant will have the obligation of supporting him, and child support payments will be reduced by $125 per month.

It was admitted that the requirement that appellee attend summer school will not be a continuing one and that the expense of kindergarten for the youngest child would soon be terminated and orthodontal expenses for another materially reduced. These reduced costs would affect the estimates made by appellee to some extent. Still, even though some of the items exceed the bare necessities of life, appellant has not successfully contradicted appellee's assertion that these estimated costs are essential to maintaining the standard of living the family had enjoyed before the divorce. In all considerations such as these the manner and style of living to which a wife and children have become accustomed is a significant factor. *Riegler* v. *Riegler,* 246 Ark. 434, 438 S.W. 2d 468. While it may be that appellee's estimates should now be reduced by something over $100 because of items to have been eliminated, neither the trial court nor this court can be blind to the ever-increasing cost of living, or the fact that, as children grow older, their necessary expenses seem to increase. Furthermore, it seems that estimated expenses of $54 per month for clothing and $35 per month for Christmas, birthdays, additional clothing and shoes for four people, considering their station in life, is conserva-

tive. Since the wife's added income has not made her self-sustaining, aside from the family burdens she must bear, the chancellor was justified in finding the evidence of changed circumstances insufficient. See *Davis* v. *Davis,* 241 Ark. 171, 406 S.W. 2d 704.

While the wife's securing employment can be an appropriate basis for reduction of alimony payments, it does not mandate that result. The burden was on the husband to show that the change in circumstances justified the reduction. *Riegler* v. *Riegler,* supra. We cannot say he did so by a preponderance of the evidence so clear that we can say the chancellor erred. Appellant complains of his debt and the loss of his potential 2% bonus. The chancellor would have been justified in attributing both the loss and a substantial part of the debt to an abortive voluntary attempt on the part of appellant to change employment and residence. Changes arising from personal decisions and choices within the control of the husband cannot be urged as a change in circumstances to justify reduction of alimony. *Grant* v. *Grant,* 223 Ark. 757, 268 S.W. 2d 617.

Appellant complains that the wife received an extremely liberal share of his property, in addition to allowances for alimony and child support amounting to almost 60% of his income. He also points out that her "take home" pay from salary, alimony and child support is nearly twice as much as his own. He overlooks the fact that he was only supporting himself out of the income he retains and that appellee was supporting herself and three children. The liberality of the original allowances cannot afford grounds for modification. See *Lively* v. *Lively,* 222 Ark. 501, 261 S.W. 2d 409.

Since we find no basis for reversing the chancellor's findings as to changed circumstances, we pretermit any discussion of an issue raised in appellee's pleadings in the trial court, i.e., that the amount of alimony is based upon a separate contractual agreement, not subject to modification by the court.

The decree is affirmed.

FIREMAN'S FUND INSURANCE CO. ET AL *v.* MALLIE HILL & LIBERTY MUTUAL INSURANCE CO.

73-74 498 S.W. 2d 865

Opinion delivered September 17, 1973

Riddick Riffel, for appellants.

Penix & Penix, by: *Bill Penix,* for appellees.

J. FRED JONES, Justice. The question before the Commission in this compensation case, was which of two insurance carriers is liable for temporary total disability from January 5, 1971, to February 18, 1972, and permanent partial disability in the amount of 50% to the body as a whole awarded to Mallie Hill as a result of a ruptured disc sustained in the course of her employment by Frolic Footwear.

Fireman's Fund Insurance Co. was the compensation carrier for Frolic until January 1, 1970, at which time Liberty Mutual Insurance Co. became the compensation

carrier. The compensability and amount of the award are not questioned. The specific question is whether the disability from a ruptured disc suffered by Mrs. Hill resulted from injury sustained prior, or subsequent, to January 1, 1970. The Compensation Commission found that it resulted from injuries sustained subsequent to January 1, 1970, and made the award against Liberty Mutual. On appeal by Liberty Mutual the circuit court found that the Commission had ignored the evidence of injury sustained in 1969 and the court failed to find any substantial evidence that the ruptured disc and resulting disability were caused by injury subsequent to January 1, 1970. The circuit court reversed the award of the Commission and remanded with directions to make the award against Fireman's Fund. The circuit court judgment recites in part as follows:

> "According to the record herein the claimant sustained injuries to her back November 5, 1969, while pulling a rack of shoes.
>
> Subsequent to that date claimant has suffered severe back injuries aggravating her condition, including but not limited to her injuries in lifting boxes in August, 1970, and pulling the racks in December, 1970, all of which ultimately required surgery in 1971 to correct.
>
> * * *
>
> The Court finds that the claimant's injuries primarily began with the back injury on November 5, 1969, and that the injuries of 1970, as well as the other injuries, were in aggravation of the 1969 injury; that there was no substantial evidence to support the Referee or Commission in ignoring the injury of November, 1969, and accepting in lieu thereof an injury of a later date; that disability should begin with the 1969 injury."

On appeal to this court Fireman's Fund contends that there was substantial evidence to sustain the award of the Commission and the circuit court erred in holding otherwise.

Both sides recognize the well-established rule that an award of the Workmen's Compensation Commission has the same force and effect as a jury verdict and must be affirmed on appeal if there is any substantial evidence to support it. The question on appeal is not what decision the circuit court or this court would have reached on trial de novo; nor is the question on appeal whether there is substantial evidence to sustain a different award than the one made. The question on appeal is whether there is any substantial evidence to sustain the decision or award the Compensation Commission did make. In *Sneed* v. *Colson Corp.*, 254 Ark. 1048, 497 S.W. 2d 673, we said:

> "On appeal to the circuit court and to this court the only question for determination is whether or not there was any substantial evidence to sustain the Commission's finding and we, of course, in examining the evidence for such determination, must view it together with all reasonable inferences deducible therefrom, in the light most favorable to the Commission's finding the same as in a jury verdict. *Northwestern Nat'l Ins. Co.* v. *Weast*, 253 Ark. 710, 488 S.W. 2d 322; *Warwick Electronics* v. *Devazier*, 253 Ark. 1100, 490 S.W. 2d 792."

We agree with the circuit court's finding of facts contained in the record as above set out, but we disagree with the conclusion reached by the circuit court. The record in this case is made up from two separate hearings before the Referee. At the first hearing on December 17, 1971, Mrs. Hill testified that she went to work at Frolic Footwear in October, 1968, and had no physical defects or disability at that time. She testified that she sustained an injury to her back on the night of November 4, 1969, when a shoe rack almost tipped over on her. She said she went to the nurse immediately, reported her injury and then called Dr. Modelevsky who prescribed pain pills and requested her to come to the office the next morning if she felt no better. She said she did return to Dr. Modelevsky on November 5 and was given muscle relaxants and pain pills and was told she had pulled a ligament in her back. She said she was hospitalized at that time for pneumonia; was also treated for her back injury and was released to return to work on December 8, 1969. She said

she did return to work on December 9 and as she was going up an incline at the Frolic plant, she slipped and fell on the ramp, skinned both knees and again hurt her back but lost no work because of these injuries. She said she continued to work the remainder of 1969 "off and on" and then testified as follows:

> "Q. Explain why you only worked off and on.
>
> A. Well my back was hurting so bad, pushing and pulling those racks and some of them you couldn't hardly pull—you had to have two people to help—I would pull those racks and it would just tear me in two—I would have to take off a few nights and then maybe I would lay around and get to feeling better and I would return to work—Dr. Modelevsky would tell me I could go back to work and I would do it again for a while and the same thing would happen again."

Mrs. Hill testified that on February 3, 1970, she sustained a hernia and testified as follows:

> "Q. When did you after that reinjure your back?
>
> A. I reinjured my back January, 1971, and though I am sorry I am getting too far ahead of myself—I reinjured my back in August of '70—I lifted a box of shoes up over my head and my hernia came out again and my back was still just killing me and I re-entered the hospital at that time—I had hernia surgery—was also taken back to surgery for more treatment on my back."

Mrs. Hill testified that following her operation for hernia she returned to work about November 2, 1970, she then testified as follows:

> "Q. Did you reinjure yourself again on December 22nd, 1970?
>
> A. Yes, sir.
>
> Q. Tell how you injured yourself at that time.

A. At that particular time I was pushing—pulling the rack just like I said and these racks were hard to push and pull and it yanked my back and I was reinjured in my back again."

Mrs. Hill testified that on January 5, 1971, she reentered the hospital and underwent surgery for a blocked intestine and also received treatment for her back. She said that after her January, 1971, hospitalization she has not returned to work. She said that Dr. Modelevsky referred her to Dr. Mahon in January, 1971, at which time she was having back pain and numbness in her leg and foot. She said that after conservative treatment failed to relieve her condition, Dr. Mahon referred her to Dr. Cunningham at St. Bernard's Hospital, who in turn referred her to a neurosurgeon in Memphis. She said the neurosurgeon referred her back to Dr. Mahon who performed a myelogram on July 12, 1971, and later performed surgery for a ruptured disc on July 22, 1971. She testified that she has been unable to work since she last worked for Frolic Footwear January 5, 1971.

At the second hearing on March 10, 1972, Mrs. Hill testified substantially as she did at the first hearing. She said she reported her back injuries to the first-aid nurse, Mrs. Collins, and to her supervisor.

Mrs. Joan Collins, the first-aid nurse at Frolic, testified from her records that on November 4, 1969, Mrs. Hill was sick and didn't come to work; that on November 5 she came to work and after 5 o'clock reported that she was sick. She said Mrs. Hill advised her that Dr. Modelevsky said she had pneumonia. She said she took Mrs. Hill's temperature and sent her home and at no time did Mrs. Hill ever report or complain to her of any injury involving her back.

Mr. Leonard Lee, foreman at the Frolic plant, testified that he does not recall Mrs. Hill ever reporting a back injury to him. He said, however, that he has about 60 women under his supervision and that if he listened to all of their complaints, he would do nothing else.

As already set out and as found by the circuit court, there is ample evidence that Mrs. Hill did receive a series

of injuries to her back in 1970 following the initial injury in November 1969. There is no question that Mrs. Hill was finally forced to cease work about January 5, 1971, because of the condition in her back, and there is no question that that disability resulted from the effects of a ruptured disc.

Turning now to the medical evidence in this case, Dr. A. C. Modelevsky, apparently the staff physician for the employer Frolic, rendered a report on August 8, 1971, stating that he first saw Mrs. Hill on November 5, 1969, at which time she gave a history of feeling something pop in her back when she was pulling a loaded shoe rack with a broken wheel. He said she was admitted to the hospital the following day where she remained for 13 days; that she was treated for viral pneumonia and back sprain. Dr. Modelevsky then reports as follows:

> "AP & lateral views of the lumbo sacral spine showed a satisfactory alignment of the vertebrae. The joint spaces were reported as intact and there was nothing seen to suggest an old or recent fracture, congenital defect or significant arthritic changes. She was seen again at the office on 11/24/69, still complaining of low back pain, numbness and stated that 'toes feel like they were frozen.' She was seen again at my office on 12/1/69, feeling much better and returned to work on 12/8/69. * * *
>
> On 2/3/70, while at work felt a sharp pain in rt. groin and had a recurrence of a previous rt. inguinal hernia—this was reduced in the Emergency Room at the hospital and after resting a couple of days, was able to return to her work. On 8/28/70, she again hurt her side and was admitted to the hospital on 8/30/70 for repair of the rt. inguinal hernia—this was done on 8/31/70. She stayed in the hospital until 9/5/70. She was seen in my office on the following days 9/14/70, 9/21/70, 9/28/70, 10/5/70 account of her back ache —she was treated with rest, and various muscle relaxants. She returned to work on 11/2/70."

Dr. Modelevsky then reported unrelated intestinal surgery and liver complications suffered by Mrs. Hill, all of which

he described as a rather "stormy course." He said, however, that she recovered and was able to be discharged on 2/10/71. He then stated:

> "Since that time, she has not been able to do any of her work on account of her back pain—she was seen in consultation by Dr. Larry Mahon and Dr. Craig Grant, a neurosurgeon. She recently had disc surgery —I had not seen her since her last admission to the hospital."

Under date of July 22, 1971, Dr. Larry E. Mahon, an orthopedic surgeon, reported that he first saw Mrs. Hill on April 13, 1971. Dr. Mahon reported a history of occupational back injury occurring in August, 1970. It would appear from the history, as related by Dr. Mahon, that Mrs. Hill confused the 1969 accident when the shoe rack tipped over as testified by her, with the accident in which she sustained her hernia in 1970. In any event, Dr. Mahon reported that Mrs. Hill's primary complaint was of low back pain and pain in the right leg with paresthesia and weakness in the right leg. He then reported as follows:

> "PHYSICAL EXAMINATION found her to be a well developed, small white female; alert, cooperative, in no acute distress. Gait pattern was within normal limits. Examination of her back found there to be tenderness about the lumbosacral area with 50% limitation of motion in all planes. There was noted to be a positive straight leg raising test bilaterally, more marked on the right side. Neurological examination found there to be a sensory deficit corresponding to the L-4, 5 nerve root dermatone on the right side. There was also depression of the right ankle jerk.
>
> I subsequently admitted her to the hospital on 4/28/71, did a *myelogram which was equivocal.* She was treated conservatively and discharged improved on 5/6/71. I saw her again on 6/21/71, stating that she was again having severe pain in her back and pain in the leg. Her examination was slightly improved. I recommended more aggressive exercise for her back and recommended she remain off from work. I saw her again on 7/12/71, still complaining of

numbness in the right leg, pain in the lowback. Her examination was significant in that she had numbness, still, in the right leg in the L-4, 5 dermatone pattern, however, she also had some aspect of bizarre numbness as well. The straight leg raising was still positive on the right side.

I readmitted her to the hospital and *did a repeat lumbar myelogram on 7/21/71, which this time showed a definite defect at L-4, 5 on the right side.* I plan on doing a laminectomy on her in the morning and will send you an additional report when she is discharged from the hospital." (Our emphasis).

Liberty Mutual earnestly contends that this case is on all fours with the case of *St. Paul Ins. Co.* v. *Liberty Mutual Ins. Co.,* 250 Ark. 209, 464 S.W. 2d 566, but that case is clearly distinguishable on the evidence of subsequent injury. In the *St. Paul* case the claimant-employee was injured when he fell from a tractor in November, 1968. Within two weeks following the November injury, the claimant's right leg and foot started going to sleep and the condition got progressively worse until surgery was required on April 6, 1969. Liberty Mutual was the insurance carrier until January 1, 1969, when St. Paul became the insurance carrier. Compensation was awarded equally against both carriers by the Commission and we reversed because there was no substantial evidence to support the Commission's finding that St. Paul was liable.

The only evidence in that case of any injury at all except the November, 1968, injury was elicited from the claimant in a discovery deposition when he was asked if he had received any other injury, and to which he 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 so much it just—I don't know how to explain it, just my legs.' "

The record in the *St. Paul* case 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.' "

The claimant in *St. Paul* then testified that following the accident in November, 1968, his right foot and leg started going to sleep and it just got progressively worse until finally he had to go to the doctor. He testified that his condition was gradually getting worse up until he moved some steel and it seemed like it hurt worse after he moved some steel. He said he did not know whether moving the steel or just time made his condition worse. He said he knew that he just got worse. He said that from the date of his accident and the onset of his symptoms his condition just got worse as every day went on.

Disability is the primary compensable element in a compensation case and the compensability is not questioned in the case at bar. We agree with the circuit court that according to the record in this case, Mrs. Hill suffered several (if not severe) back injuries which aggravated her condition following her initial injury on November 5, 1969. Mrs. Hill continued to work "off and on" until January 5, 1971, when she was forced to quit work because of her back.

Following her initial injury in 1969 x-rays were negative and Mrs. Hill was treated for "back sprain" by Dr. Modelevsky. Following her subsequent injuries in 1970 and 1971 myelogram findings on 4/28/71 were equivical and on July 21, 1971, a subsequent myelogram examination revealed a *definite defect.* We are of the opinion there was substantial evidence from which the Commission could have found that Mrs. Hill's rup-

tured disc and related disability actually occurred as a result of one or all of the back injuries sustained by her subsequent to 1969.

The judgment of the circuit court is reversed and this cause is remanded with directions to affirm the award of the Commission.

Reversed and remanded.

NOAH SIMMONS *v.* STATE OF ARKANSAS

CR 73-94 498 S.W. 2d 870

Opinion delivered September 17, 1973

Harold L. Hall, Public Defender, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Philip M. Wilson,* Asst. Atty. Gen., for appellee.

J. FRED JONES, Justice. Noah Simmons was convicted of grand larceny and sentenced to 21 years in the peniten-

tiary with 11 years suspended. On appeal to this court, he contends that the evidence was only circumstantial and was insufficient to sustain his conviction. The appellant relies on a rule announced in a number of our decisions that:

> "Where circumstantial evidence alone is relied upon to establish the guilt of one charged with crime, such evidence must exclude every other reasonable hypothesis than that of the guilt of the accused." *Logi* v. *State,* 153 Ark. 317, 240 S.W. 400.

See also *Duckworth* v. *State,* 83 Ark. 192, 103 S.W. 601; *Ayers* v. *State,* 247 Ark. 174, 444 S.W. 2d 695; *Jones* v. *State,* 246 Ark. 1057, 441 S.W. 2d 458.

The appellant contends that the facts and circumstances shown must be absolutely inconsistent with any other rational theory and cites *Walker* v. *State,* 174 Ark. 1180, 298 S.W. 20. In *Reed* v. *State,* 97 Ark. 156, 133 S.W. 604, we said:

> "But mere circumstances of suspicion are not sufficient upon which to base the conviction for a crime, which must be established by substantial evidence to the exclusion of a reasonable doubt."

In *Parker* v. *State,* 252 Ark. 1242, 482 S.W. 2d 822, we said:

> "On appeal, in criminal cases, as in others, the evidence must be viewed in the light most favorable to the appellee, and the judgment affirmed if there is any substantial evidence to support the jury's verdict. *Murphy* v. *State,* 248 Ark. 794, 454 S.W. 2d 302; *Stanley* v. *State,* 248 Ark. 787, 454 S.W. 2d 72. A conviction may be had on circumstantial evidence alone if there was substantial evidence to go to the jury because the law makes no distinction between direct evidence of a fact and evidence of circumstances from which the existence of the fact may be inferred. *Lancaster* v. *State,* 204 Ark. 176, 161 S.W. 2d 201. In light of the foregoing rules we state the evidence which we find sufficient to make a jury question."

This court, in criminal cases on appeal, views a jury verdict, or a decision of the trial judge sitting as a jury, in the light most favorable to the appellee. We only determine whether there was substantial evidence to support the verdict and, if there is, we must affirm. *McCray* v. *State,* 254 Ark. 601, 494 S.W. 2d 708; *Crow* v. *State,* 248 Ark. 1051, 455 S.W. 2d 89. We do not attempt to weigh the evidence, for that is the function of the jury, or the trial judge sitting as a jury, who is in a position to evaluate the testimony of witnesses as they testify from the witness stand.

Now turning to the facts in the case at bar, Simmons was convicted of taking money from a cash register at a Penney store. Lela Smith, a customer in the Penney store, testified that she was standing near the cash register involved and heard the bell on the cash register ring. She said she looked immediately toward the cash register; saw Simmons standing sidewise beside the register, and saw some money in his hand as he left the cash register. She said that one of the clerks called for Simmons to halt, but that he continued to leave the store and walked out the door. She described Simmons as wearing a yellow, or gold, colored shirt, having an "Afro" hair style, and walking with a limp. This witness also testified that Simmons later came to her house; admitted to her that he had committed the crime and requested her not to testify against him in court as his attorney had advised that her testimony would likely convict him. On cross-examination this witness testified that she did not actually see Simmons take anything out of the cash register and that she did not see what he did with the money he had in his hand, but she did see him leave the store.

Georgia Hixon testified that she was employed at the Penney store and was busily engaged at the back of the store when she heard the bell on a cash register ring. She said she immediately looked toward the cash register and saw Simmons standing by it. She said as Simmons left the cash register, she walked toward him and told him to stop but that he just walked out of the store. She said that Simmons had on a yellow, or gold, colored shirt and walked with a limp, and that she saw no one else in the store dressed in that manner or limp when they walked.

Charles Smith testified that he was employed at the Penney store on the day in question; that Mrs. Hixon called over to him and advised him that somebody had tapped the cash register till, and that it was a young man in a yellow shirt. He said he immediately went outside and overtook Simmons. He said Simmons was the only person he saw who had on a yellow, or gold, shirt. He said he told Simmons what Mrs. Hixon had said and that Simmons told him another young man had gotten the money; that he, Simmons, saw the other man going out the door and that he had on a yellow shirt. He testified that Simmons told him the other individual who had taken the money from the cash register threw it behind the watch counter. On cross-examination Mr. Smith said that the only reason he stopped Simmons was that he was the only one on the street who had on a yellow shirt.

Mr. Carl Brooks, another Penney employee, testified that he followed Mr. Smith outside the store and met Smith and Simmons returning to the store. He said he overheard Simmons say that the person he saw run out of the store threw the money behind the jewelry counter. He said he found approximately $60 in wadded up bills behind the jewelry counter, and that the cash register was short the amount of money found.

Simmons testified in his own defense; he said that as he was walking out of the Penney store on the day in question, someone ran past him and threw some money on the floor behind the jewelry counter. He said he knew what was going on because he was familiar with crime himself. He said he just kept on walking and that when Mr. Smith overtook him and asked him to return to the store, he agreed to do so because he knew what Mr. Smith was talking about; that he knew he had nothing to hide, so he just told Mr. Smith where the money was. He said he told Smith "Yeah, I saw the dude. He threw the money over there." Simmons denied that he took any money from the cash register. He said he was over by the door when he heard a woman "holler" for someone to stop, but that he took no heed because she was not referring to him. He denied telling Mrs. Smith that he was guilty but said he told her he would be *found* guilty if she testified against him.

Dwight Sims, a witness called by the defense, testified that he was in the vicinity of the Penney store on the day in question and saw Simmons that day. He said he also saw another man come out of the Penney store wearing a gold colored shirt. On cross-examination he testified that he had never seen Simmons before the incident happened, and that the other man he saw come out of the store wearing a gold colored shirt, ran down the street away from the store.

Kenneth Profit also testified as a witness for Simmons. He said he was standing in front of the Penney store waiting for a bus on the day in question. He said that a "dude" came out of the Penney store running fast; that he was wearing a yellow shirt and he saw him run down the street. He said he did not know Simmons.

It is difficult to imagine a stronger case of circumstantial evidence than is presented by the record in this case. Certainly there is substantial evidence to sustain the conviction, so the judgment of the trial court is affirmed.

Affirmed.

GEORGE ROSE SMITH, J., concurs.

GEORGE ROSE SMITH, Justice, concurring. As the majority opinion indicates, in past criminal cases we have approved instructions telling the jury that when the State relies upon circumstantial evidence only, its proof must exclude every reasonable hypothesis except that of the defendant's guilt. The Attorney General now suggests that we should change that rule, in harmony with the doctrine approved in *Holland* v. *United States,* 348 U.S. 121 (1954), and hold that the usual instruction upon reasonable doubt covers the ground and makes the special circumstantial evidence instruction unnecessary. The suggestion may very well have merit; compare our treatment of the unavoidable accident instruction in civil cases. *Houston* v. *Adams,* 239 Ark. 346, 389 S.W. 2d 872 (1965). We need not explore the question here, since the judgment is being affirmed, but I think it appropriate to mention in this concurring opinion the possibility that our rule may be re-examined in some proper case in the future.

WILLIE MAT SIMS *v.* STATE OF ARKANSAS

CR 73-58 499 S.W. 2d 54

Opinion delivered September 17, 1973
[Rehearing denied October 15, 1973.]

Eugene Hunt, for appellant.

Jim Guy Tucker, Atty. Gen., by: *O. H. Hargraves,* Deputy Atty. Gen., for appellee.

CONLEY BYRD, Justice. To reverse a ten year conviction for manufacturing and growing marijuana in violation of the Controlled Substance Act, (Acts 1971, No. 590 as amended by Acts 1972, No. 68), appellant Willie Mat Sims contends:

> "I. The lower court committed error by allowing the sheriff of Arkansas County and Kenneth R. McKee, supervisor of the narcotics section of the Arkansas State Police to testify as an expert witness when these individuals had not been qualified and in fact were incapable of being qualified as such.
>
> II. The court erred in allowing numerous items of evidence to be introduced without the chain of custody being established.
>
> III. Defense counsel at trial failed to adequately represent the appellant in that:

A. Defense counsel failed to request a jury instruction regarding the appellant's failure to take the witness stand in his o vn behalf;

B. Defense counsel was generally ineffective in his overall representation of the appellant herein."

The record shows that Gene Garrison, Sheriff of Arkansas County, had twelve years experience as a law enforcement officer and that as such he had attended a school on narcotics. On May 5, 1972, while searching some woods for a liquor still, he observed the appellant leaving the area. Later in the day, after appellant had departed, he found some marijuana plants. The plants were being grown and cultivated within some wire baskets to prevent the rabbits from eating the plants.

Mr. Garrison kept the plants under surveilance until October 17, 1972. During that time he made some plaster casts of some boot prints made in the field after a rain. On October 17th, Sheriff Garrison obtained a search warrant to search appellant's home. As a result of that search Sheriff Garrison found several packages of marijuana and some marijuana seed stored as if to be used for the next year's planting. The sheriff also found that appellant's boots matched the plaster prints he had taken near the plants earlier in the year.

Appellant signed a confession in which he admitted that he grew the marijuana plants found and the marijuana plants at two other locations.

Sheriff Garrison identified each exhibit taken from appellant's home and testified that appellant described some of the Marijuana packets taken as selling for five dollars.

Deputy Sheriff Leroy Broadway testified that appellant said: ". . . after we had talked to him—he said we outsmarted him and if you was going to dance you had to pay the fiddler."

Kenneth R. McKee, supervisor over the narcotics section of the Arkansas State Police testified that he had

been dealing with marijuana violators since 1955. He then identified the plants grown and taken from appellant's home as marijuana.

POINT I. We find no merit in the contention that the court erred in permitting Sheriff Garrison and Kenneth R. McKee to qualify as expert witnesses to identify marijuana. In the first place there was no objection to their testimony on that basis. Furthermore, their experience would qualify them to identify marijuana by sight and smell. See *Miller* v. *State,* 168 Tex. Crim. 570, 330 S.W. 2d 466 (1959), and *State* v. *Franco,* 76 Utah 202, 289 P. 100 (1930). In the last mentioned case the court said:

> "Objections were made to the testimony of the officers that the stuff contained in the sack and in the cans was marijuana on the ground that the witnesses were not qualified to state what the substance was. The rulings on these objections are assigned as error. In view of the testimony of the officers showing the experience they had in searching for and obtaining marijuana, the court did not err in permitting them to testify. The marijuana seized was introduced in evidence, and is shown to be not an extract or preparation which may be difficult or impossible of characterization without chemical analysis, but the dried leaves, stems, and seeds of the plant. One reasonably familiar with the plant should be able to identify it by its appearance. However, the state very properly did not rest its case as to the character of the drug upon the officers' testimony. The sack and cans were taken to the state chemist who examined and analyzed their contents, and testified that it was marijuana."

POINT II. Sheriff Garrison identified each item of evidence introduced that came from the search of appellant's home. The other evidence he identified as being a picture or replica of that which he had personally observed. Furthermore, the objection now made was not raised in the trial court. Such objections cannot be raised for the first time on appeal.

POINT III. Appellant here contends that his trial counsel failed to adequately represent him. Some of the

matters of which he complains involve trial strategy such as asking or not asking for an instruction on a defendant's failure to take the witness stand in his own behalf. Other contentions are that counsel permitted the sheriff to identify the substances as marijuana without qualifying him as an expert or without requiring a chemical analysis. We find no merit to these contentions. Not only did Sheriff Garrison observe the growth and cultivation of the marijuana plants and make plaster casts of foot prints fitting appellant's boots but appellant signed a confession admitting that he was growing marijuana. Under those circumstances there is not a lot of help a lawyer can give to a defendant except to ask for mercy on the penalty to be imposed.

Affirmed.

EARNEST DEAN MURPHY *v.* STATE OF ARKANSAS

CR 73-63 498 S.W. 2d 884

Opinion delivered September 17, 1973

Harold L. Hall, Public Defender, by: *Garner L. Taylor Jr.,* Dep. Public Defender, for appellant.

Jim Guy Tucker, Atty. Gen., by: *O. H. Hargraves,* Deputy Atty. Gen., for appellant.

CONLEY BYRD, Justice. To reverse his conviction for first degree murder allegedly committed in the perpetration of a robbery, appellant Earnest Dean Murphy contends:

> "I. The trial court erred in permitting the State to introduce that portion of the defendant's statement which implicated him as a participant in another crime.
>
> II. The trial court erred in permitting the sons of the deceased to testify, and in failing to strike their testimony and admonish the jury to disregard it.
>
> III. The trial court erred in failing to direct a verdict for the defendant.
>
> IV. There is no substantial evidence to support the verdict."

The record shows that appellant and several other young people, while swimming at Horseshoe Lake in Pulaski County, met David Hardwick, the deceased, who had run out of gas in his pickup truck. One of the members of the swimming party took Hardwick to get some gas. Thereafter, Hardwick, appellant and a co-defendant returned to the lake where they drank some intoxicants. While there appellant admits that he struck Hardwick; that he took Hardwick's money, his billfold and truck; and that he threw Hardwick's body into the lake. After

taking the truck to Hughes, Arkansas, appellant and his co-defendant returned and disposed of the truck by running it into the Arkansas River. Thereafter they took a motorcycle and returned to Hughes where they were apprehended.

Testimony on behalf of the State showed that the decedent's body had a one by one half inch abrasion under the right eye and a blood alcohol content of 0.27% by volume. The Assistant State Medical Examiner stated that death was caused by drowning. When the body was found floating in the lake, the right front pocket in decedent's trousers was turned inside out and his wallet was missing. Decedent's pickup truck was later found in the Arkansas River.

POINT I. Appellant here contends that the trial court committed error in permitting the State to introduce that portion of his confession that implicated him in the crimes of grand larceny and the possession of stolen property.

The confession after stating the events that occurred at the lake, narrated how appellant and his co-defendant took the truck to Hughes and returned on a Tuesday and disposed of the truck to get rid of it. The confession then stated:

> ". . . Tuesday night we and looked for a motorcycle to leave on because it would be better on gas and Betty knew a guy that had one that he had stole and redid everything on it and we took it and went back to Hughes the same night. . . ."

Most authorities concede that the action of an accused in fleeing from the scene of a crime is a circumstance to be considered with other evidence in determining probable guilt, *Rowe* v. *State,* 224 Ark. 671, 275 S.W. 2d 887 (1955). In connection therewith evidence as to the conduct of the accused during the period of his flight including any criminal conduct constituting an inseparable part of the flight such as obtaining money or transportation is generally held admissible. See *State* v. *Ross,* 92 Ohio

App. 29, 108 N.E. 2d 77 (1952), and *State* v. *Martin,* 175 Kan. 373, 265 P. 2d 297 (1953). Furthermore, evidence of flight after the commission of a crime is generally admissible even though it does not occur immediately after the crime, *Commonwealth* v. *Liebowitz,* 143 Pa. Super. 75, 17 A. 2d 719 (1941). Neither does the fact that the evidence is cumulative prevent its admissibility, *Smith* v. *State,* 216 Ark. 1, 223 S.W. 2d 1011 (1949). Consequently we find this contention without merit.

POINT II. We find no merit in appellant's contention that the trial court failed to strike the testimony of decedent's sons.

One son testified: that he last saw his father on Saturday Sept. 9th; that his father had money on him at that time; that his father carried a wallet in his pocket and drove a 64 Chevy pickup truck; and that his father carried his money in his billfold and in his right front pocket. He also identified the body found floating in the lake as his father. The other testified that he last saw his father on Saturday. The court otherwise sustained all objections to the remainder of the testimony on the ground of incompetency or because of leading questions.

The annotator in 67 A.L.R. 2d 731 points out that under the general rule, evidence that the victim of a homicide was survived by a wife or children is irrelevant and inadmissible in a homicidal prosecution unless it is material to the determination of the guilt or innocence of the accused. The same annotator points out that mere receipt of such evidence does not in itself constitute reversible error.

The evidence elicited from the one son and attempted to be elicited from the other son with reference to where decedent carried his money was certainly material to the issue of whether a robbery had occurred under the circumstances. The State at that stage of the proceeding was obligated to corroborate the robbery admitted in appellant's extra-judicial confession. See Ark. Stat. Ann. § 43-2115 (Repl. 1964).

POINTS III & IV. Appellant here contends that the trial court should have directed a verdict and that the evidence is insufficient to support a felony murder conviction. In support of his arguments appellant relies upon *Bell* v. *State,* 177 Ark. 1034, 9 S.W. 2d 238 (1928), and *Williams* v. *State,* 239 Ark. 1109, 396 S.W. 2d 834 (1965).

In the *Bell* case there was no corroboration of an extra-judicial confession. The *Williams* case requires proof of the perpetration of the crime alleged in the felony murder prosecution.

Appellant here not only made an extra-judicial confession but testified in his own behalf. While on the witness stand he admitted that he was with decedent at the lake, that he hit the deceased, took his wallet, money and truck and then threw him into the lake. In addition the State proved: that appellant was seen with the decedent at the lake near the time of his death; that decedent's wallet, money and vehicle had been removed; and that the wallet and vehicle were found where appellant said they would be found. Furthermore, the Deputy State Medical Examiner, after noting an abrasion under the right eye, testified that decedent died from drowning.

When the evidence is viewed in the light most favorable to the jury verdict, we find substantial evidence to support the conviction. See *Reeves* v. *State,* 222 Ark. 77, 257 S.W. 2d 278 (1953).

Affirmed.

JERRY LYLE CALDWELL *v.* STATE OF ARKANSAS

CR 73-65 498 S.W. 2d 858

Opinion delivered September 17, 1973
[Rehearing denied October 8, 1973.]

Louis W. Rosteck, for appellant.

Jim Guy Tucker, Atty. Gen., by: *James W. Atkins,* Asst. Atty. Gen., for appellee.

CONLEY BYRD, Justice. Appellant Jerry Lyle Caldwell for reversal of his convictions of burglary and grand larceny contends that the evidence was insufficient and that, assuming the sufficiency of the evidence, there was insufficient proof of value to sustain a grand larceny conviction. We find no merit in either contention.

The proof, stated in the light most favorable to the trial court's finding, shows that appellant was doing business in Little Rock as Caldwell Safe & Lock Company and as such had an employee by the name of James Collins. Collins generally rode home from work with appellant unless he spent the night at appellant's home. Both Collins and appellant testified that they had been at appellant's home until 11:00 p.m. on November 20, 1970, when appellant left to take Collins home. Appellant's wife had retired for the night before they left home. While in route from appellant's home in Little Rock located at 2607 Johnson Street, to Collins' home at 2119 Perry Street, appellant testified that he remembered he had left something cooking on the stove and that he stopped at a phone booth near the Thriftway Food Store located at 7000 Asher Avenue, to call his wife. While making the phone call he heard Collins pop the door to

the store and saw him come back with the head to the safe located therein. He says that he asked him "what he thought he was doing taking the safe, because I knew Bob pretty well and I took him out and dumped it out in . . . the pond." In his confession he stated:

> "On Thursday or Friday night approx. Nov. 19 or 20, 1970, between 12:00 midnight and 1:00 a.m. myself & Jimmy Collins went to the Thriftway food store at 7000 Asher Ave. I was driving a 1966 Mustang and parked by the phone booth at the Deep Rock Service Station across from the store. I went into the phone booth & Jimmy left the car & took a Jimmy Bar & popped the front door open. Jimmy Collins carried shavings from a Mosler safe with him into the store because the shavings if analyzed would match the shavings or metal from the safe in the grocery store. The safe was locked and Jimmy opened the safe with the combination. Jimmy was with me when I changed the combination & he had the combination. Jimmy got the safe open & there was no money in the safe. Jimmy come out of the store & brought the safe top with him & left the metal shavings near the safe. He got in the car & I drove to Rodney Parham & Reservoir Road where Jimmy got out and threw the safe top into a pond of water on the west side of Reservoir Road. Then we drove off & went home. Jimmy stayed with me that night & worked for me at the store."

Mrs. Robert Davis testified that she and her husband owned the Thriftway Supermarket at 7000 Asher Avenue and that they in connection with their business used the services of Caldwell Safe & Lock Company. After the break-in appellant was called to replace the safe head, and while there he was sympathetic with them and told them that most robberies like that were inside jobs. Mrs. Davis testified that the value of the safe head would be over $100.

James Collins stated he and appellant went from work to appellant's home where they had some drinks. He had with him a paper bag containing some safe cuttings and a long screw driver which he intended to use in burglarizing the Thriftway Supermarket. His intentions were

to go home, borrow his step-dad's car and come back and do the job, but when appellant stopped to make the call he went on and did it. When asked if there was any prior plan or agreement between him and appellant to participate, he answered:

> "Well, there wasn't a plan or an agreement. I asked him what he thought about doing it and he said that I better not do it."

The testimony of the officers was to the effect that divers were unable to find the safe head in the pond pointed out to them. While appellant contends that he was only taking Collins home when he stopped to phone his wife, the fact remains that, notwithstanding his prior conversations relative to the burglary, he conveniently stopped near the Thriftway Supermarket, transported Collins to an alleged disposal area, and then returned to appellant's home to spend the night. Furthermore, he conversed with Mrs. Davis about the burglary the next day but neglected to mention Collins' conduct. We find the evidence sufficient to support appellant's conviction as a principal.

The owner's testimony as to value was sufficient to support the grand larceny charge. See *Polk* v. *State,* 252 Ark. 320, 478 S.W. 2d 738 (1972).

Affirmed.

JAY RANDALL WOLFS *v.* STATE OF ARKANSAS

CR 73-72 498 S.W. 2d 878

Opinion delivered September 17, 1973

Murphy, Carlisle & Taylor, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Philip M. Wilson,* Asst. Atty. Gen., for appellee.

FRANK HOLT, Justice. Appellant was convicted by a jury of the crime of assault with intent to kill. His punishment was assessed at 19 years in the penitentiary and from a judgment on that verdict comes this appeal. Appellant first contends for reversal that the court erred in its failure to grant appellant's motion for a continuance. We cannot agree.

Ark. Stat. Ann. § 43-1705 (Repl. 1964) provides that defendant must show "sufficient cause" to secure a continuance. Appellant acknowledges that in interpreting this statute the rule is well established in our state that a motion for continuance is addressed to the sound discretion of the trial court and we do not reverse on appeal absent the showing of abuse of discretion. *Scates and Blaylock* v. *State,* 244 Ark. 333, 424 S.W. 2d 876 (1968) and *Nowlin* v. *State,* 252 Ark. 870, 481 S.W. 2d 320 (1972). Furthermore, the burden is upon the appellant to demonstrate abuse of discretion. *Perez* v. *State,* 236 Ark. 921, 370 S.W. 2d 613 (1963). Therefore, in the instant

case, appellant must demonstrate such prejudice resulting from the denial of his motion for continuance as to result in ineffective representation.

A few days after the commission of the alleged offense, the appellant, along with a co-defendant, was arraigned at which time the public defender was appointed as counsel to represent them and a trial date was set approximately three weeks later. On trial date the court permitted the public defender to withdraw as counsel for appellant because there was a conflict of interest inasmuch as the public defender would be representing a witness for the prosecution, appellant's co-defendant who testified for the state. The trial court immediately appointed present counsel to defend appellant. When the trial began 1 1/2 days later, appellant's counsel made an oral motion for a continuance based upon the statement that even though he had investigated the case as thoroughly as possible, the case should be continued "due to the number of witnesses the state will call (approximately ten witnesses) and because of the necessity of talking with the defendant and talking with witnesses for the defendant;" that it was impossible to talk with all witnesses before the trial and it would be "practically impossible to defend" the appellant properly; that it had come to counsel's attention "last night that this defendant has had psychiatric problems in the past and that in order to develop a possible defense of mental deficiency" it would be necessary to have a thorough psychiatric examination; that the defendant's relatives had not been contacted and "last night" appellant's father had called appointed counsel; that appellant's father was en route and "it is believed the father can give vital information in regard to defendant's background and in regard to matters necessary to properly defend this person;" and that non-resident character witnesses could be contacted.

In reply to the court's inquiry, appellant's counsel acknowledged that the public defender's office had furnished him the results of the investigation of the case, consisting of a narrative report of three of the state's nine witnesses. It was determined that some of these witnesses would testify with respect to the circumstances surround-

ing the arrest and items of evidence. One of appellant's two newly appointed counsel stated that "one major witness we have not talked to," other than a firearm expert, is the prosecuting witness who had been out-of-town. It was then determined that the prosecuting witness was present in the court room and available for interrogation. Upon the court's further inquiry, appellant's counsel stated that a local psychiatrist was scheduled to examine the appellant that very morning. Further that his examination would require 5 1/2 hours and another two or three hours for an evaluation. The court then remarked that he would permit the appellant's attorneys to talk to the witnesses, examine the evidence and "let you have Dr. Finch (local psychiatrist) examine him" and that if Dr. Finch found the appellant psychotic, "I'll send him to the state hospital now and that ends it, but if he says he isn't, I don't know of any reason we can't go to trial." Thereupon, late that morning the court impaneled the jury and recessed until 9 a.m. the next morning, which afforded the appellant additional time for trial preparation.

The next day the state's prosecuting witness, whom the court had made available to appellant, testified that in the late hours of the night, as he was driving his truck on a local highway, a car approached him and someone fired through his windshield; that in a few minutes this car turned around and as it came alongside his truck the occupant of the rear seat leaned out the window and fired a shot through the door on the driver's side. A short time later appellant's co-defendant, testifying for the state, admitted that he was the driver of the car and they had engaged in a shooting spree late that night, consisting of shooting out street lights, and appellant had fired the two shots from their vehicle at the truck driver. The appellant, testifying in his own behalf, admitted the escapade, except he expressly denied that he shot at an motorist. The state and the defense stipulated as to the testimony of the firearm expert and the other witnesses merely testified as to the circumstances of the arrest. Appellant's grandfather attended the trial and testified that in Arizona where he lived the appellant had enjoyed a good reputation as a resident there.

The local psychiatrist testified that he had conducted his examination and concluded his evaluation. He found appellant to be "fairly normal psychiatrically" although somewhat irresponsible, impulsive and adolescent. "[A]lthough the patient is twenty-one years of age, I would feel that he is still going through adolescent behavior." "[N]o evidence of psychosis at the present time." "[N]o evidence of organic brain disease at the present time." His evaluation was based entirely upon his examination of the appellant. The record does not reflect there were any medical records in existence with reference to appellant's asserted mental deficiency and neither did the defendant testify that he had suffered in the past from any mental problems. It was not indicated by Dr. Finch, appellant's own witness, that he needed additional time or information in order to adequately evaluate the appellant's mental condition.

It appears that only one subpoena was issued for a witness at appellant's request. This individual could not be located and we cannot understand from the record what would be the nature of the testimony of this witness as no proffer of proof was made. Another local witness who appeared at appellant's request was not used inasmuch as counsel and appellant were of the view that he would be of no assistance as a character witness. We note that appellant had testified that he was convicted of a felony in another state for the sale of dangerous drugs and, locally, he was convicted of disorderly conduct and twice for public drunkenness.

Our rule, as stated *supra,* is that the granting or refusing of a continuance is within the sound discretion of the trial court and the burden is upon the appellant to demonstrate abuse of discretion in accordance with the general rule. In *Chambers* v. *Maroney,* 399 U.S. 42 (1970), the court observed:

> But we are not disposed to fashion a *per se* rule requiring reversal of every conviction following tardy appointment of counsel or to hold that, whenever a habeas corpus petition alleges a belated appointment, an evidentiary hearing must be held to determine whether the defendant has been denied his constitutional right to counsel.

We are of the same view.

In several of our recent Arkansas cases dealing with eve of trial appointment or retention of counsel, we have upheld a denial of a motion for continuance. In *Brown* v. *State,* 252 Ark. 846, 481 S.W. 2d 366 (1972), we held there was no prejudice demonstrated where the motion for continuance was denied when the defendant himself changed counsel five days prior to trial. In *Gathright* v. *State,* 245 Ark. 840, 435 S.W. 2d 433 (1968), we approved a denial of a continuance where new counsel was employed seven days prior to trial; and in *Ebsen* v. *State,* 249 Ark. 477, 459 S.W. 2d 548 (1970), we found no abuse of discretion in denying a continuance where counsel was retained three days prior to trial after previous counsel withdrew due to defendant's refusal to pay him. In *Therman* v. *State,* 205 Ark. 376, 168 S.W. 2d 833 (1943), we found no abuse of discretion in a refusal of a motion for a continuance where the defendant's counsel did not show up the day of the trial and another attorney was appointed and the trial was delayed only three hours. In that case, the defendant knew for several days his counsel would not show up and all witnesses were present in the court room.

However, the appellant makes the argument that in those cases continuances were given previously, or change of counsel was the voluntary act of the defendant, or defendant knew of the impending withdrawal. Therefore, they can be distinguished from the case at bar inasmuch as the change of counsel was unconnected with defendant's conduct.

We are of the view from the totality of the circumstances that the appellant has not met the required burden of showing that he was prejudiced by late appointment of present counsel. When the trial began, 1 1/2 days after appointment, the court was recessed until the next day giving appellant's counsel additional time for trial preparation. The public defender had made available to present counsel results of his investigation. The "major" witnesses in the case were the prosecuting witness and the firearms expert. The testimony of the firearm expert was

given by stipulation. The court made available to the appellant's counsel the prosecuting witness for questioning as well as all other witnesses. A sufficient time was given for a mental examination by a psychiatrist of appellant's own choice. At trial the next day, after this extension of time, appellant's counsel did not deem it necessary to renew his motion for a continuance nor add any additional basis for a continuance.

Significantly, during the time the jury was deliberating, the trial court made an extended inquiry of appellant and his counsel as to whether either of them had any complaint with reference to the trial. Neither expressed any complaint. The appellant stated that he was "satisfied" with the presentation of his case and that his counsel had interviewed him for two days with reference to his case. His counsel stated that he had seen appellant during this time for a "total of at least 8 to 12 hours." Appellant acknowledged that they had answered all his questions and had tried to get all the witnesses he desired. "I don't have any complaints. They did the best they could, with what they had." Counsel had treated him as a gentleman and researched and answered any questions that he had. He agreed that his counsel's decision was correct not to use a character witness he had asked them to call.

We agree as in *Chambers* v. *Maroney, supra,* that our courts should always make an early appointment of counsel in indigent cases and further we cannot formulate "a *per se* rule" or standard which would require a reversal of every conviction as a result of a tardy or late appointment. Although the case at bar has given us much concern, however, in considering all the circumstances of the late appointment of counsel, we cannot say that the appellant has met the burden of demonstrating that the court abused its discretionary authority. We will, of course, continue to closely scrutinize the entire proceedings whenever the issue of late appointment of counsel is presented.

Appellant next contends for reversal that the court erred in permitting the prosecuting witness to testify about his position in the truck at the time the second shot was fired through the door on the driver's side inas-

much as his testimony was "so inflamatory as to materially prejudice appellant's rights at the time." We agree with the trial court that the prosecuting witness certainly could testify as to where he was sitting and where he would normally be sitting. The appellant favors us with no citation to support his contention. Certainly the prosecuting witness should be allowed to state what his sitting position as a driver was under normal driving conditions and as to his position to avoid bodily injury at the time he was fired upon the second time. We cannot understand how this testimony could be said to be inflamatory or conclusionary so as to materially prejudice appellant's rights.

Affirmed.

FOGLEMAN, J., concurs.

JOHN A. FOGLEMAN, Justice, concurring. Although I am well aware of the problems of circuit judges in maintaining docket currency and affording a speedy trial in criminal cases, I reluctantly concur in the result reached in this case. My reluctance is attributable to my recognition of the problems encountered by appointed counsel in affording effective assistance, in the limited preparation time afforded here, to one charged with such a grave offense based on such inexplicable conduct. I am forced to agree, however, that prejudice in this case is not so obvious that we can say there has been such a manifest abuse of the broad discretion vested in the circuit judge in the matter of continuances to relieve appellant of any showing of prejudice. It is only because appellant failed to properly demonstrate prejudice that I concur.

The principal arguments advanced on behalf of appellant in this respect are:

1. When the case was called for trial, one and one-half days after the appointment, appointed counsel had been unable to interview any of the witnesses for the prosecution and had been provided only a narrative report of interviews of three witnesses

(unidentified in the record) by the public defender, who apparently quickly (and appropriately) abandoned the investigation when a conflict of interest appeared.

2. Physical evidence pertinent to the state's case was not made available for examination by newly appointed counsel until the day the case was set for trial.

3. Inadequate opportunity for medical examination, in view of the bizarre conduct alleged and a history of prior psychiatric problems experienced by appellant.

4. Character witnesses from Tucson, Arizona, where appellant had lived until three months prior to the alleged offense, could not reach Fayetteville in time to testify.

Appellant concedes that the burden of showing abuse of discretion lay upon him. He has failed to show:

1. The names of witnesses not interviewed by appointed counsel and the testimony or information which could have been elicited from them.

2. The content and inadequacy of the public defender's narrative report furnished his counsel.

3. The inadequacy of appointed counsel's examination of the physical evidence and the revelations which examination would have afforded.

4. The history of his psychiatric problems.

5. The names of character witnesses who would have come to Fayetteville and testimony which would have been given by them.

The above list of omissions is intended to be illustrative and not exhaustive.

In *Thacker* v. *State,* 253 Ark. 864, 489 S.W. 2d 500, we held there was no abuse of discretion in the denial of a continuance to a defendant in a criminal case, where the movant failed to file any affidavit or to produce evidence showing the facts to be proved by an absent witness, the affiant's belief in their truth, the materiality of the anticipated testimony, and due diligence on the part of the defendant [as required by Ark. Stat. Ann. §§ 27-1403, 43-1706 (Repl. 1964)] or that there was any probability that absent witnesses would be available. The failure to file such an affidavit is a critical factor, to say the least, in appellate review of the trial court's action in denying a continuance. *Thacker* v. *State,* supra; *Leach* v. *State,* 229 Ark. 802, 318 S.W. 2d 617. The failure to file such an affidavit, where the motion is based upon absence of witnesses, has been held fatal to an appellant who seeks reversal on that basis. *Carter* v. *State,* 196 Ark. 746, 119 S.W. 2d 913. While other grounds for the motion are not required to be so shown, reliance was here placed entirely upon counsel's conclusional statements. It is extremely difficult to assess the prejudice to the defendant in the absence of such a showing.

Lest it be said that appellant's appointed counsel were unable to produce supporting evidence for the motion for continuance in the limited time available, I point out that they were not thereby foreclosed. Even though a motion for new trial is no longer a requisite for appellate review, it is still a permissible procedure. Ark. Stat. Ann. § 43-2704 (Supp. 1971). A trial court may grant a new trial when the defendant's substantial rights have been prejudiced by a verdict, if the court is of the opinion that the defendant has not received a fair and impartial trial. Ark. Stat. Ann. § 43-2203 (Repl. 1964). The circuit court's refusal to grant a continuance would have been a proper ground for such a motion, if it had been made to appear that there was an abuse of discretion or manifest denial of justice. See *Figeroa* v. *State,* 244 Ark. 457, 425 S.W. 2d 516; *Jones* v. *State,* 205 Ark. 806, 171 S.W. 2d 298; *French* v. *State,* 205 Ark. 386, 168 S.W. 2d 829; 58 Am. Jur. 2d 325, New Trial, § 117. On making such a motion, appellant would have been

afforded an opportunity to tender evidence to show prejudice, if it was impossible to do so at the time of his motion for continuance. See *Tyson* v. *State,* 196 Ark. 1179, 120 S.W. 2d 29; *Gross* v. *State,* 242 Ark. 142, 412 S.W. 2d 279; *Cooper* v. *State,* 215 Ark. 732, 223 S.W. 2d 507; *Pinson* v. *State,* 210 Ark. 56, 194 S.W. 2d 190; 58 Am. Jur. 2d 422, New Trial, § 204.

Since appellant failed to avail himself of his opportunities to make a showing of prejudice and to afford the trial judge a chance to review his action denying a continuance in the light of evidence not before the court at the time it was denied, I concur.

Although there is no fundamental difference in the basic reason for my reaching the same result arrived at through the reasoning of the majority opinion, I feel compelled to state my approach to the question because I cannot subscribe to that portion of the majority opinion which seems to find insulation against appellant's complaint about the denial of his motion for continuance in his and his attorneys' responses to the circuit judge's interrogation that he had no complaint about the trial. Statements that the appellant was satisfied with his attorneys' presentation of his case, their efforts to obtain attendance of all the witnesses he desired and their consultation with, and advice to, him are a far cry from an admission that counsel could not have been better prepared if given more time for investigation and his case put in a better light if other evidence, not available at the time of trial, had been presented, particularly when appellant's responses are qualified by saying that "they (counsel) did the best they could with what they had."

For the reasons I have stated, I would affirm the judgment.

JOHN McMAHAN ET AL *v.* THE BOARD OF TRUSTEES OF THE UNIVERSITY OF ARKANSAS ET AL

73-55 499 S.W. 2d 56

Opinion delivered September 24, 1973

John T. Lavey, for appellants.

Ray Trammell and *Jim Guy Tucker,* Atty. Gen., by: *Lewis Smith,* Asst. Atty. Gen., for appellees.

CARLETON HARRIS, Chief Justice. This litigation involves an effort by appellants to obtain the names of those persons who were given complimentary tickets for all football games participated in by the University of Arkansas, in this State, during the Fall periods of 1969, 1970 and 1971; also, the number of complimentary tickets received by each of those persons. Suit was instituted in

the Pulaski Circuit Court seeking to mandamus the Board of Trustees of the University to furnish this information. It might be here stated that other information relative to complimentary tickets was sought in the complaint, but all information has been furnished except the names of the recipients of complimentary tickets. The trial court, after hearing evidence, held that the lists of persons receiving complimentary football tickets to the games played in this State during the years 1969, 1970 and 1971 "are not public records as contemplated by those statutes [Freedom of Information Act], not being by law required to be kept and, further, plaintiffs making no showing of any legitimate personal interest in themselves or the class they represent or legitimate public interest being served in said items being made available to them for copying and inspection, that the petition filed herein be dismissed." From this judgment, appellants bring this appeal. For reversal, it is asserted that the trial court erred in dismissing the petition. A second point is asserted, viz., that the trial court erred in refusing to enforce a request for Subpoenas *Duces Tecum.*

Appellees set out seven points, i.e., seven reasons, why the judgment of the trial court should be sustained;[1] while more than one appear to contain merit, there is no need to discuss them in this opinion since we are of the view that point "C", in itself, precludes appellants from prevailing, i.e., the Freedom of Information statute is inapplicable to the lists in issue.

Appellants' entire position is based upon Act 93 of 1967 (Ark. Stat. Ann. § 12-2801—07 [Repl. 1968]), and they argue that, under its provisions, they are entitled to

[1]"Trial court should be affirmed on its dismissal of appellants' petition.
A. Jurisdiction is lacking because this is a suit against the state prohibited by Article 5, Section 20, Arkansas Constitution.
B. Discretionary authority regarding these lists is constitutionally protected by Amendment 33, Arkansas Constitution.
C. In the alternative, the Freedom of Information statute is inapplicable to the lists in issue.
D. Plaintiffs made no showing of necessary interest to compel production of the lists.
E. An action in nature of mandamus cannot be used to enforce alleged rights which are non-existent under Act 93 of 1967.
F. Scope of judicial review of administrative action is limited.
G. Appellants failed to sustain the burden of proof."

the information sought. Appellants first refer to the "preamble" of the act, but the reference actually is to a portion of the title, as supporting their position. This contention need not be discussed for we have said many times that the title of an act is in no sense controlling, and is only properly considered if the act itself is ambiguous. In *Roscoe* v. *Water and Sewer Improvement District No. 1,* 216 Ark. 109, 224 S.W. 2d 356, we said:

> "The title of an Act is in no sense controlling, and, like a preamble, or emergency clause, it may be looked to for the purpose of ascertaining a meaning not fully expressed in the Act proper, yet—as we have so often said—where there is doubt as to the legislative intent, due either to ambiguous phrases or a suggested word omission, and where the missing word can be appropriately supplied by determining from the title, preamble, or other collateral phrases just what the lawmakers intended to accomplish, it is then proper to consider any or all of these collateral aids."

Since we find no ambiguity, there is no reason to consider the preamble, or the title.

Pertinent portions of § 12-2803 and 2804 provide as follows:

> "'Public records' are records made, maintained or kept by any public or governmental body, board, bureau, commission or agency of the State or any political subdivision of the State, or organization, corporation or agency, supported in whole or in part by public funds, or expending public funds. ***
>
> "12-2804. Except as otherwise specifically provided by laws now in effect, or laws hereafter specifically enacted to provide otherwise, all state, county, township, municipal and school district records *which by law are required to be kept and maintained* [our emphasis] shall be open to inspection and copying by any citizen of the State of Arkansas during the regular business hours of the custodian of the records."

Webster's New International Dictionary defines public record as "A record required by law to be made

and kept; a record made by a public officer in the course of his legal duty to make it; a record filed in a public office and open to public inspection."

This definition is the general definition of a public record, but, of course, statutory requirements are paramount. It is here contended that the statutory definition of public records makes the records sought subject to public inspection, but if the language of § 12-2803 at first blush lends itself to this construction, such an interpretation quickly vanishes upon reading § 12-2804. Of course, a statute must be read in its entirety to reach a proper interpretation.

In *McCaa Chevrolet Company* v. *Bounds, Admr.*, 207 Ark. 1043, 183 S.W. 2d 932, we said:

> "In ascertaining the intention of the legislature recourse may be had to the entire act under consideration. 'The different parts of a statute reflect light upon each other . . . Hence, a statute should be construed in its entirety, and as a whole.' 50 Am Jur. 350. 'The intention of the lawmaker is to be deduced from a view of every material part of the statute'." [Citing numerous cases].

It is at once apparent from even a cursory reading of § 12-2804 that the records which the General Assembly had in mind are those mentioned in the italicized phrase "which by law are required to be kept and maintained." The Freedom of Information Act *does not itself provide that any particular records shall be kept;* it only provides that records which are required by some statute (other than the Freedom of Information Act) to be made and kept, shall be open to public inspection. There is no semblance of ambiguity in this provision and whether the statute be construed narrowly or broadly, the italicized phrase can only mean one thing, viz., that the Freedom of Information Act, as far as inspection of records is concerned, applies only to those records which by statute are required to be kept and maintained. Appellant has cited no statute, nor do we know of any, that requires the University of Arkansas, or its Athletic Department, to keep and maintain a record of complimentary tickets

given, either the number of same, or the names of the persons receiving them. It is true that such a record is kept and appellants argue that the act permits public inspection of any record which is maintained or kept by any public or governmental body, board, bureau, commission or agency of the State. In other words, it is contended that any time such a State agency keeps a record, though not required by law, it immediately becomes subject to the provisions of the Freedom of Information Act. It is apparent, from what has been said, that we do not agree with this position. Of course, the athletic accounts, including the number of complimentary tickets given, and the lists of names, are available to the auditors, both for an interior audit by the University, and for the State Legislative Audit Division, but this does not mean that the lists are a public record, and the fact that an agency may have confidential records is recognized by statute. Ark. Stat. Ann. § 13-1505 (Repl. 1968) sub-section (D) provides in part:

> "The Legislative Auditor shall have access at all times to all of the books, accounts, reports, *confidential or otherwise* [our emphasis], vouchers, or other records of information in any state office, department, board, bureau, or institution of this state. Nothing in this section shall be so construed as authorizing or permitting the publication of information now or hereafter prohibited by law."

According to the testimony, the lists of numbers of complimentary tickets, and the lists of names, are compiled primarily because of the contracts that the University has with other institutions covering the games played in Arkansas during a particular season. It appears that, according to most of the exhibits offered, the total gate, after deductions of expenses (including officials' fees, travel expenses, and complimentary tickets), was split between Arkansas and the Southwest Conference team being played. As an example, Mr. George Cole of the Athletic Department at the University, testified:

> "When we sign a contract with Texas University or TCU they state in the contract that they're playing Arkansas; that they would want, I'll use an arbi-

trary figure, they would [want] five hundred dollars worth of complimentary tickets. Then, when they make their report they deduct that. Now then, we deduct five hundred dollars worth from our complimentary tickets and if we give more than that we have to pay Texas half of the price of that ticket for any over five hundred dollars. That's in the contract."

Fred S. Vorsanger, Vice-President for Business Affairs and Secretary to the Board of Trustees, testified that the lists were made to be used, if requested, as a part of the settlement with the opposing team; that the other school would be primarily interested in numbers (of complimentary tickets) but that the names of the recipients of the tickets were kept in case that school wanted to confirm the numbers.

As previously stated, appellants have obtained all information sought except the names of the ticket holders. For instance, an exhibit was offered showing the disposition of football tickets for games played in Arkansas during the Fall of 1970, reflecting as follows:

" DISPOSITION OF TICKETS	TOTAL	PER CENT OF TOTAL
SOLD TO:		
Public	237,313	78.26%
General Admission (High School, Miscellaneous)	5,896	1.94
Faculty and Staff	8,829	2.91
Students	31,154	10.27
Complimentary	8,146	2.68
Opponents	11,971	3.94
TOTAL TICKETS SOLD AND COMPLIMENTARY TICKETS	303,309	100%
COMPLIMENTARY TICKETS BY GROUP:		
"A" Men	487	6.39%
Board of Trustees	448	5.40
Faculty and Staff	1,898	23.20
Legislators	1,892	23.21
Miscellaneous	337	4.10

Newspaper	800	9.80
Radio Stations	1,170	14.30
State Officials[2]	232	2.80
Team	882	10.80
TOTAL COMPLIMENTARY TICKETS BY GROUP	8,146	100%
RECEIPTS	$1,347,461.71"	

For the reasons herein stated, and without discussing further defenses advanced by appellees, we hold that appellants are not entitled, under the statute (Freedom of Information Act), to the information sought.

As to the second point for reversal, we find no merit. Appellants sought to have Subpoenas *Duces Tecum* served on Cole and Vorsanger requiring them to appear with all rules and regulations pertaining "to the physical and financial accounting for football tickets" for the years heretofore mentioned. It is difficult to determine from the record just what action was taken by the trial court. An order had been signed directing the mentioned individuals to bring such records, but appellants say that the court sustained objection to the subpoenas being issued, and refused to order appellees to produce the rules and regulations described in the subpoenas.[3] At any rate, discussion of this point would be academic since the testimony reflects that there are no such written rules and regulations.

Affirmed.

GEORGE ROSE SMITH, J., not participating.

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[2] Perhaps, in view of the holding herein, it might be well to state that this category, "State Officials", does not include Supreme Court Justices, who are not recipients of complimentary tickets.

[3] The record reflects that the court stated:

"I very reluctantly signed those two orders. I left or let my reluctance be known to counsel for petitioner. I had no earthly idea what he wanted insofar as rules and regulations. If you have a little booklet that you call rules and regulations, bring it. I am going to deny your request at this time. They can produce it, that is, your witnesses. You can develop the facts in your inquiry; don't go into it right now."

PHILIP PETRUS ET AL *v.* ARKANSAS IRRIGATION COMPANY

73-60 499 S.W. 2d 60

Opinion delivered September 24, 1973

Macom, Moorhead & Green, and *Chas. A. Walls Jr.,* for appellants.

John D. Thweatt and *James M. Thweatt,* for appellee.

GEORGE ROSE SMITH, Justice. For some 30 years the plaintiff-appellee, Arkansas Irrigation Company, has maintained a 6,000 acre reservoir in Prairie county, known as Peckerwood Lake. The company uses water from the reservoir in its own farming operations and sells water to neighboring rice farmers. The company does not own

the entire bed of the lake in fee simple, but it does have flowage rights upon lands lying below 207 feet mean sea level.

The appellants, Philip and Joseph Petrus, are brothers whose farm lands are partly subject to the irrigation company's flowage easements. In the fall of 1961 the Petrus brothers constructed levees to enclose about 20 acres of their land that was subject to the appellee's flowage rights. The Petruses also installed a pump with an intake below the 207-foot line, enabling them to withdraw water from the reservoir. Whether the Petruses had a valid contract authorizing them to enclose the 20 acres and install the pump is the principal question in this case.

In 1964, the appellee brought this suit to require the Petrus brothers to remove the levees and the pump, to recover compensation for the Petruses' use of the land within the levees for the growing of crops, and to recover compensation for water pumped by the Petruses from the reservoir. The taking of testimony was not completed until 1969; the Petruses' attorney, J. B. Reed, died after the case had been submitted to the chancellor for decision. This appeal is from a decree in favor of the plaintiff upon all three causes of action asserted in the complaint. The appellants' present attorneys did not participate in the trial proceedings.

According to the Petrus brothers' testimony, they installed the levees and the pump under an oral contract with Dale Wiley, who was the appellee's general manager for 18 years before his death in 1962. The precise terms of the asserted oral agreement are not in the record, because the chancellor sustained the appellee's objection to that testimony. Although the appellants contend that the terms of the contract were admissible, there was no proffer of proof when the appellee's objection was sustained. We are left to assume that the agreement simply authorized the Petruses to enclose and occupy the 20-acre tract and to pump water from the reservoir.

The irrigation company's position all along has been that its manager, Wiley, had neither actual nor

apparent authority to enter into the asserted agreement with the Petrus brothers. Familiar basic rules governing the authority of a corporate manager are discussed by Fletcher in his Cyclopedia of the Law of Private Corporations (1969 rev.). In Section 667 the author states the fundamental principle that such a manager has implied or apparent authority to make contracts "falling within the scope of the ordinary and usual business of the company." Such an agent, however, has no authority to sell the company's real estate, unless specially empowered to do so. § 687. Fletcher adds that it is a well-known rule that the manager of a corporation cannot give away its property. §689.

Applying the foregoing rules to the case at bar, we are of the opinion that the chancellor was right in concluding that Wiley did not have actual or apparent authority to make the asserted contract with the Petruses. Roger Crowe, the president of the corporation, testified that Wiley did not have that authority. The company's first manager, Fricke, and its present manager, Downing, both testified that they would not have executed a contract for a period in excess of a year. There is no contrary testimony with respect to Wiley's actual authority.

With respect to Wiley's apparent authority the record is equally favorable to the appellee. The irrigation company's standard form of contract appears to have been a one-year contract for the sale of water from Peckerwood Lake. Wiley unquestionably had the power to execute those agreements; for, in Fletcher's words, they fell within the ordinary and usual business of the company. There is no proof, however, that Wiley ever entered into a contract remotely similar to that now asserted by the appellants. There was proof that Wiley employed the witness Hahn to clear 100 acres, but such an undertaking would be within the company's ordinary business of impounding water. There was also testimony that Hahn discussed a $15,000 contract with Crowe, who said that Wiley had full authority to enter into it. There is, however, no proof or proffer of proof of the terms of that contract, which may have been a routine one.

It is clear that the agreement now relied upon by the Petruses was not within the ordinary and usual scope

of the irrigation company's business. The Petruses testified that they were to have a perpetual right to occupy the 20-acre enclosure. We infer that they were also to have a perpetual right to pump water from the reservoir. There is no suggestion that the Petruses were to make any monetary payment for those valuable rights. Instead, the company's inducement for making the agreement seems to have been some rather nebulous benefit from the accelerated drainage that would result from the construction of the levees. The appellee's testimony indicates that such an acceleration was not really beneficial and could have been attained by the company itself at an expense of not more than $1,000. It is of course quite obvious that if the irrigation company made a practice of entering extensively into similar agreements by which the bed of its reservoir was released to others in perpetuity, with no financial return to the company, it would eventually be out of business.

We conclude that Wiley had neither actual nor apparent authority to make the contract. We need not discuss at length the appellants' contention that the company ratified the contract by "inaction and silence." Crowe testified that as soon as he noticed the Petruses' enclosure, which was then complete or nearly so, he told them that Wiley did not have the authority to permit the encroachment and that it would have to be removed. The appellee took no affirmative action that could be regarded as a ratification of the agreement. It did fail to bring suit for more than two years, but during that delay there was no disadvantageous change of position on the part of the Petruses. A ratification might be found if it were shown that the irrigation company was knowingly receiving substantial benefits during the period of its inaction, as in *Southern Elec. Corp.* v. *Ashley-Chicot Elec. Co-op,* 220 Ark. 940, 251 S.W. 2d 813 (1952), but, as we have indicated, the weight of the evidence does not establish the appellee's receipt of such benefits.

Two other points for reversal are argued. First, the chancellor, in addition to ordering the removal of the encroachments, awarded the appellee $4,450 as the fair rental value of the 20 acres during the appellants' oc-

cupancy. The appellants are right in stating that the record contains no evidence fixing the rental value of the land. That part of the decree must be reversed.

Secondly, there is also no proof to support an award of $13,294.98 for the appellants' consumption of water. That award was to be calculated at a specified percentage of the market value of the rice and soy beans grown on the lands that were watered. The market value and sale price of the crops were not proved, but the deficiency cannot be charged to the appellee. At the beginning of the trial the parties stipulated that the market value and sale price would "be submitted by the Defendants and become a part of the record." Had Mr. Reed, the appellants' trial attorney, lived, he would unquestionably have recognized his duty to complete the record. Unfortunately Mr. Reed died, and the appellants' present attorneys, in taking the appeal, simply designated the entire record. In view of that designation there was no reason for the appellee's counsel to be aware of the deficiency until they received a copy of the appellants' printed abstract and brief. Since the omitted proof was not available in the files of the trial court, the appellee could not have had it sent up pursuant to a writ issued by this court. Ark. Stat. Ann. §§ 27-2129.1 and -2129.2 (Repl. 1962). We see no objection to counsel's decision to explain the matter in their brief. In the circumstances justice requires that the cause be remanded so that the missing testimony may be supplied and a supplementary decree be entered.

Affirmed in part, reversed in part, and remanded.

HARRIS, C.J., not participating.

JOE ANN COX *v.* GULF UNION CORPORATION

73-65 499 S.W. 2d 63

Opinion delivered September 24, 1973

Acchione & King, by: *Harold King,* for appellant.

Haley, Young, Bogard & Gitchel, P.A., for appellee.

LYLE BROWN, Justice. Appellee, Gulf Union Corporation, is the record owner of a lot and improvements located at 144 1/2 Forrester Street in North Little Rock. On October 5, 1970, Gulf entered into an option to purchase agreement with Arnold Cox and Joe Ann Cox, husband and wife. Gulf instituted this suit, alleging that appellants had forfeited their option to purchase but nevertheless appellants were interfering with Gulf's exercise of its ownership. Arnold Cox did not answer; in fact he was a mere nominal party to the contract. Joe Ann Cox resisted the complaint, alleging that she orally exercised the option and that Gulf waived the requirement of notice that she was exercising her option, that she was not delinquent in her monthly payments, and (on appeal) that the trial court erred in permitting the trial attorney for Gulf to testify.

We shall summarize the principal provisions of the written option agreement. Mrs. Cox paid $1000 and was

granted possession and an exclusive option for approximately six months (to April 1, 1971) to purchase the property. During the option period she was to make monthly rental payments of $89.22 and during that period the status of landlord and tenant would exist between the parties. It was further provided that the option to purchase was conditioned on the payment of the monthly rentals and written notice by registered mail on or before April 1, 1971, to the effect that the Coxes were exercising the option. If the option was exercised as provided, optionor would convey the property to optionees and take a mortgage for $10,600, less credit for the initial $1000. The agreement stated that in case of default, the relation of landlord and tenant would exist and Gulf could demand possession of the property.

The trial court held that the Coxes failed to comply with the terms of the agreement and lost their option; that following April 1, 1971, the relation of landlord and tenant existed; that pursuant to a notice given by Gulf, the Coxes were obliged to vacate the property as of November 1, 1971; and that Gulf was from that time entitled to exclusive possession and use of the premises.

Gulf introduced the testimony of Louis Mashaw, Clay Hyde, and Attorney David Bogard. Mashaw is the "trouble-shooter" for Gulf in Arkansas and resides in Hot Springs. Gulf is headquartered in Louisiana. Mashaw testified that he met with the Coxes in Mr. Bogard's office on September 28, 1970, and again on October 5; that at the first meeting the draft of the agreement was not satisfactory with the Coxes; that he took a check for $1000 but held it until another and more satisfactory agreement could be drafted and executed by the parties. Mashaw signed the October 5 agreement on behalf of Gulf. He said he took no part in receiving monthly payments.

Witness Clay Hyde, an assistant vice-president of Gulf, resides in Baton Rouge and is in charge of collections. We summarize his essential testimony. The account originated prior to the option to purchase agreement. The Coxes were at one time the owners of the property and they executed a mortgage to Gulf. Shortly after the

mortgage was foreclosed the option to purchase was executed and Gulf left the mortgage account in the IBM machine and used it for entering payments made under the option to purchase. Hyde experienced difficulties with the collection of the agreed monthly rental payments which were to be made during the period of the option. The first payment was due November 1, 1970, and a check was sent dated November 20; the check was not paid because of insufficient funds. The check was eventually honored. During the ensuing period Gulf experienced similar difficulties in getting checks honored. During the months following, Mrs. Cox continued to make monthly payments on a belated basis. By September 1971, she was three months in arrears. Then in early October, Gulf received three payments and they were applied to the July, August and September payments. Those payments made her current through September. Just before she mailed the three payments Mrs. Cox had been sent a letter by Gulf's attorney which instructed her to vacate the premises. That letter was dated September 29, 1971. Later, in October, Gulf received two money orders representing three payments. Those money orders were returned to Mrs. Cox. One more payment was received by Gulf and it was likewise refused. At no time prior to, or after, April 1, 1971, did Mrs. Cox give written notice that she was exercising her option to purchase the property.

On cross-examination Mr. Hyde explained that he could not say when payments were received but could tell the dates they were posted on the IBM machine. He detailed the dates as follows: The first payment was posted the latter part of October 1970; the next one, December 8, covering November; the third one was January 8, for December; on January 8, two payments were run through the machine, covering December and January; the February payment was posted on the 25th; the payment due in March was posted on April 15; the next payment was posted on June 10; and the last credit was made in October, when three payments were sent in for July, August and September. Toward the last of October three payments were made at one time and these funds were returned since Gulf had sent Mrs. Cox notice to vacate the premises.

Mr. Hyde conceded that under date of April 7, 1971, Mrs. Cox was requested to pay the insurance on the property. She responded by sending a check but it was returned "NSF" and was never cashed. Gulf proceeded to pay the premium. He also testified that under date of March 16, 1971, Mrs. Cox was sent four mortgage payment cards; that those cards would last her through the July payment, at which time some more cards would be sent. Then that procedure of sending payment cards was repeated on July 21, 1971. Mr. Hyde explained that those letters and cards went out automatically because the account had not been withdrawn from the IBM machine. A request for payment was also sent out on October 21, 1971. Again, Mr. Hyde said that was because the account was still in the IBM machine. The witness was also confronted with cancelled checks in the amount of the monthly payments, one being dated May 26, 1971, and the other July 26, 1971. Finally, Hyde was asked if he had a conversation with Mrs. Cox in July or August about her paying the property taxes and he replied that he did not so recall.

Over the objection of Mrs. Cox, Gulf's attorney David Bogard was permitted to testify. The objection was on the basis that the rule on the witnesses had been granted at the beginning of the trial. He placed several letters in the record. The first one was dated December 22, 1970. The letter concerned the receipt of NSF checks. Mrs. Cox was reminded that she only held an option to purchase and one of the prerequisites for exercising the option was the prompt payment of monthly installments. The next letter was dated December 30, 1970, which was again in regard to NSF checks, and stated that unless two payments, covering November and January, were in his hands by January 8, 1971, Gulf would reclaim the property. Then on June 1, 1971, Bogard wrote her that since she had not exercised her option to purchase in accordance with the terms of the agreement, Gulf was declaring a landlord-tenant relationship; and that they would expect monthly rental payments in order that she could occupy the premises as a tenant. Then on September 29, 1971, Bogard wrote her that Gulf was terminating the landlord-tenant relationship as of October 1, 1971. Finally, on October 12, 1971, Bogard returned by mail two money

orders recently received. The letter came back undelivered, whereupon Bogard mailed the money orders by certified mail to Mrs. Cox's attorney.

Mrs. Joe Ann Cox was the only witness for herself. She said that in August 1971 she discussed the taxes over the telephone with Mr. Hyde and that he asked her to send payment for the taxes. Before doing so she checked and found they had not been paid. She produced a tax receipt showing redemption for the 1969 and 1970 taxes. The receipt was dated September 1, 1971. She testified that the option to purchase was not the true agreement between the parties. She insisted that she first met with Mashaw and Bogard on September 28, 1970; that the instrument drawn at that time was not satisfactory; that she and Mashaw signed the last page and it was agreed that the other pages would be rewritten; that those pages were rewritten and she was given her copy; that after she got home she read it and stopped payment on the $1000 check; and that Mr. Hyde called her about the check. She explained to Hyde that she was not satisfied with the agreement as drawn; that Hyde assured her a deed would be executed and delivered to her; and that she then sent Gulf another check for $1000.

On cross-examination she insisted that she did not receive any of the letters introduced by Mr. Bogard. She proclaimed ignorance about the contents of the option to purchase and insisted that she did not know what it meant to exercise an option. Mrs. Cox also introduced some records of payments for which Mr. Hyde did not give her credit in his testimony.

We have concluded that Mrs. Cox was entitled to prevail in this action. That is because we think the evidence is clear that Gulf waived the requirement of written notice by April 1. It is also evident that Gulf continuously accepted monthly payments made after the month in which they came into existence. In fact, the contract does not declare an exact day of the month as a deadline for payment. It does not even state that the monthly payments shall be paid during the month in which they are created. There were four significant factors which

occurred after the April 1, deadline which justifiably led Mrs. Cox to believe that Gulf was treating her as a mortgagor:

(1) On April 7, 1971, Mrs. Cox was requested by Gulf's home office to pay the insurance. "Enclosed please find a statement for the insurance coverage on *your* property. Since insurance payments are not included in your *mortgage payments,* please remit $121.00 to Benton & Owens, Inc." (emphasis ours);

(2) In July 1971, Gulf's home office sent Mrs. Cox four payment cards with instructions that one be used each month in making her *mortgage* payments (emphasis ours);

(3) The evidence is clear to us that in August 1971, Mrs. Cox was requested by Gulf to pay the property taxes, which she did; and,

(4) Under date of October 21, 1971, Gulf sent Mrs. Cox this written notice: "Just a friendly reminder your *loan* payment is past due. Please give this your immediate attention". (emphasis ours.)

In the purchase option there was no mention made of payment of taxes and insurance. If Mrs. Cox, at the times she was asked to pay those items, was merely a tenant, the primary obligation for such payments was not on her but on Gulf. See 51C CJS Landlord and Tenant §§ 359 and 374.

It is true that during the period of the four recited transactions Mrs. Cox was being sent letters by Mr. Bogard which, if she received them, (which she says she did not) explained to her that she was merely a tenant. Mrs. Cox testified that in her state of confusion she called Mr. Hyde and he assured her that she would get her deed. Be that as it may, with the home office, by its actions enumerated above, assuring Mrs. Cox that she was a mortgagor rather than a tenant, it would be logical that she would rely on the home office actions rather than those of the attorney in Little Rock.

We think the enumerated acts of Gulf, occurring after April 1, were inconsistent with their right to written notice and any right they claimed to monthly payments being made on a day certain. In *Keith* v. *City of Cave Springs,* 233 Ark. 363, 344 S.W. 2d 591 (1961) is this statement on "waiver":

> Thus, 'waiver' occurs where one in possession of a right, whether conferred by law or contract, with full knowledge of the material facts, does or forbears to do something, the doing of which or the failure or forbearance to do which is inconsistent with the right or his intention to rely upon it.

Then in *Sirmon* v. *Roberts,* 209 Ark. 586, 191 S.W. 2d 824 (1946) we said in essence that one entitled to notice within a designated period cannot complain for want of the notice when, by his actions and conduct, he leads the adverse party to assume there was a waiver.

As to the effect of accepting tardy payments see *Wade* v. *Texarkana Bldg. & Loan Ass'n.,* 150 Ark. 99, 233 S.W. 937 (1921). That case accords with our view.

We do not reach the question of the propriety of Mr. Bogard appearing as a witness when he was an attorney in the case. Assuming that the letters had been admitted through another procedure, the weight of the evidence was still on the side of Mrs. Cox. With respect to participating lawyers testifying, we have fairly recently discussed the subject in *Montgomery* v. *The First Nat'l Bank of Newport,* 246 Ark. 502, 439 S.W. 2d 299; *Old American Life Ins. Co.* v. *Taylor,* 244 Ark. 709, 427 S.W. 2d 23 (1968); and in *Rushton* v. *First Nat'l Bank of Magnolia,* 244 Ark. 503, 426 S.W. 2d 378 (1968).

The cause is reversed and remanded with directions that a decree be entered consistent with our findings.

J. T. DAVIDSON *v.* COMMERCIAL CREDIT EQUIPMENT CORP.

5-6243 499 S.W. 2d 68

Opinion delivered September 24, 1973

Brown, Compton & Prewett, Ltd., for appellant.

No brief for appellee.

JOHN A. FOGLEMAN, Justice. J. T. Davidson, appellant here, sought to cancel a chattel mortgage securing the payment of a $20,000 purchase money balance on an airplane he bought from Texas Aviation Service.

As grounds for cancellation, he asserted the contract was usurious. Here he contends the chancery court erred in denying the relief he sought.

There is no dispute about the basic facts. The $20,000 balance was to be paid in 60 monthly installments. In computing the finance charge, or time price differential, a chart prepared by Financial Publishing Company of Boston, Massachusetts, was used. It provided for an "add on" rate of $5.50 for a 60-month term at an annual actuarial interest rate of 10%, the maximum allowable in Arkansas. The parties stipulated that the application of this factor would result in a finance charge of $5,500 and equal monthly payments of $425 each.

The chancellor specifically found that: The Financial Publishing Company was a reputable financial publishing company; the rate chart was utilized without error or miscalculation; accepting testimony on behalf of appellant at face value, the maximum overcharge would amount to five cents per month or $3.00 over the five year term; no evidence based upon an independent calculation of the correct interest charge had been made by any witness; the only witness who testified relied solely upon two financial publications, one of which was printed by Financial Publishing Company; appellant had failed to meet his burden of proving the contract usurious; any error made in calculating the interest resulted from a reliance, in good faith, upon a financial table published by a reputable financial publishing company, rather than from an intention to extract a usurious interest charge. Since we are unable to say the chancellor's findings are clearly against the preponderance of the evidence, we affirm.

Only one witness testified. He was Marion R. Smith, Executive Vice President of the National Bank of Commerce of El Dorado. He stated his familiarity with various documents used for computing interest. He expressed the opinion that the monthly payments should have been $424.95 per month. He used a book prepared by Area Computer Services, Inc., and, by applying the appropriate factor for a 10% interest rate over a five-year

term to the principal balance, arrived at a figure of $424.942 which he rounded off at $424.95. He stated that, if he were attempting to make the computation in the bank's operations, he would use an equal monthly loan amortization table contained in a book published by Financial Publishing Company of Boston, and readily available to all banking institutions and lending agencies. By using that book he also arrived at a monthly payment of $424.95. He stated he was not familiar with the book containing the table or chart used in this case. Upon examination, the only differences he could find between the chart used by appellee and the books he relied upon were the necessity for mathematical calculation to determine the amount of the monthly payment when it was used and the fact that it did not carry seven digits to the right of the decimal point, as did the book to which he first referred.

We agree with appellant that one cannot purge a usurious contract by a retroactive correction or a subsequent disclaimer. We also agree that the validity of a contract attacked for usury does not turn upon the question of whether the alleged usurer has a specific intent to violate the usury laws. The intent required is an intent to receive or reserve a rate of interest that proves to be usurious. Still, we have long recognized that an honest error of calculation will not render a contract usurious. In *Garvin* v. *Linton,* 62 Ark. 370, 35 S.W. 430, we said:

> There must be an intent to take unlawful interest, to constitute usury. There can be no usury when the amount taken in the contract for interest in excess of 10 per cent per annum was reserved through a mistake or ignorance of the fact that it was in such excess. If the lender, by mistake of fact, by error in calculation, or by inadvertence in the insertion of a date, contracts to receive an illegal rate of interest, "such mistake, error, or inadvertence will not stamp the taint of usury on such engagement, nor cause to be visited upon him, who did not knowingly and intentionally disregard the law in this behalf, the highly penal consequences of an usurious offense."

Moody v. Hawkins, 25 Ark. 191; Bank of De Shon, 41 Ark. 331.

The act of usury will not be presumed, or imputed to the parties, and will not be inferred if the opposite conclusion can be fairly and reasonably reached. *Commercial Credit Plan* v. *Chandler,* 218 Ark. 966, 239 S.W. 2d 1009; *Cammack* v. *Runyan Creamery,* 175 Ark. 601, 299 S.W. 1023; *Briggs* v. *Steele,* 91 Ark. 458, 121 S.W. 754. In *Cox* v. *Darragh Company,* 227 Ark. 399, 299 S.W. 2d 193, we held that a mistake in charging an illegal rate of interest would not stamp a transaction with the taint of usury, relying upon the quotation from *Garvin* v. *Linton,* supra; *Hinton* v. *Brown,* 174 Ark. 1025, 298 S.W. 198; and *Temple* v. *Hamilton,* 178 Ark. 355, 11 S. W. 2d 465. We affirmed the judgment of the trial judge, sitting as a jury, holding that evidence that payments were scheduled upon an erroneous calculation made and furnished by a banker, at the request of the creditor, constituted substantial evidence to sustain the holding that usury had not been shown. Later, we reversed a holding by a chancery court that a contract was usurious, on the ground the evidence showed that the excessive finance charge resulted from an honest mistake. *Sammons-Pennington Company* v. *Norton,* 241 Ark. 341, 408 S.W. 2d 487. There the president of the creditor corporation had testified that he called upon his finance company to furnish the amount of interest at the maximum legal rate to be added to the debt. The company used "Lake's Monthly Installment and Interest Tables" to supply the figure, which was stipulated, at the trial, to be excessive by $57 to $60. We said:

> It appears that, in determining whether a usurious charge has been made, all attendant circumstances must be taken into consideration. When this is done, we think it is plain that the overcharge in the instant litigation was the result of an error, made in good faith, rather than being based on an intent to violate the usury law.

One of the most important considerations in reaching our result was that the creditor had endeavored to follow our admonition in *Holland* v. *Doan,* 228 Ark. 340, 307

S.W. 2d 538, that one who does not know how to figure interest should have his calculations checked by one who is familiar with figuring interest. We also pointed out that an accountant who testified the interest exceeded the legal limit reached his conclusion after computations extending over the better part of a day and that, even in stipulating the excess, no definite figure was used. Even though we did not premise our result upon the fact, we observed that it seemed ridiculous to surmise that anyone would risk the cancellation of a principal debt of $16,000 in order to receive $57 to $60 in excess interest.

This case clearly falls within the pattern of *Cox* and *Sammons-Pennington,* rather than of *Holland* v. *Doan,* supra, relied upon by appellant. In *Holland,* the interest charged was 11.95%. No offer to remit the excess was made in that case until after all the evidence in the case had been presented on both sides, and we found no evidence of a mathematical miscalculation. The creditor had used a chart furnished by GMAC and apparently charged interest on the basis of one year, or 52 weeks, when the payments were to be made over only 48 weeks. We said the excessive amount was arrived at because the wrong formula was used in spite of the fact that the creditor must surely have known that a year consisted of 52, not 48 weeks. Here appellee, in its first pleading, offered to refund any overcharge. It used a chart furnished by the same publishing company that distributed a book that would have ordinarily been used by the National Bank of Commerce in El Dorado.

Slight variations in results may be reached by use of other methods. Use of a multiple of a factor from "Lake's Monthly Installment and Interest Tables" (Sixth Edition) for $1,000 principal at 10% over 60 months would produce a payment of $424.92. This would indicate an excess of $4.80. The real test for usury, i.e., a comparison of the amount the borrower is required to pay with the total amount he could be required to pay at the maximum rate of interest for the term, is made by using the statutory system of applying payments first to interest and the excess to principal. *McDougall* v. *Hachmeister,* 184 Ark. 28, 41 S.W. 2d 1088, 76 A.L.R. 1463;

Widmer v. *J. I. Case Credit Corp.,* 243 Ark. 149, 419 S.W. 2d 617; *Lyttle* v. *Mathews Investment Company,* 193 Ark. 849, 103 S.W. 2d 47; *Hare* v. *General Contract Purchase Corp.,* 220 Ark 601, 249 S.W. 2d 973; *Commercial Credit Plan, Inc.* v. *Chandler,* 218 Ark. 966, 239 S.W. 2d 1009; Ark. Stat. Ann. § 68-606 (Repl. 1957). If that test is used applying monthly payments of $425, the last payment would be slightly over $4.00 more than the legal limit. By use of the means hereinabove mentioned, range of the excess is from $3.00 to $4.80. If it were ridiculous to think one would deliberately risk cancellation of a $16,000 debt to extract an extra $57, it would be ludicrous to think one would risk $20,000 in an effort to collect $3.00 or $4.00 more.

Under all circumstances presented here, we affirm the chancellor's decree, because we cannot say the conclusions he reached from the facts was not supported by a preponderance of the evidence.

ASSEMBLY OF GOD CHURCH, LAMBERT, ARKANSAS *v.* BERL FORD ET AL

73-86 499 S.W. 2d 273

Opinion delivered September 24, 1973

Gannaway, Darrow & Hanshaw, for appellant.

Fenton Stanley, for appellee.

CONLEY BYRD, Justice. Appellant Assembly of God Church, Lambert, Arkansas, pursuant to Ark. Stat. Ann. § 82-401 (Repl. 1960), applied to the County Judge of

Hot Spring County for a permit to establish a cemetery upon an acre of land adjoining its church building. Appellees and cross-appellants Berl Ford, et al, opposed the granting of the application. The county judge after hearing evidence denied the application. On appeal to the circuit court appellant took the position that under Ark. Stat. Ann. § 82-401, *supra,* the county judge had no discretion once the State Health Department approved the application. Appellees and cross-appellants took the position that the county judge had some discretion and that it was necessary for the court to hear evidence on the need and desirability of a cemetery on the desired site. After both parties announced that they were willing to stand on their respective propositions, the circuit court noted that the State Health Department had approved the site for a cemetery and ordered the county judge to issue the permit. In lieu of a supersedeas bond on appeal, the circuit judge ordered that no interments be made within one year from the date of the order. Although the church appealed from the "one year" moratorium, it now concedes that the issue is moot and asks us to affirm the circuit court. Cross-appellants raise several contentions including the contention that if the county judge had no discretion once the State Health Department approved the application then the church's remedy should have been by mandamus instead of by appeal. Since we consider the stipulation in the trial court to waive all contentions except the principal one having to do with a construction of the statute, we consider only the issue which the parties stipulated to before the trial court.

The statute here involved provides:

"Whenever it is proposed to locate a cemetery, or to extend the boundaries of an existing cemetery, the party, or parties, so proposing shall make written application to the county judge, or to the mayor of an incorporated city or town, according to whether said cemetery, or extension of a cemetery, is to be located in the jurisdiction of one or the other of these authorities, describing accurately the location and boundaries of the proposed cemetery, or extension of a cemetery. Before acting upon the application the

> county judge, or the mayor, as the case may be, shall refer the application to the State Board of Health, for investigation from a sanitary standpoint. In making such investigation the State Board of Health shall take into consideration the proximity of the proposed cemetery, or extension of a cemetery, to human habitations, the nature of the soil, the drainage of the ground, the danger of pollution of valuable springs or streams of water, and such other conditions as would bear upon the situation. Having completed its investigation as promptly as can be done, the State Board of Health shall submit a report to the judge, or to the mayor, as the case may be, and either approve or disapprove the application. Having received the report from the State Board of Health, the judge, or the mayor, as the case may be, shall, as recommended by the State Board of Health, either grant, or deny, the application. Should the application be granted the judge, or the mayor, as the case may be, shall issue to the party, or parties, making the application, and in such form as may be prescribed by the State Board of Health, a permit to establish or extend the cemetery in question. The said permit shall be recorded in the office of the county judge, or the mayor, and a copy forwarded to the State Board of Health.

When this statute is construed together with Ark. Stat. Ann. §§ 82-411 through 82-426 (Repl. 1960), as amended (Supp. 1971), it at once becomes apparent that it applies only to cemeteries owned by a church, a municipal corporation, or a family or community not employing salesmen or paying sales commissions. Like the trial court, we agree that the county judge has no discretion under the statute to refuse a permit once the State Health Department has given its approval.

Affirmed.

HAROLD ALEXANDER *v.* STATE OF ARKANSAS

CR 73-80 499 S.W. 2d 849

Opinion delivered September 24, 1973
[Rehearing denied October 29, 1973.]

Engeler & Johnson, by: *James C. Johnson,* for appellant.

Jim Guy Tucker, Atty. Gen., by: *Philip M. Wilson,* Asst. Atty. Gen., for appellee.

FRANK HOLT, Justice. a jury found appellant guilty of possession of a controlled substance (marihuana) and assessed his punishment at one year in the penitentiary and a $750 fine. Before trial, appellant filed a motion to suppress the evidence which was seized as a result of a car search. Appellant contends the search was conducted without probable cause and, therefore, the court erred in overruling his motion.

The relevant facts are that the owner of a local drive-in restaurant complained to a policeman that drinking and littering on his parking lot were causing a continous problem and asked if anything could be done about it. Two policemen proceeded to his premises

and found only one car in the vicinity which was parked at a phone booth next to the highway. The car had no license plate and the officers stopped to investigate. Appellant, a passenger, was observed leaving the car and using a phone booth. The officers talked with the driver-owner of the car and determined that since the automobile was recently purchased the time had not expired for licensing. However, the officers observed a portion of a brown paper sack protruding from underneath the seat on the passenger side of the automobile. The shape and size of the sack caused the officers to believe it contained a bottle of liquor. The driver-owner of the car was a minor. He had previously had encounters with the local police with respect to the illegal possession of intoxicants. The appellant, the passenger, had experienced a similar difficulty. The driver-owner was asked by one of the officers, after seeing the paper sack, if he had any "booze" or anything to drink in the car. The officers testified that he stated that he did not and gave his consent to search. The driver-owner himself testified "[N]o, you can look." He further testified that he moved his coat that was in the car so that the officers could see under the coat. The coat, upon being moved, however, covered the exposed paper sack. One of the officers opened the car door, got the paper bag and found that it contained a quantity of marihuana. A paper box was observed in the rear part of the car and it also contained a quantity of marihuana.

Appellant's only contention is that in these circumstances the officers did not have probable cause for a warrantless search of the automobile in which marihuana was discovered. Appellant makes the argument that the officers had insufficient facts within their knowledge upon which they "could have reasonably concluded that the automobile contained that which offended against the law." We need not determine the existence of probable cause to justify a warrantless car search under the requirements of *Carroll* v. *United States,* 267 U.S. 132 (1925). A voluntary invitation or consent waives the immunity rule. *Martin* v. *State,* 251 Ark. 1025, 476 S.W. 2d 235 (1972).

In the very recent case of *Schneckloth* v. *Bustamonte,* 93 S. Ct. 2041 (1973), it was held that a well

established exception "to the requirements of both a warrant and probable cause is a search that is conducted pursuant to consent." See, also, *State* v. *Barron,* 395 P. 2d 158 (1964). In *Schneckloth, supra,* an exploratory, warrantless car search, without probable cause, was upheld since the search was conducted by consent. The vehicle was stopped by an officer who observed it had defective lights. Only one of the six occupants, a passenger named Alcala, had a license. He said the car was his brother's. When the officer asked him if he could search the car, Alcala stated "[S]ure, go ahead." The police found three stolen checks wadded up underneath the rear car seat. Appellant, a passenger in the car, was subsequently convicted of unlawfully possessing a check with the intent to defraud.

There, as in the case at bar, a motion to suppress was made on the basis that the evidence was acquired through an unconstitutional search and seizure. The court upheld the validity of the search on the basis of Alcala's voluntary consent. The court, *inter alia,* set the standard for voluntary consent as "a question of fact to be determined from the totality of all the circumstances." However, there, as in this case, there was no evidence that the search was coerced or involuntary. In the case at bar, the driver-owner himself testified "[N]o, you can look." The totality of the circumstances shows that the owner-driver freely gave his consent for the officer to search the car. Therefore, since the warrantless search was by consent it was constitutionally permissible to search the car and seize any contents that offended against the law. All warrantless searches and seizures are not prohibited by the Fourth Amendment, U. S. Const., or Art. 2, § 15, Ark. Const. - only those which are unreasonable. As in *Schneckloth, supra,* we cannot say where one voluntarily consents to a warrantless search that the search is unreasonable.

Affirmed.

WILLIAM WAYNE DECKER *v.* STATE OF ARKANSAS

CR 73-8 499 S.W. 2d 612

Opinion delivered October 1, 1973

William C. McArthur, for appellant.

Jim Guy Tucker, Atty. Gen., by: *O. H. Hargraves* Deputy Atty. Gen., and *Richard Mattison,* Asst. Atty. Gen., for appellee.

CARLETON HARRIS, Chief Justice. William Wayne Decker, appellant herein, was convicted in the Pulaski County Circuit Court of robbery allegedly occurring on January 21, 1970. The jury, under the Habitual Criminal Act, fixed his punishment at twenty-one years confinement in the Arkansas Department of Correction. Two days later, Decker was convicted in the same court of the crime of grand larceny and his punishment was fixed by the jury at thirty years confinement. No appeal was taken from the judgment in either case. Attorney J. H. Cottrell represented Decker in both cases through appointment by the court. Thereafter, Decker filed a petition for a Writ of Habeas Corpus in the Pulaski County Circuit Court, and that court, treating the petition as a Criminal Procedure Rule I Petition, appointed new counsel to represent Decker. On hearing, the trial judge denied any relief, and from the judgment so entered, Decker appealed to this court. Three points were asserted for reversal as follows:

I.

The alleged confession of appellant was improperly admitted into evidence.

II.

The appellant was denied adequate representation of counsel at trial insofar as a key witness was not called.

III.

Appellant was denied his constitutional right to appeal his case.

The original cases were tried by an assigned judge, and following the Rule I hearing and before judgment was entered, the regularly presiding judge of the Pulaski County Circuit Court caused the record of the two trials to be transcribed for his use and information in determining the Rule I Petition. These transcripts were filed with this court along with the record of the Rule I hearing. On April 16, 1973, this court entered an order which *inter alia* provides as follows:

> "Inasmuch as the complete record is now available, it is the order of this court that this appeal (from the denial of relief under Criminal Procedure Rule I) be treated as an appeal from the original convictions, and the clerk of the court is directed to notify counsel for appellant that he may present and brief any additional points wherein it is felt that the trial court committed reversible error. The clerk shall likewise notify the Attorney General to reply to appellant's brief, said briefs to be submitted in compliance with Rule Eleven of this court."

These briefs have now been filed and the case is ready for disposition. The following additional points for reversal have been raised.

IV.

Defendant's requested instruction re alibi was improperly refused.

V.

Defendant's motion for dismissal of grand larceny charge (No. 72070) on grounds of double jeopardy was improperly denied.

VI.

Defendant's motion for a directed verdict was improperly denied. (No. 72070).

VII.

Defendant's objection to reference of the robbery in the trial for grand larceny was improperly overruled.

VIII.

Defendant's confession was improperly admitted in rebuttal. (No. 72070).

IX.

Defendant's confession was inadmissible and improperly admitted because he was not properly advised of his constitutional rights.

Two other points are raised but they are repetitious of the first two points asserted in the Rule I hearing.

We proceed to a discussion of the contentions for reversal.

I.

This allegation refers only to the trial of Decker on the charge of grand larceny as the confession was not used in the robbery case. The record reveals that appellant was arrested on July 16, 1971 by a North Little Rock policeman, subsequently brought to the Little Rock Police Department, and questioned by City Detectives Larry Dill and Bill Johnson. Decker testified that he had been wounded before his arrest[1] and was suffering from gunshot wounds through his foot, side, and arm, and that he had been taken to Memorial Hospital in North Little Rock where he was treated, taken the next day to Medical Center where the gunshot wounds were cleansed and he was given a prescription to kill the pain.

[1]See *Decker* v. *State,* 251 Ark. 28, 471 S.W. 2d 343.

He said that he was beaten and "slapped around" by the officers before signing a waiver[2]; that he was beaten with a pistol by Dill, and finally signed the rights waiver about 1:30 in the morning; subsequently he stated that it was about 10:00 P. M. Decker also said that he asked for an attorney but the request was denied. As for the statement made, appellant said that he signed his name on a blank sheet and initialed four blank pages, being told that the officers were getting a specimen of his signature. Decker's statement is somewhat conflicting and accordingly confusing. Detective Dill testified that Decker was brought to the Little Rock Police Department and advised of his rights about 5:15 P.M.; that appellant stated he understood, and signed the waiver in the presence of the witness and Detectives Jones and Johnson. Dill stated that Decker was not beaten, threatened, nor mistreated in any manner; that the latter was entirely normal and aware of what he was doing when he signed the waiver. The witness said that when Decker would make a statement, the information given would be checked out and that he was questioned, off and on,[3] until approximately 1:45 A.M., at which time he made a complete statement which was reduced to writing by Dectective Jones. The witness then read the written statement to Decker who signed it at the bottom of the third page and initialed it at the top and bottom of the first and second pages.

The court conducted a hearing in chambers on the question of whether the statement had been voluntarily given, and after hearing the evidence, ruled that it was admissible. In *Mullins* v. *State,* 240 Ark. 608, 401 S.W. 2d 9, this court, in passing on the same contention now raised by Decker, stated:

> "All of appellant's contentions as to the confession, including the advisement of his right to counsel, were examined by the trial court in its hearing in chambers. The conflicting testimony between

[2]This referred to the "Miranda form", setting out constitutional rights, Decker acknowledging by signature that he had been explained these rights and told that any statement could be used against him.

[3]The officer testified that actual interrogation consumed three or four hours.

> appellant and the officers made a question of fact to be decided by the court pursuant to Act 489 of 1965. The court made a finding adverse to appellant and admitted appellant's confession in evidence. We have concluded that there is substantial evidence in the record to support the trial court's determination and said determination will not be disturbed here on appeal."

We hold that there was substantial evidence to support this finding.

II.

Decker's defense was based upon an alibi, i.e., he claimed to have been in Jackson, Mississippi at the home of a sister at the time the alleged crime occurred. However, when both the robbery and grand larceny cases were called, counsel for appellant announced that he was ready; no request was made for a continuance nor was there any contention that there was an important witness for the defense who could not be present. At the trial on the charge or robbery, Donald Decker, brother of appellant, testified that "around the 17th" (January, 1970), Decker, together with his wife and child, mother and father, went to Jackson, Mississippi to visit Decker's sister and stayed five or six days.

At the trial on the charge of grand larceny, Effie Decker, mother of appellant, testified that she and her husband, appellant and his wife and baby, and David Bryant, all went to Jackson to visit her daughter and appellant's sister, Charlene Graham, on January 17 and returned after staying there five days; that appellant was there the entire time, the family traveling in appellant's automobile. David James Bryant, a cousin of appellant, also testified to those facts. The alleged error is based on the fact that the sister, Charlene Graham, who had in the meanwhile moved to California, was not present at either the robbery or grand larceny trials. In the Rule I hearing Mrs. Graham did testify, stating that the relatives heretofore mentioned came to her home on the 16th or 17th and remained there

either five or six days. She said that appellant stayed there the entire period of time. The witness had since moved back from California to Little Rock.

We find no merit in this contention for several reasons. In the first place, no effort was made to obtain the witness and Decker himself testified that he really didn't think it was necessary for her to be present since he had two other witnesses to testify to the same facts. This apparently was a decision made by the appellant himself rather than by counsel. At any rate, no motion for continuance was made and Decker accordingly has waived any right to object. Not only that, but since the mother and other relatives did testify to the alibi, the evidence of the sister would only have been cumulative.

III.

As earlier stated, this appeal is being treated as an appeal from the original convictions.

IV.

This point relates to the alibi defense. In the robbery case, the trial court was requested to give an instruction offered by the defendant on the defense of alibi, which was refused; however, no error was committed for the jury was given an instruction (the court giving its own instruction), specifically mentioning the defense of alibi, and telling the jury that such a defense is as proper and legitimate if proved as any other and all the evidence bearing upon this point, along with all the evidence, should be carefully considered by the jury and "if the jury have a reasonable doubt as to whether the defendant was there when the crime was committed they should give the defendant the benefit of the doubt and find him not guilty." This was a correct instruction and appellant can have no legitimate complaint that his own instruction was not given.

In the grand larceny case, no instruction was requested on this phase. We, of course, have held many times that where an accused desires an instruction on a particular issue not covered by the instructions given,

he should request a correct instruction thereon and will not be heard to complain if he fails to do so. *Lowmack* v. *State,* 178 Ark. 928, 12 S.W. 2d 909.

V.

It is next asserted that the trial court committed error by failing to grant appellant's motion for dismissal of the grand larceny charge on grounds of former jeopardy. To discuss this point, it is necessary that the background of the case be given. Alfred Williams, employed by Caldwell Oil Company in Little Rock, operated a service station. About 1:00 A.M. on January 21, Lawrence Hobbs, a regular customer, came into the station. About thirty or forty minutes later, two men came in looking for a set of jumper cables. While all were present, a truck driver came in to get change. After he left, the two men supposedly looking for jumper cables, pulled a knife and a gun and robbed the station, placing Hobbs and Williams in the rest room. After being placed in the rest room, they were again threatened, but each victim assured the robbers that they did not know the latter, stating, "I never seen you before." The two heard a car start up. Hobbs testified:

> "I heard something say, 'Ugh', like my car. You have to double clutch it to put it in low gear. So, evidently, he didn't know how to drive my car. I said, 'Al, they got my car.' And I was fixing to go out the door and Al pushed me back and we was peeping up under the crack in the door and we didn't see no feet walking back and forth. So, he eased the door open and come on out. He was fixing to dial the police but the telephone wire was chopped loose. He took him a dime and went out on the outside to pay the phone and called the police."

It is argued that all of the essential issues were litigated in the first trial for robbery, and that the grand larceny trial relitigated the same issue. Appellant chiefly relies upon the case of *Turner* v. *Arkansas,* 407 U.S. 366, where this was the question at issue. Turner had been tried for murder, it being alleged that he killed a man

while robbing him. The jury returned an acquittal and Turner was then charged with robbery. He contended that a trial on this charge would constitute double jeopardy, but we disagreed. See *Turner* v. *State,* 248 Ark. 367, 452 S.W. 2d 317. A second appeal was taken from a trial court order denying the motion to dismiss the indictment for robbery, this time appellant presenting the complete transcript of the trial record in the murder charge. We held that our decision on the prior appeal was the law of the case. See *Turner* v. *State,* 251 Ark. 499, 473 S.W. 2d 904. In reversing, the United States Supreme Court said:

> "In the present case, petitioner was not charged with robbery at the first trial, but the State has stipulated that the robbery and murder arose out of 'the same set of facts, circumstances, and the same occasion.' The crucial question, therefore, is what issues a general verdict of acquittal at the murder trial resolved. The jury was instructed that it must find petitioner guilty of first-degree murder if it found that he had killed the decedent Yates either with premeditation or unintentionally during the course of a robbery. The jury's verdict thus necessarily means that it found petitioner not guilty of the killing. *** Had the jury found petitioner present at the crime scene, it would have been obligated to return a verdict of guilty of murder even if it believed that he had not actually pulled the trigger. The only logical conclusion is that the jury found him not present at the scene of the murder and robbery, a finding that negates the possibility of a constitutionally valid conviction for the robbery of Yates."

In the case now before us, the circumstances are entirely different. The robbery of the service station and the stealing of the automobile were two separate crimes, and while to a degree related, certainly were not the same offense. The crime of robbery was over before the automobile was stolen. The proof offered in the robbery charge would not sustain the charge of stealing the automobile, and we accordingly find no merit in this alleged error.

It is then asserted that the evidence was insufficient to sustain the grand larceny conviction, the argument apparently being based on the fact that no one testified that he actually saw appellant and his companion take the car. Of course, circumstantial evidence is sufficient if the circumstances are such that no other reasonable hypothesis can be reached. Here, Hobbs had driven his car to the station. After the robbery, he was made to go into the rest room. His testimony quoted in the preceding point establishes that, because of a deficiency in the clutch, he recognized the sound of the car as it started off immediately after the men had warned the two victims to remain in the rest room. The car was gone when he returned. These circumstances certinly presented a fact question for the jury, but in addition, Decker gave a written statement in which he said this car was used in the getaway.

VII.

It is next contended that references to the robbery were improperly admitted in the trial for grand larceny and that such testimony had a prejudicial effect. We do not agree. A logical explanation of the circumstances of the taking of the car could not have been given without testimony first being presented about the robbery; the jury would never have known why the two men were in the rest room together and afraid to come out unless the jury had also known that the two men were there by force and threats of what would happen if they did come out. Only one brief paragraph is allotted to this argument.

VIII.

It is then asserted that defendant's confession was improperly admitted in rebuttal, and that the State should have offered its entire case when putting on its evidence. The statutes dealing with the manner of proceeding in a criminal case after the oath is given the jury are Ark. Stat. Ann. §§ 43-2110—43-2114 (Repl. 1964). The first mentioned section provides that the prosecuting attorney shall make his opening statement; the next section provides that defendant or his counsel

may then make a brief statement for the defense; the next section authorizes the state to offer evidence in support of its case; next, the defendant offers evidence in support of his defense, and § 43-2114 provides:

> "The parties may then respectively offer rebutting evidence only, unless the court for good reason, in furtherance of justice, permit them to offer evidence upon their original case."

In *Lacy* v. *State,* 240 Ark. 84, 398 S.W. 2d 508, it was contended that the court erred in permitting the prosecuting witness to testify on rebuttal relative to a jacket allegedly worn by the appellant. This court quoted the contention and stated its answer to that contention as follows:

> "'. . . the alleged victim, testified that her attacker had on a cream colored sweater and tight pants; she made no reference whatsoever about a coat or jacket. After the appellant and his witnesses had taken the stand and testified that on the night of November 12th, that appellant had worn a blue jacket, the trial court, over the objections and exception of appellant, permitted the prosecuting witness to testify on rebuttal to the effect that appellant was wearing a coat or a jacket.'
>
> "Our statute (Ark. Stat. Ann. § 43-2114 (1947) says:
>
> 'The parties may then respectively offer rebutting evidence only, unless the court for good reason, in furtherance of justice, permit them to offer evidence upon their original case.'
>
> "This statute permits the Court, 'for good reason, in furtherance of justice,' to allow the State to reopen its case and offer new evidence. Even if the recalling of the prosecutrix to testify about the jacket which the defendant wore could be considered as new evidence, still the Court had a right to allow such to be offered; and the Court did not abuse judicial discretion in such ruling."

See also *Walker* v. *State,* 100 Ark. 180, 139 S.W. 1139, where we said:

> "Error of the court is assigned in permitting the State to introduce testimony not properly in rebuttal after defendant had rested his case. The statute (Kirby's Digest, § 2378)[4] authorizes the presentation of testimony in chief after the defendant has closed his case when that appears to be necessary 'in furtherance of justice,' and of that the trial court must be the judge. It rests within the sound discretion of trial courts to permit testimony to be adduced out of time, and the exercise of that discretion will not be distrubed by this court unless an abuse is shown."

We hold the contention to be without merit.

IX.

It is next argued that the confession was taken in the robbery case but was improperly used in trial for grand larceny, the brief on behalf of Decker stating, "There is no evidence he was advised he was a suspect for grand larceny." The record reflects that Decker signed two "Rights Waivers" on July 16, one setting out that he had been advised that he was a suspect in an armed robbery and the other admitting that he had been advised that he was a suspect in a burglary and grand larceny case. It is not entirely clear whether the last mentioned waiver had reference to this particular instance of grand larceny, though it does appear that this is the case. Certainly, Decker knew that he was suspected of stealing the automobile at the service station since he included details in the written statement he signed. We find no prejudicial error.

The last two contentions deal with points raised in the Rule I hearing and have already been covered in this opinion.

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[4]This statute reads identically with § 43-2114.

Finding no reversible error, the judgment is affirmed.

It is so ordered.

OLA BELLE DOPIERALLA ET UX *v.* ARKANSAS LOUISIANA GAS COMPANY

73-76 499 S.W. 2d 610

Opinion delivered October 1, 1973

Shelby R. Blackmon, for appellants.

Charles W. Baker, Baker & Probst, P.A., for appellees.

GEORGE ROSE SMITH, Justice. The appellee brought this action to recover the unpaid balance of the purchase price of a combined heating and air-conditioning system which the defendants, Mr. and Mrs. Dopieralla, bought for their beauty salon and beauty school in North Little Rock. By answer and counterclaim the Dopierallas denied liability and sought damages, on the ground that the air-conditioner had broken down so repeatedly that they had finally been compelled to take out the entire system and replace it. At the close of the case the trial judge directed a verdict for the plaintiff. Whether the

testimony presented an issue of fact is the only issue on appeal.

The seller rested after establishing a prima facie case by proof that the buyers signed a purchase contract in October of 1967; that the contract called for 72 monthly payments of $45.18 each; and that the defendants became delinquent after having made only 40 monthly payments.

The Dopierallas offered their own testimony and that of three other witnesses. According to their proof, they relied upon the seller to select an air-conditioner capable of cooling their place of business. The witnesses said that the unit which was installed never operated for more than a few days without breaking down. The seller, upon being called, would wait about a week before sending someone to work on the system. During the interruptions in service the Dopierallas lost customers owing to the excessive heat that was created by the steam, the hot water, and the driers in the beauty shop and school. Some of the girls fainted. According to Mrs. Dopieralla, she was assured by Charles Jackson, one of the seller's employees, "that they could make it work." * * * "Every time they worked on it they kept assuring us that they would" make it work. According to Mrs. Dopieralla's son, he was finally told by one of the seller's repairmen, who had worked on the unit most of an afternoon, that "there's not much I can do with it. It needs replacing." The record is not completely clear as to dates, but apparently the purchasers stopped making payments and replaced the system soon after the incident just mentioned.

The defendants' proof is uncontradicted. That is, after the defense rested its case the plaintiff did not call Charles Jackson or its repairmen or any witness at all to deny the defendants' testimony. Thus the issue is whether the purchasers' undisputed proof made a case for the jury.

We have concluded that it did. The controlling principles of law are not in dispute. Under the Uniform Commercial Code the buyer may revoke his acceptance of

a commercial unit not conforming to the contract if his acceptance was reasonably induced by the seller's assurances. Ark. Stat. Ann. § 85-2-608 (Add. 1961). The revocation must occur within a reasonable time after the buyer discovers or should discover the ground for revocation. *Id.* What is a reasonable time depends upon the circumstances. § 85-1-204. That question is ordinarily one of fact for the jury. Anderson, Uniform Commercial Code, § 1-204:4 (2d ed., 1970); *Robinson* v. *Jonathan Logan Financial,* 277 A. 2d 115 (App. D. C., 1971).

Counsel for the appellee argue, with no citation of authority, that it was simply not reasonable for the purchasers to keep the unit and make payments for 40 months in reliance upon the seller's assurances that the air-conditioner would be made to work. That argument might well be addressed to a jury, but it does not justify our saying as a matter of law that the buyers' reliance was unreasonable. We regard this case as being controlled by our decision in *Gramling* v. *Baltz,* 253 Ark. 361, 485 S.W. 2d 183 (1972), where the purchaser of a truck delayed his rejection of the vehicle for more than two years in reliance upon the seller's assurances that repairs could be made. We held that a question of fact was presented and reversed the trial court's action in directing a verdict against the buyer.

In *Gramling* the purchaser's delay exceeded two years, while here it exceeded three years. That difference, however, is not controlling. If we were unable to say that a delay of more than two years was not unreasonable *as a matter of law,* there is nothing in the statute requiring such a declaration when the delay exceeds three years. Moreover, in the case at bar the air-conditioning unit was presumably used for not more than six months in each year. There was no occasion for the purchasers to complain or to seek rescission during the rest of the year. Consequently the delay of 40 months in the case at bar was actually not as significant as the delay of more than two years in the *Gramling* case.

Reversed and remanded for a new trial.

JONES, J., not participating.

SHEILA STOKES ET AL *v.* RICHLAND HOMES MANUFACTURING COMPANY ET AL

73-147 499 S.W. 2d 597

Opinion delivered October 1, 1973

Partlow & Mayes and *Oscar Fendler,* for appellants.

Reid, Burge & Prevallet, for appellees.

GEORGE ROSE SMITH, Justice. This is a claim for death benefits under the workmen's compensation law. The decedent, John Doyle Stokes, was employed by the appellee Richland Homes Manufacturing Company at the time of his death in a traffic accident in 1971. The commission, whose decision was upheld by the circuit court, denied compensation on the ground that Stokes' death did not occur in the course of his employment. Whether that finding is sustained by substantial evidence is the question on appeal.

Richland manufactures, sells, and delivers mobile homes. Stokes was one of Richland's three regular drivers, who were employed to drive Richland's trucks in the delivery of mobile homes. The drivers were paid a minimum weekly wage, plus from 16 to 21 cents a mile for delivering the mobile homes.

Highway regulations, as they are pertinent to this case, required that a truck pulling a mobile home be

accompanied by two specially equipped escort vehicles, one ahead of the truck and the other behind it. Richland did not own any escort vehicles or directly employ any escort drivers. Instead, Richland required its truckdrivers to arrange for their escorts. Richland did, however, pay its drivers an extra 30 cents a mile to enable the drivers in turn to pay the escorts.

When the drivers reported for work at Richland's plant in Manila on the morning of July 27, 1971, Richland had a delivery for one of its drivers, Tommy Horton, but did not have a delivery for Stokes. That meant that Stokes was free to do anything he liked for the rest of the day. Stokes agreed to act as one of Horton's escorts, driving an escort truck owned by Horton. Stokes and Horton had escorted each other in the past, swapping their services rather than making payments to one another. Richland knew that its drivers worked as escorts when off duty and had no objection to that practice.

The other escort that day was W.H. Wallace, who drove his own vehicle. Stokes drove Horton's escort truck and was accompanied by a friend, Melvin Girdley, who went along for the swimming and water skiing that the men planned for later in the day.

The caravan of three vehicles proceeded from Manila to Heber Springs, where the mobile home was delivered to Richland's consignee. On the way the group were stopped by a Commerce Commission agent, and Stokes rewired some lights on the mobile home. Stokes bought a case of beer during the trip.

The mobile home was delivered at about 3:00 p.m. The escort drivers then had no further responsibilities and were at liberty to go their own way. The four men actually went to Greers Ferry Lake and swam, skied, and drank beer until about 8:00 p.m. When they started back to Manila, Horton drove the Richland truck, with Girdley as his passenger; Wallace drove his car; and Stokes drove Horton's escort truck.

The party met again at Newport to get something to eat. Horton thought that Stokes had had enough to drink. When the group left Newport, Stokes was riding as a passenger in the Richland truck with Horton, and Girdley was driving Horton's smaller truck. On the way Horton dozed off and ran off the road, the Richland truck overturned, and Stokes was killed.

Counsel for the claimants argue that Stokes' death occurred either in the course of his regular employment by Richland or in the course of his special employment as an escort driver. We hold that there is substantial evidence to support the commission's finding that Stokes' death did not take place in the course of his employment in either capacity.

We first consider Stokes' status as a special employee. Stokes had no responsibilities as an escort driver after the mobile home was delivered to its consignee. We may assume, without so deciding, that if Stokes had been injured or killed while driving Horton's escort truck back to Manila, the commission might have found the occurrence to have been within the course of Stokes' special employment. But that did not happen. Stokes had been replaced by Girdley as the driver of the escort vehicle. If Horton had the authority to bind Richland by employing Stokes as an escort, then Horton necessarily had the correlative authority to replace Stokes when that action became advisable. Girdley then became the special employee. To hold that Stokes was still a special employee while riding as a passenger with Horton would mean that Richland and its insurance carrier were responsible for a total of three escort drivers at the same time, although no such situation was ever contemplated by anyone.

There remains Stokes' status as a regular employee. The difficulty here is that Stokes did not undertake the trip in his capacity as a regular employee and was not performing any services as such at the time of the fatal accident. It is undisputed that on the day in question Stokes had no duties as a regular Richland driver after he was told in the morning that the employer had no

delivery for him that day. Counsel argue, however, that Stokes resumed his status as a regular employee when he got in the company truck to ride back to his home in Manila with Horton, because he had to report for work at Manila the next morning. Richland, however, had no duty to provide Stokes with return transportation to Manila in the circumstances of this case. To the contrary, in the normal course of events there would have been three drivers on the road with three vehicles, so that Stokes would not have had any occasion to ride with Horton as a passenger. He certainly was performing no duties for Richland. Larson points out that "an isolated and unauthorized ride in the employer's conveyance has usually been held to be outside the course of employment." Larson, Workmen's Compensation, § 17.30 (1972). We cannot say that the commission was without any substantial basis in the proof in concluding that Stokes was not serving Richland in his capacity as a truckdriver at the time of his death.

Affirmed.

MEMBERS MUTUAL INSURANCE Co. *v.* MARGIE LEE BENEFIELD

73-77 499 S.W. 2d 608

Opinion delivered October 1, 1973
[Rehearing denied October 29, 1973.]

Atchley, Russell, Waldrop & Hlavinka, for appellant.

Spencer & Spencer, for appellee.

LYLE BROWN, Justice. Appellee, Margie Lee Benefield, obtained a default judgment in a personal injury case

against O. B. Brown. Members Mutual Insurance Company was the liability insurance carrier for O. B. Brown. Margie Lee Benefield, after the judgment, proceeded against Members Mutual to recover upon Brown's liability insurance policy. Members Mutual appeals from the judgment obtained against it. It is appellant's position that Brown failed to notify it of filing of suit and service of process and that he failed to immediately forward summons to appellant insurer, all as required by the policy.

Most of the facts were stipulated. The accident occurred in Lafayette County on February 21, 1970. A few days thereafter, Brown, who resided in Dallas, went to the Dallas office of Members Mutual and reported the collision. Members Mutual immediately assigned investigation to Beaubouef Claim Service in Shreveport. Suit was filed on August 18, 1970, and a copy of the complaint was forthwith mailed by appellee's counsel to Beaubouef. The latter promptly forwarded the complaint to Members Mutual. On September 30, 1970, non-resident service was had on Brown in Dallas. A week thereafter, Brown called Members Mutual and relayed the information that he had received another letter about the suit; he did not specifically tell them that he had received a summons. On October 21, 1970, Beaubouef was notified by appellee's counsel that service was complete, that Brown was in default, and that appellee expected to obtain judgment as soon as court convened. On November 6, 1970, default judgment was entered. At no time did Members Mutual take any formal action to defend the suit.

Condition 3 of Brown's policy provided: "If claim is made or suit is brought against the insured, he shall immediately forward to the company every demand, notice, summons or other process received by him or his representative". Condition 6 provided that no action would lie against the company unless, as a condition precedent, the insured shall have fully complied with the terms of the policy.

We have laid down a principle which we think to be controlling in the case before us. We said in *Kealy* v. *Lum-*

bermen's Mutual Ins. Co., 239 Ark. 766, 394 S.W. 2d 629 (1965):

> It is our opinion that if appellee did in fact receive notice in ample time to properly defend the suit against the company, then it should not be allowed to escape liability merely because the provisions of section 11 of the policy were not strictly complied with.

Section 11 mentioned in *Kealy* is identical with Condition 3 in Brown's policy.

The trial court in essence instructed the jury that if Members Mutual received notice of the filing of the suit in ample time to provide reasonable opportunity to defend, then appellee was entitled to a verdict. We hold that to be the law as pronounced in the *Kealy* case. When that law is applied to the unchallenged record in this case it is abundantly clear that appellee was entitled to recover from Members Mutual.

Affirmed.

IVAN C. WRIGHT *v.* ARKANSAS STATE HIGHWAY COMMISSION

73-82 499 S.W. 2d 606

Opinion delivered October 1, 1973

Burris & Berry, for appellant.

Thomas B. Keys and *David P. Saxon,* for appellee.

J. FRED JONES, Justice. This is an appeal by Ivan C. Wright from a mandatory injunction issued by the Chancery Court of Clay County requiring Mr. Wright to effectively screen his junkyard located on Highway No. 1, or in the alternative remove all junk 1,000 feet from the right-of-way of Highway No. 1 under the provisions of Act 640 of 1967, Ark. Stat. Ann. §§ 76-2513—76-2519 (Supp. 1971).

On his appeal to this court Mr. Wright first contends that the chancellor erred in finding that he was operating a junkyard within the meaning of the statute. He next contends that Act 640 of 1967 is unconstitutional as applied to him in that it constitutes a taking of his property without just compensation. He then contends that aesthetic considerations alone are not sufficient for the exercise of the police power of the state in the taking or damaging of property for public use without just compensation.

We find no merit to the first contention and we do not reach Mr. Wright's second and third contentions because they are raised for the first time on this appeal and were not alleged or argued before the chancellor. *Ragge* v. *Bryan,* 249 Ark. 164, 458 S.W. 2d 403.[1]

Mr. Wright first demurred to the petition filed in chancery court by the Arkansas State Highway Commission and alleged that the petition did not state by what authority the Highway Commission sought to regulate the establishment, use and maintenance, of junkyards; that the petition did not state what lands, if any, he owned abutting on the highway upon which the alleged junkyard was maintained. The petition was amended to supply the deficiency complained of in the demurrer. Mr. Wright filed an additional demurrer to the complaint alleging that the Highway Commission was created under Amendment 42 to the Arkansas Constitution; that the Amendment vested the Highway Commission with all

[1]The appellant's attorney on this appeal did not represent him at the trial.

the powers and duties thereafter imposed by law for the *administration* of the State Highway Department with full power to enable the Commission, its officers and employees to clearly use the laws and regulations of the State Highway Department. He alleged that the petition filed by the Commission was filed under Act 640 of 1967 and seeks to confer on the Commission powers and duties not provided for or authorized under Amendment 42; that the Act seeks to confer on the Highway Commission authority to regulate property not on the highway and property within 1,000 feet of the highway, and that the Commission would have no authority to act outside of the right-of-way along which the highway travels. He then prayed that the petition be dismissed as "being without authority of law." This demurrer was filed on November 19, 1971, and on the same date Mr. Wright filed an answer denying the Commission's authority under existing law to regulate the use, establishment and maintenance of junkyards adjacent to highways; admitting that he owned the property involved but denying that he was operating, or had established, a junkyard on the property within 1,000 feet of the right-of-way of Highway No. 1. On February 29, 1972, the demurrers were overruled and, although Wright reserved the right to rely on the demurrers when he filed his answer, he proceeded to trial on the merits.

At the trial on the issues before the chancellor, Larry Long, an employee of the State Highway Environmental Development Section, testified that he inspected the property involved; that the conditions found on the premises did not comply with Act 640. He said that the property contained junk and dismantled automotive vehicles and was located in the City of Rector at the junction of Highway No. 1 and Arkansas 90, both public highways with Highway No. 1 being a primary highway. Mr. Long was then cross-examined at length as to the general location of the property and whether or not the automobiles could be restored as antique automobiles.

Mr. Wright simply contended, and attempted to prove, that his operation did not come within the definition of a junkyard or automobile graveyard under the Act and was, therefore, not subject to regulations under

the Act. The statutory definition under § 76-2514 reads as follows:

> "a. The term 'junk' means . . . waste, or junked, dismantled, or wrecked automobiles, or parts thereof. . .
> b. The term 'automobile graveyard' shall mean any establishment or place of business which is maintained, used, or operated, for storing, keeping, buying or selling wrecked, scrapped, ruined, or dismantled motor vehicles or motor vehicle parts.
> c. The term 'junkyard' shall mean an establishment or place of business which is maintained, used or operated for storing, keeping, or selling junk, or for the maintenance or operation of an automobile graveyard. . . . "

Mr. Wright contended at the trial that he was simply conducting an antique automobile business and was storing 175 old automobiles on his property adjacent to the highway so that prospective purchasers could view his display of antique automobiles from the highway. He testified that he has not purchased or sold any automobiles from the premises in 10 years since he ceased operating an automobile salvage business on the premises. He said he still maintains an automobile junkyard on the backside of the lots involved, but that it is screened from view from the highway by a building on the premises. He said that automobiles become antiques when they are 20 years of age; that the automobiles displayed to the traveling public on his premises adjacent to the highway are all more than 20 years of age and becoming more valuable as antiques each day.

Photographs of the automobiles and the premises on which they were located were placed in evidence. From viewing the photographs, the chancellor remarked in his findings as follows:

> "I can't see how they could possibly be referred to as antiques until they are operable and restored, they are nothing but old skeletons of automobiles. * * * [T]his is the most incredible testimony I have ever heard as a defense."

We have also examined the photographs and are inclined to agree with the chancellor. From the photographs in evidence some of the old automobiles and trucks appear to be without wheels; some appear to have the doors off, windshields and window glasses out, and some appear to have their wheels buried in the ground halfway to the axle. Even though Mr. Wright testified that he mowed between the automobiles at regular intervals, the pictures clearly indicate that such intervals were a long way apart. In plaintiff's pictorial exhibits No. 4 and 5 appear a sign "Welcome to Rector Business District" and immediately behind this sign is one of the appellant's old automobiles turned up on its side and covered with vines which have grown up over it and another old automobile adjacent to it.

We find it unnecessary to detail the remaining testimony in this case because it had to do with the supply, demand and value of antique automobiles. The picture exhibits in the record simply show a jumbled collection of old automobiles and automobile bodies, and we conclude that the chancellor did not err in finding that the appellant was maintaining a junkyard within the meaning of the statute.

There is no evidence in the entire record as to just compensation or to what extent, and in what manner, Mr. Wright's property would be damaged by removal or screening the automobiles from highway view, except that it would prevent him from displaying the old automobiles to view from the highway. The chancellor's opinion was based in part upon findings recited in the opinion as follows:

> "The testimony is these old automobiles were being stored until somebody comes along and maybe buys them. He says he has not sold any for over a period of ten years and I assume he probably likes to collect old automobiles. He is not too anxious to sell them, otherwise he would have turned these over a ten year period of time. I can assume from these pictures here that they are going to cause rats and mice and anything that wants to collect in these old carcasses. That's what I would refer to them as. I can't see how

they could possibly be referred to as antiques until they are operable and restored, they are nothing but old skeletons of automobiles. Under this theory here, if I were to adopt the theory that they are antiques, any junk dealer in the country could say, 'I am saving these for antiques.' Some of the windshields are broken, some of the windows knocked out, some of those in the pictures may not have been in a wreck but they sure hit something that was very steady."

We are unable to say that the chancellor's finding is against the preponderance of the evidence. The decree is affirmed.

Affirmed.

VIRGINIA LOUISE KENNEDY *v.* STATE OF ARKANSAS

CR 73-88 499 S.W. 2d 842

Opinion delivered October 1, 1973

[Rehearing denied October 29, 1973.]

Fred M. Pickens Jr., James A. McLarty & Pickens, Boyce, McLarty & Watson, for appellant.

Jim Guy Tucker, Atty. Gen., by: *James W. Atkins,* Asst. Atty. Gen., for appellee.

J. FRED JONES, Justice. Virginia Louise Kennedy was charged with first degree murder in the killing of George Henry Duty. She was convicted at a jury trial for voluntary manslaughter and sentenced to six years in the penitentiary. She contends on appeal that the trial court erred in admitting into evidence a statement she made during interrogation by police officers because she was physically and mentally unable to comprehend her constitutional rights as given to her by Lieutenant Wilson prior to making the statement.

There is no question that the appellant fired the fatal shot that killed George Henry Duty. She was well-known to the law enforcement officers having been previously convicted for grand larceny, prostitution, forgery and uttering, assault with intent to kill, and having been arrested on numerous occasions for public drunkenness.

The facts in the case at bar briefly are these: The deceased was an old boyfriend of the appellant and after he was sentenced to the penitentiary, the appellant started living with Donald Crawford in a housetrailer, or converted bus, near her mother's home. Paul Burns had been living with the appellant's mother. The deceased had recently been released from the penitentiary and he and Paul Burns and the appellant went to the housetrailer where the appellant and Crawford had been living, Crawford was already at the trailer. It appears that all the parties were drinking beer and the appellant shot and killed Duty with a .22 rifle. The appellant, Crawford, and Burns then took Duty to a hospital but he was dead upon arrival. The appellant was taken into custody at the hospital by a municipal policeman, Gary

Wilson, who transported her to the county jail where she made the statement here in question about three and a half hours after she was taken into custody. The statement was taken on a tape recorder in question and answer form and was reduced verbatim to a typed transcription. The state offered the statement in evidence at the trial and the appellant objected to its introduction, contending that it was not admissible under *Miranda.* The appellant's contention seems to be that she was intoxicated and was too drunk to understand her constitutional rights if they were explained to her, and too drunk to intelligently waive her right to the services of an attorney when she was first arrested by Officer Wilson and subsequently questioned by Officer Young. The court announced that they would have a "*Miranda* hearing" and proceeded to a hearing in chambers.

At the in-chambers hearing Officer Wilson testified that at the time he took the appellant into custody at the hospital, he told her she had a right to remain silent and anything she said could be used against her in a court of law; that she had the right to an attorney and have him present while she was being questioned and if she could not afford to hire an attorney, one would be appointed for her. He said that he asked her if she understood the warning and she said that she did. He said the arrest was made and warning given at approximately 7:00 p.m.; that the case being a "county case" Sheriff Henderson was handling the investigation and he simply transported the appellant to the county jail where she was questioned about 10:50 p.m. when Sheriff Henderson returned from the scene of the homicide. He said he was present when the appellant was questioned by state police Officer Young and that Officer Young again advised her of her constitutional rights. He said the warning given her was recorded along with her statement and was included in the written transcript.

At the in-chambers hearing Officer Wilson testified that the appellant "was kindly shook up" at the time of her arrest. He said she had a strong odor of intoxicants on her breath but that she was not swaying, unsteady or staggering. He said that she was crying,

but appeared to be in complete control of her faculties. He said that immediately after he arrested the appellant, he gave her an intoximeter test which registered .22. Officer Wilson then testified that he had known the appellant for three or four years; that he had arrested her on previous occasions for public drunkenness, and had observed her when she was sober. He said that in his opinion the appellant was not drunk when he arrested her at the hospital. He said she responded immediately to all questions asked her at the time of her arrest; that he had had numerous dealings with the appellant in the past years and that there was no doubt in his mind that she comprehended the questions he asked and statements he made to her in giving the *Miranda* warning.

At the in-chambers hearing Officer Young testified that when he questioned the appellant she seemed to understand every question asked her and everything said to her; that she answered all questions in a manner which would indicate she knew what she was talking about. He said the appellant had obviously been drinking but that she was not drunk. He said she would have been considered as driving while intoxicated had she been driving an automobile, but that she was coherent and able to walk and talk in a satisfactory manner.

Sheriff Henderson had testified in open court prior to the in-chambers hearing and his testimony was considered by the trial judge on the voluntariness of the statement made by the appellant. Sheriff Henderson said that he first went to the Newport Hospital when advised of the homicide. He said he talked to some of the witnesses including the appellant and then went out in the county where the homicide occurred. He said he later talked to the appellant at the county jail. He said that when he first talked to the appellant at the hospital, she was crying; that she had been drinking some but was not in a drunken condition. He said "she knew what she was doing." Sheriff Henderson testified that he had been sheriff of the county for 10 years and had seen the appellant drunk several times during that period. He said he believed he had only had her in the

county jail once or twice for public drunkenness, but he had seen her in the city jail on several occasions. He said he had observed the appellant when she was very "staggery" and had no control of her faculties. In comparing the previous occasions when he had observed her while drunk, he said that when he talked with her at the hospital "She knew everything, knew me, talked with me; she wasn't staggering." He said that the appellant had known him for some time and, prior to the interrogation, she kept asking him to help her; that she didn't mean to shoot Duty; that Duty begged her to shoot him but that she did not mean to do so. He said she indicated to him that the shooting was an accident and that during these statements he advised her to be quiet until she was advised of her rights, etc.

On cross-examination Sheriff Henderson testified that when he first went to the hospital, he talked to several witnesses and that the appellant probably did come to him and start telling her story of what had happened. He said he had seen "Cookie" (the appellant) drunk on many occasions. He then testified as follows:

> "Q. Was she drunk this time?
>
> A. No; no, she wasn't what I would say a bad drunk; she had been drinking but she was not to the point of what I would call a drunken condition.
>
> * * *
>
> Q. It is your opinion then and you are saying then she was in an intoxicated condition that night when you saw her?
>
> A. She was intoxicated, yes, sir, but she was far from being drunk."

Gerald Carlyle, the deputy prosecuting attorney, testified at the in-chambers hearing. He testified that he was present when the appellant was questioned around 10:45 or 10:50 p.m.; that she appeared to be stable and

did not appear to be under the influence of intoxicants. He said that she was responsive to all questions asked her and appeared to have complete control of her senses. He said that he is of the opinion that she was thoroughly able to comprehend the *Miranda* warning given her at the time she was questioned, and that she understood the warning. He said he knew nothing of the appellant's condition at the hospital when she was first arrested and warned of her rights by Officer Wilson. He said that during the interrogation the appellant started crying at one point and the sheriff let her call her mother before she was questioned. He said that the appellant did call her mother and talk with her; that she told her mother she was in custody at the police department and was all right. He said she then settled down and gave her statement. He said that he was not present when Officer Wilson advised the appellant of her constitutional rights, but that he was present when Officer Young so advised her just prior to her statement. He said that he asked the appellant if she had been warned of her rights and she told him that she had.

The appellant testified at the in-chambers hearing. She said that she was acquainted with Officer Wilson and remembers him placing her under arrest at the hospital. She said that she knew what was meant by a warning of constitutional rights, but that she did not remember Officer Wilson warning her of her rights at the hospital. She was asked what she recalled as to her emotional state and her condition when she was arrested at the hospital and she responded, "I was just real nervous." She said she does not know whether she was crying or not but that she thinks that she was. She said she does not remember Officer Wilson telling her that she could have an attorney appointed for her if she couldn't afford one. She said that she would have asked for an attorney at that time had she known one would have been appointed for her.

> "Q. Your statement is that Mr. Gary Wilson did not tell you that?
>
> A. He may have but if he did I forgot about it."

On cross-examination the appellant testified:

"Q. Didn't you know you had the right to have an attorney if you wanted one?

A. Yes, sir, but I didn't have no way of getting hold of one."

The appellant then testified that she was convicted in the Jackson County Circuit Court in 1964 for assault with intent to kill and was sentenced to two years in the state penitentiary with the sentence suspended; that in 1965 she was sent to the state penitentiary for violating the terms of the previous suspension; that in 1968 she was convicted of grand larceny and sentenced to ten years in the penitentiary to be suspended on good behavior, and that in 1968 she was convicted for prostitution. She said that in 1972, less than three months before Duty was killed, she was again convicted of forgery and uttering and sentenced to the penitentiary for three years which was suspended. She said she pleaded guilty to all of these charges. At the conclusion of the in-chambers hearing the trial court held the statement admissible.

In the statement offered in evidence the appellant gave her name and gave her age as 28 years. The statement as recorded then reads in part as follows:

"BUDDY YOUNG: You are presently under investigation on a murder charge. You know you have the right to remain silent.

VIRGINIA KENNEDY: Yes sir.

BUDDY YOUNG: And anything you say can be used against you in a court of law.

VIRGINIA KENNEDY: Yes sir.

BUDDY YOUNG: You have the right to consult with an attorney before you make any statement.

VIRGINIA KENNEDY: Yes sir.

BUDDY YOUNG: You have the right to stop answering questions at any time for the purpose of consulting an attorney.

VIRGINIA KENNEDY: Yes sir.

BUDDY YOUNG: Now, do you want to go ahead and make a statement at this time, without an attorney present, you can waive your right to remain silent and make a statement. Do you wish to make a statement at this time?

VIRGINIA KENNEDY: Yes sir, I will."

The appellant then proceeded to give direct and responsive answers to the questions asked her. She said that Duty took her and Paul Burns to her housetrailer in his automobile and while there, Duty's brother-in-law came out to repossess the automobile from Duty. She said that Duty had been drinking some beer and argued with his brother-in-law about the automobile. She said that when Duty came back into the trailer after talking with his brother-in-law about the automobile, he started cursing and blackguarding and told Donald Crawford who was there, that if he, Duty, could not have her, the appellant, that Crawford was not about to get her. She then said:

"Then he hit me and knocked me down, whenever he did. I don't know, I just grabbed the gun and shot him."

The appellant said that Duty threatened her with a chain he jerked from the door latch and also threatened her with a knife and she just shot him and couldn't help it. She said she already had a shell in the gun because Duty had threatened her previously at her mother's home. She said she kept a shell in her gun all the time when Crawford was away from the trailer and she was there by herself. She said she was afraid of the decedent Duty. In her statement the appellant said that Duty didn't actually strike her but that he pushed her with both hands and when he did, he knocked

her down and she received a knot on her head and a bruise on her arm. She said she fell backwards and fell close to the gun so she picked it up and shot him.

Sergeant Young testified before the jury that alcohol in the body affects different people in different ways. He said that some people can be drunk and pass out with .08 or .09% and others who have developed a high tolerance can go as high as .31 or .32% and still be able to walk and talk.

Donald Crawford and Paul Burns testified as witnesses for the appellant. They both testified to the effect that some beer was being consumed by all of them on a friendly basis in the trailer. There was some testimony that a half pint of whisky was brought to the trailer by one of the parties. Their testimony was to the effect that the difficulty between Duty and the appellant arose when the automobile Duty was driving was repossessed by a former owner. They said the appellant attempted to restrain Duty from following the former owner toward the automobile after it was repossessed; that the appellant and Duty started cursing and shoving each other; that Duty threatened the appellant with a door chain and a knife and that the appellant shot him.

The appellant testified before the jury in her own defense. She said she had been drinking heavily on the day of the homicide and does not remember even going to the trailer with Duty and Paul Burns on that day. She said she had tried to think back and remember what happened but that she had been unable to do so. She said she drinks beer every day and also drinks whisky. She said she had been drinking like that ever since she was 17 years of age; that she thinks she is an alcoholic; that she had attempted to stop drinking but has been unable to do so.

We are of the opinion that the court did not err in admitting the appellant's statement into evidence. Certainly her answers to questions asked her were direct and responsive and there is nothing in the answers that

would indicate she was under any mental or physical disability at the time they were made. There is some conflicting testimony as to the amount of alcoholic beverages the appellant had consumed and the effect it had upon her, but there is substantial evidence to support the trial court's finding that the appellant was advised of her constitutional rights as set out in *Miranda* and that she knowingly and intelligently waived her right to the services of an attorney at the time she gave her statement and that she intelligently and knowingly did so.

In *Reed* v. *State,* 255 Ark. 63, 498 S.W. 2d 887, we reversed the conviction for error in admitting a statement of the accused into evidence without warning and advice of his constitutional right to the services of an attorney at the time of arrest as set out in *Miranda* v. *Arizona,* 384 U.S. 436 (1966). A similar deficiency appears in the warning given by Officer Young in the case at bar. He did not advise the appellant that an attorney would be appointed for her if she was unable to employ one. The record is not clear whether Officer Young was attempting to warn the appellant of her constitutional rights before questioning her, or whether he was attempting to determine if she had already been warned of her constitutional rights. In any event, according to Officer Wilson, he gave the appellant the complete *Miranda* warning approximately three and one-half hours before Officer Young talked to her and before she made her statement. The appellant testified that if such warning was given to her by Officer Wilson, she had forgotten about it.

In *Brooke* v. *State,* 86 Ark. 364, 111 S.W. 471, a public drunkenness ordinance was under attack. The defendant had been charged with violation of the ordinance and in that case we cited with approval the standard dictionary definition of drunk as being:

> "'Under the influence of intoxicating liquor to such an extent as to have lost the normal control of one's bodily and mental faculties, and commonly, to evince a disposition to violence, quarrelsomeness and bestiality.'"

In *Miller* v. *State,* 251 Ark. 502, 474 S.W.2d 112, the appellant signed a waiver of his constitutional rights but testified at an in-chambers hearing that he had been drinking and did not remember whether his constitutional rights had been explained to him or not. His testimony was to the effect that he was too drunk to read and too drunk to know what was going on at the time he signed the waiver and statement. In that case we held that the trial court did not err in admitting the statement into evidence as voluntarily made and in doing so we pointed out that the appellant had no difficulty remembering other events in connection with his arrest and detention.

In *Hale* v. *State,* 252 Ark. 1040, 483 S.W.2d 228, we approved the action of the trial court in admitting a statement made to arresting officers 90 minutes after the accused was given the *Miranda* warning and we distinguished that case from *Scott* v. *State,* 251 Ark. 918, 475 S.W.2d 699, where there was a 90 day lapse of time between the giving of the warning and the admissions made by the accused.

In the Pennsylvania case of *Commonwealth* v. *Smith,* 447 Pa. 457, 291 S.2d 103 (1972), the conflict in the evidence was very similar to the conflict in the evidence in the case at bar and in that case the Supreme Court of Pennsylvania said:

> "Appellant contends that at the time his confession was taken he was too intoxicated to understand the constitutional warnings, thereby rendering involuntary his waiver and subsequent statement. The fact that an accused has been drinking does not automatically invalidate his subsequent incriminating statements. The test is whether he had sufficient mental capacity at the time of giving his statement to know what he was saying and to have voluntarily intended to say it. Recent imbibing or the existence of a hangover does not make his confession inadmissible, but goes only to the weight to be accorded to it. See United States v. Martin, 434 F.2d 275 (5th Cir. 1970); United States v. Kershner,

> 432 F.2d 1066 (5th Cir. 1970); 2 Wharton's Criminal Evidence (12th Ed.) § 388 (Cum. Supp. 1970)."

The same question was presented to the Wyoming Supreme Court in *Lonquest* v. *State,* 495 P.2d 575. In admitting the confession in that case the court pointed out that no confession or statement should be received unless the maker was capable of realizing what he was saying and not suffering from delusions or hallucinations, so that he knowingly, understandingly and comprehendingly made the statement. The court pointed out, however, that the judge first and the jury are the only possible available instruments by which such determination can reasonably be made. The Wyoming Court then applied the general rule quoting from *People* v. *Schompert,* 19 N.Y.2d 300, 279 N.Y.S.2d 515, 226 N.E.2d 305, as follows:

> "'The general rule applicable to confessions obtained from persons under intoxication has been well stated to the effect that 'proof that the accused was intoxicated at the time he confessed his guilt of crime will not, without more, bar the reception of the confession in evidence. But if it is shown that the accused was intoxicated to the degree of mania, or of being unable to understand the meaning of his statements, then the confession is inadmissible.' ***'"

See also *People* v. *Dagge,* 295 N.E.2d 336; *State* v. *McClure,* 185 S.E. 2d 693.

The judgment is affirmed.

WILLIAM P. LUNDAY, CHARLES A. LUNDAY, JR. *v.* FRED TOENEBOEHN & LEE TOENEBOEHN

73-83 499 S.W. 2d 602

Opinion delivered October 1, 1973

Kenneth R. Smith, for appellants.

Buford M. Gardner, Jr., for appellees.

CONLEY BYRD, Justice. Appellants William P. Lunday and Charles A. Lunday, Jr. brought this action to determine what interest Mrs. Charles A. Lunday, Sr. was claiming in the property. After appellees Fred Toeneboehn and wife intervened they amended the complaint, to set aside, as a forgery, a deed allegedly executed by their Father Charles A. Lunday, Sr. and Bessie B. Lunday, his wife to Fred E. Toeneboehn and Lee Toeneboehn. To reverse the decree in favor of the Toeneboehns, appellants contend that the findings of the trial court are against a clear preponderance of the evidence.

The proof shows that Charles A. Lunday, Sr. had suffered some strokes. He married Bessie B. Lunday on February 14, 1970, and died on November 11, 1970. Sometime in September Mr. Lunday and Mr. Toeneboehn went to the office of appellants' counsel for the purpose of conveying the lands here involved. At that time Mr. Lunday seemed to think he was the sole owner and intended to sell the whole subdivision for $10,000. Appellants' counsel at that time informed Mr. Lunday that he was only a joint tenant with his son Charles A.

Lunday, Jr. As a result of that conversation the lawyer prepared two deeds, one for the son and his wife and one for Mr. and Mrs. Lunday. On September 21st the deed in question was allegedly executed and delivered. However, subsequent thereto and before he went to the hospital and suffered his stroke on September 27th, Mr. Lunday moved his mobile home to the lands with the intention of making it his home. Mr. Lunday did not recover consciousness after his stroke which occurred shortly after he entered the hospital.

With reference to the transaction at Toeneboehn's house, Bessie B. Lunday testified that she and Mr. Lunday went to Toeneboehn's house in an automobile driven by Mr. Lunday. She says that while there she saw Mr. Lunday sign the deed and a receipt for $5,000 which she saw Mr. Toeneboehn pay to Mr. Lunday. Thereafter, they went to the notary's office where the deed was acknowledged. She also identified a number of checks signed by Mr. Lunday, some as late as June 24, 1970. After testifying that she saw Mr. Toeneboehn pay the $5,000 to Mr. Lunday and that she did not know what Mr. Lunday did with the money, the following occurred:

"THE COURT: Well, what did he do with it there in your presence:

A. I don't know what happened, I still don't know. He went into the hospital on a Monday and I still don't know where the money went.

THE COURT: You were at the Toeneboehn's home when the money was paid and the deed was made?

A. Yes, sir.

THE COURT: How did you travel to the Toeneboehn's home?

A. How did we go there — in Charley Lunday's car.

THE COURT: Who drove it?

A. He did.

THE COURT: Did you see whether he put it in his pocket or just what?

A. I don't know what he did with it. I never seen it.

THE COURT: You never did see the money?

A. I never seen what he did with it.

THE COURT: Just tell the Court what you did see happen with reference to the money, who handed it to him?

A. Fred handed it to him.

THE COURT: Right there in your presence?

A. That is right.

The COURT: What did you see then happened to it?

A. I never seen anything happen to it.

THE COURT: Did he go around holding the money in his hands the rest of the day?

A. I don't know.

THE COURT: You never did see—did you black out then?

A. I guess I did.

THE COURT: How did you get back home?

A. I went in the car.

THE COURT: Who drove it?

A. He did.

THE COURT: Did he have the money in his hands then?

A. I never seen what he had—what he did with the money.

THE COURT: You never did see what he did with the money?

A. No."

With reference to her rights in the property after the conveyance to Toeneboehn the record shows the following:

"Q. Do you and Mr. Toeneboehn have some sort of an arrangement or agreement on this property?

A. Do we?

Q. Yes.

A. Well, not that I know of. He said it would be alright for me to stay there, have my trailer there.

Q. You don't have any agreement with him concerning the lot or part of part of this property?

A. Well, he didn't know for sure.

Q. Does it depend upon what happens, whether he gets the property?

A. That is right, I guess that is so. If he doesn't get it, I don't stay, I guess.

Q. But if he does get it, you get to stay there?

A. I think so."

Fred Toeneboehn testified that he saw Charles Lunday, Sr. sign the deed in his home; that they then went to the Kansas Savings and Loan where Mr. and Mrs. Lunday acknowledged the deed, and the receipt for the $5,000 was typed by a girl in the bank; and that upon the return to his home he paid the $5,000 in cash, and Mr. and Mrs. Lunday signed the receipt. Nothwithstanding, that he says he paid $5,000 for the deed he testified that

he only placed revenue stamps thereon for a $1,500 consideration.

James L. Lewis, a questioned document examiner, testified that after a comparison of the name signed to the deed and the receipt with acknowledged signatures of Mr. Lunday, the alleged signatures on the deed and receipt were a forgery.

Myra B. Gross, a Notary Public of Wyandotte County, in the State of Kansas, stated that she was not acquainted with Mr. and Mrs. Charles A. Lunday, Sr. prior to the time she took the acknowledgment. Her testimony as to what occurred at that time is as follows:

> "On or about September 21, 1970, Mr. Kerr, President, Investors Mortgage Bankers, Inc. called me to his desk where Mr. Fred Toeneboehn was present, and I was introduced to Mr. and Mrs. Charles Lunday. Mr. Kerr informed me that the Lundays were selling a parcel of real estate to Mr. and Mrs. Fred Toeneboehn with a prepared deed bearing signatures of Charles Lunday, Sr. and Bessie Maze Lunday. Mr. Kerr advised the parties that the deed should not have been signed except in our presence and questioned each of the Lundays if their signature appearing on the deed was affixed by them and each of them stated that they had signed the deed. Upon their statement before Mr. Kerr, Mr. Toeneboehn, and me, that their signatures were genuine, the Notary Seal was affixed."

Robert S. Kerr, President, Investors Mortgage Bankers, Inc., Roeland Park, Kansas, after testifying that Toeneboehn had, before Sept. 21, 1970, consulted with him relative to the procedure for transferring title to property, stated that he was not acquainted with Mr. and Mrs. Charles A. Lunday, Sr. prior to the transaction. He then stated:

> "On or about September 21, 1970, Mr. Toeneboehn and the Lundays appeared in my office and presented a deed to a parcel of land which was completed to the inclusion of signatures. Since signatures were

already affixed, I called Mrs. Myra Gross, a Notary Public in my office, to my desk, and in her presence, asked the Lundays, individually, if the signature appearing on the deed was that placed there by each of them, and in both instances the reply was affirmative.

With both parties appearing to be in full awareness that they were transferring the title to property to the Toeneboehns and attesting to the genuineness of their signatures, the Notary Seal was affixed."

Upon the testimony and the exhibits in the record we can only conclude that the signatures of Charles A. Lunday, Sr. to the deed and the receipt are a forgery. In fact it is rather obvious. The trial court intimated as much but seemed to think that appellants had not sustained their burden of proving that no consideration was paid and that the acknowledgment before the notary was a ratification of the signature. It was here that the chancellor fell into error. In the first place the notary only stated that Toeneboehn told her that the persons who acknowledged the deeds were Mr. and Mrs. Lunday. In the next place the learned chancellor failed to apply the law of fabricated evidence to the record before him.

It is pointed out by the authorities that the fabrication of evidence raises a strong presumption against those who have recourse to such practices. See *Winchell, et al* v. *Edwards, et al,* 57 Ill. 41 (1870), and *Silva* v. *Northern California Power Co.,* 32 Cal. App. 139, 162 P. 412 (1916).

The credibility of both Toeneboehn and Mrs. Lunday is subject to suspicion since they testified positively that Mr. Lunday signed both the deed and the receipt, and a great preponderance of the evidence shows both instruments to be forgeries. Thus, when the record is considered under the fabrication of evidence rule, we find that a preponderance of the evidence shows that the deed should be set aside for forgery.

Reversed and remanded.

HAZEL MORGAN *v.* STATE OF ARKANSAS

CR 73-78 500 S.W. 2d 83

Opinion delivered October 1, 1973
[Rehearing denied November 5, 1973.]

Harold L. Hall, for appellant.

Jim Guy Tucker, Atty. Gen. by *O. H. Hargraves,* Deptuty Atty. Gen., for appellee.

CONLEY BYRD, Justice. Appellant Hazel Morgan was convicted by a jury of the crime of pandering, Ark. Stat. Ann. § 41-3208 (Repl. 1964), and sentenced to five years in the State Department of Corrections.

1. Carolyn Garcia testified: that she was encouraged to work as a prostitute for appellant on appellant's premises; that she was thirty years of age and had been married five times; that although she had never before

been a prostitute she worked for appellant at appellant's premises for four hours on a Monday and four hours on a Tuesday on a sixty-forty split and earned one hundred dollars each day.

Three other women testified that they worked as a prostitute for appellant at the same place and about the same time.

We hold this evidence to be sufficient to sustain the charge of procuring or enticing a female to become a prostitute.

2. We find no merit to the contention that the trial court erred in permitting the other women to testify that they worked as a prostitute at the same time and place. Evidence to show that appellant constantly employed other women as prostitutes was admissible to show a scheme or course of conduct. See *Boyle* v. *State,* 110 Ark. 318, 161 S.W. 1049 (1913).

3. Appellant contends that the alternative mode and means of committing the offense of pandering cannot be intermingled to arrive at an alternative way of violating the statute. The contention is without merit for in *Malone* v. *State,* 202 Ark. 796, 152 S.W. 2d 1019 (1941), it was pointed out that after charging the offense it is permissible to describe in the alternative the manner in which the female was procured, persuaded or enticed to become a prostitute. Here the matter was narrowed by a bill of particulars to charging appellant with procuring Carolyn Garcia to become a prostitute.

4. Appellant here argues that the court erred in giving State's Instruction No. 1 because it does not fully define pandering and does not state that the jury must find that appellant induced Carolyn Garcia to become a prostitute. We find no merit in the contentions. In the first place the objections now stated were not raised in the trial court. In the next place the instruction does properly define the term pandering in terms of the statute, and the other instructions pointed out that before the jury could find the defendant guilty they had

to find that she induced Carolyn Garcia to become a prostitute.

5. We find no merit in the contention that the court in giving its instructions erred in using the phrase "procuring of any female for the purpose of prostitution" instead of using the phrase "inducing the prosecuting witness to become a prostitute."

Affirmed.

STATE OF ARKANSAS *v.* JERRY ROBERTS

CR 73-98 499 S.W. 2d 600

Opinion delivered October 1, 1973

Jim Guy Tucker, Atty. Gen., by: *James W. Atkins,* Asst. Atty. Gen., for appellant.

M. J. Probst, Baker & Probst, P.A., for appellee.

CONLEY BYRD, Justice. Informations were filed against appellee Jerry Roberts charging him with six violations of the State Credit Card Crime Act, Ark. Stat. Ann. § 41-1977 (Supp. 1971). Each information was filed in the name of Alex Streett, Prosecuting Attorney, by Francis T. Donovan, Deputy Prosecuting Attorney. After the jury was impaneled, appellee moved to dismiss the charges

against him because Francis T. Donovan had not been duly appointed as a deputy prosecuting attorney pursuant to Ark. Stat. Ann. § 24-119 (Repl. 1962).[1] The trial court granted the motion and the State has appealed. For reversal the State in its brief contends that the *de facto* status of Deputy Prosecuting Attorney Francis T. Donovan was sufficient to sustain the validity of the informations filed.

Mr. Donovan appeared at oral argument and attempted to raise a constitutional issue and to contend that he was a deputy *de jure*. Because such arguments had not been made in the briefs and because appellee was not necessarily in a position to respond, as is our practice, we did not permit the points to be raised or argued. Since such issues may be raised in an action to which Mr. Donovan is a party, nothing herein stated is to be considered as expressing our opinion on those issues.

Appellee relies upon *State* v. *Eason and Fletcher,* 200 Ark. 1112, 143 S.W. 2d 22 (1940), to support the proposition that he was entitled to raise the issue as to Donovan's qualification.

The record shows that Alex Streett was elected as prosecuting attorney and took office on January 1, 1971, and that he was elected in 1972, to a second two year term and took the oath of office on January 1, 1973. Pursuant to Ark. Stat. Ann. § 24-119 (Repl. 1962), Mr. Donovan was appointed as a deputy prosecuting attorney on January 1, 1971, and was confirmed by the circuit court. No new appointment by the prosecuting attorney nor confirmation by the court[2] was made for Mr. Donovan for the term commencing January 1, 1973, but he continued to act as such deputy and to try cases before the circuit court until the present objection was raised by appellee on May 10, 1973. Mr. Streett appeared and con-

[1]No objection was raised to the time the motion was made. See Ark. Stat. Ann. § 43-1206 (Repl. 1964) and *Johnson* v. *State,* 223 Ark. 929, 270 S.W. 2d 907 (1954).

[2]The trial Judge said he would not approve the appointment of Mr. Donovan, but see *State ex rel. Pilkinton, Prosecuting Attorney* v. *Bush, Judge,* 211 Ark. 28, 198 S.W. 2d 1004 (1947), holding that the judge's actions are subject to review.

firmed that Mr. Donovan was his deputy.[3] He also testified that he had not made new appointments for his deputies serving in other counties.

We have a number of cases involving *de facto* officers and the right of a litigant to collaterally attack the validity of proceedings by *de facto* officers. See *Faucette, Mayor* v. *Gerlach,* 132 Ark. 58, 200 S.W. 279 (1918); *Keith* v. *State,* 49 Ark. 439, 5 S.W. 880 (1887), and *Kaufman & Co.* v. *Stone, Admin.,* 25 Ark. 336 (1869). The *de facto* rule and the public policy supporting the same are set out in *Faucette, supra,* as follows:

> " 'An officer *de facto* is one who by some color of right is in possession of an office and for the time being performs its duties with public acquiescence, though having no right in fact. His color of right may come from an election or appointment made by some officer or body having colorable but no actual right to make it; or made in such disregard of legal requirements as to be ineffectual in law; or made to fill the place of an officer illegally removed; or made in favor of a party not having the legal qualifications; or it may come from public acquiescence in the officer holding without performing the precedent conditions, or holding over under claim of right after his legal right has been terminated; or possibly from public acquiescence alone when accompanied by such circumstances of official reputations as are calculated to induce people, without inquiry, to submit to or invoke official action on the supposition that the person claiming the office is what he assumes to be.' Cooley on Constitutional Limitations (7 ed.), pages 897 and 898. Continuing, the learned author said: 'But for the sake of order and regularity, and to prevent confusion in the conduct of public business and insecurity of private rights, the acts of officers *de facto* are not suffered to be questioned because of the want of legal authority except by some direct proceeding instituted for the purpose by the State or by some one claiming the office *de*

[3]The record does not explain why Mr. Streett did not sign the informations and proceed with the trial.

> *jure,* or except when the person himself attempts to build up some right, or claim some privilege or emolument, by reason of being the officer which he claims to be. In all other cases the acts of an officer *de facto* are as valid and effectual, while he is suffered to retain the office, as though he were an officer by right, and the same legal consequences will flow from them for the protection of the public and of third parties. This is an important principle, which finds concise expression in the legal maxim that the acts of officers *de facto* cannot be questioned collaterally.' "

Keith, supra, and *Kaufman & Co., supra,* support the proposition that the title to an office can only be tried in a direct proceeding to which the officer is a party. In the cases of *Greenwood* v. *State,* 17 Ark. 332 (1856), and *Miller* v. *Callaway,* 32 Ark. 666 (1878), the officers were direct parties to the proceedings.

The confusion that follows when courts fail to recognize the *de facto* officer doctrine can be seen by the results that flowed from our decisions in *Howell* v. *Howell and Stevens* v. *Stevens,* 213 Ark. 298, 208 S.W. 2d 22 (1948). See also *Pope* v. *Pope,* 213 Ark. 321, 210 S.W. 2d 319 (1948).

In *Smith* v. *Landsden,* 212 Tenn. 543, 370 S.W. 2d 557 (1963), the Supreme Court of Tennessee in determining what constituted a "collateral attack" said:

> "From the above quotations can be gleaned several guidelines for determining whether a particular attack upon the title of a public official is 'collateral.' By the very definition of the word if the attack is secondary, subsidiary, subordinate, *i.e.,* related to the main matter under consideration but not strictly a part thereof, the attack is indirect and collateral. If the official's title is questioned in a proceeding to which he is not a party or which was not instituted specifically to determine the validity of his title the attack is collateral. If the title of the officer is questioned in a proceeding in which he is a party merely because he is acting in his official capacity the attack is

collateral. Lastly if the attack is made because it is necessary to show the officer's want of title to lay a basis for some other relief the attack is collateral. . . . "

When the record before us here is considered in the light of the foregoing authorities, it appears that Mr. Donovan, through the acquiescence of the circuit judge, was at least a *de facto* deputy prosecuting attorney. Furthermore, the attack here made upon his authority to act would constitute a collateral attack and as such it cannot be made under the law. For cases from other jurisdictions denying an attack upon the status of a deputy prosecuting attorney under similar circumstances, see *Walker* v. *State,* 146 Tex. Crim. 138, 171 S.W. 2d 887 (1943), and *State* v. *Nevius,* 77 Ohio Ct. App. 161, 66 N.E. 2d 243 (1945).

In *State* v. *Eason and Fletcher, supra,* relied upon by appellee neither the *de facto* status of the officer nor the collateral attack issue was considered. Consequently, we do not consider the language thereof controlling in this case.

For the reasons herein stated the order of dismissal is reversed and remanded.

CLAUDE EARL FLAHERTY AND GENE WHIPPLE
v. STATE OF ARKANSAS

CR 73-70 500 S.W. 2d 87

Opinion delivered October 1, 1973
[Rehearing denied November 9, 1973.]

Franklin Wilder, for appellants.

Jim Guy Tucker, Atty. Gen., by: *James W. Atkins,* Asst. Atty. Gen., for appellee.

FRANK HOLT, Justice. The appellants were charged and convicted of operating a gambling house in violation of Ark. Stat. Ann. § 41-2001 (Repl. 1964). The jury assessed a one year penitentiary sentence for each of them. For reversal of the judgment, the appellants first contend

there was no gambling conducted at appellant Flaherty's home and, therefore, the evidence was insufficient to support a conviction for operating a gambling house.

The state adduced evidence that for approximately three weeks the police had observed Whipple driving Flaherty's car during which time he was picking up and delivering parlay cards. The police, with a search warrant, went to Flaherty's residence where they were invited in. The search warrant was exhibited and both appellants, the only occupants, were placed under arrest. The officers then discovered parlay cards, betting slips, racing forms, and a stack of football schedule sheets. For approximately one hour, an officer answered and tape recorded all incoming telephone calls. These calls were mostly from people placing bets on football games and horse racing. The callers would identify themselves either by first name or initials. Some would ask to speak to Earl (appellant Flaherty) and some would ask for Whip (appellant Whipple). During this hour two individuals appeared at the residence and upon police inquiry it was determined they had in their possession a weekly football schedule. As a result of the raid the police confiscated and introduced into evidence one telephone listed in Flaherty's name and another in a relative's name; a small indexed code book containing unidentified numbers; envelopes containing a large quantity of what appeared to be betting slips with "numbers" on them; numerous parlay cards and parlay card stubs; a roll of money wrapped with a rubber band ($1,174); a sack containing 121 weekly current football schedule sheets; racing forms; and an envelope with telephone bills. The appellants did not testify.

On appeal we review that evidence which is most favorable to the appellee with all reasonable inferences deducible therefrom and we must affirm if there is any substantial evidence to support the finding of the trier of the facts. *Miller* v. *State,* 253 Ark. 1060, 490 S.W. 2d 445 (1973). In the case at bar, we are of the view that the evidence was amply substantial to sustain the findings of the jury.

The argument is further made that Flaherty's home could not constitute a gambling house since he had lived for many years in a nice residential area and his neighbors testified they had observed no gambling activities about his premises. This was a fact question to be considered by the jury. Furthermore, in *Liberto & Mothershed* v. *State,* 248 Ark. 350, 451 S.W. 2d 464 (1970), we said "the keeping of a gambling house is not limited to a place where those engaged in gambling find shelter."

Appellant next asserts that the admission of the telephone recordings into evidence was error. The police officer placed a suction cup, or recording device, on the mouthpiece of the telephone receiver. Whenever the phone rang the conversation was recorded. The portable cassette tape recorder was admitted into evidence and the recorded conversations, between the officer and the callers placing bets, were heard by the jury. The appellants contend that the recordings were inadmissible hearsay and in violation of the Federal Communications Act, 47 U.S.C. § 605, and further the introduction of the evidence denied appellants their Sixth Amendment right to confront witnesses against them. We cannot agree.

In *Liberto & Mothershed* v. *State, supra,* the officer answered incoming telephone callers placing bets. We approved the admissibility of the officer's testimony as being permissible to show that the out-of-court statement "***is not hearsay if it is given in evidence for the purpose of proving that the statement was made, providing that the purpose is otherwise relevant in the case at trial. The statements here given were obviously relevant to show the use of the telephone numbers involved." Similarly, in the case at bar, the officer could have testified as to the conversations he heard since such testimony is not introduced to support the truth of the matter asserted, but only to show that such statements were made. On the same basis, the tape recorded conversations were admissible.

Appellants also assert that the tape recording was inadmissible as being in violation of Federal Communications Act, 47 U.S.C. § 605. We examine this contention

in the light of 18 U.S.C. § 2510, et. seq., which is the wire interception provision of the Omnibus Crime Control and Safe Streets Act. That section is the 1968 amendment to 47 U.S.C. § 605. In the case at bar, we consider § 2510, et. seq., controlling. The question then becomes whether the officer at the Flaherty residence improperly "intercepted" the communication in violation of 18 U.S.C. § 2511, which would render the contents of the communication inadmissible in a court of law as required by 18 U.S.C. § 2515. "Intercept" is defined in § 2510 as meaning the "aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device." The authorities are to the effect that testimony repeating the contents of police answered telephone calls during a valid search is admissible in evidence pursuant to either § 605 or § 2511.

In *United States* v. *Pasha,* 332 F. 2d 193 (7th Cir. 1964), a government agent was assigned to answer calls to an apartment during the search. The contents of those calls were testified to during defendant's prosecution for failure to pay an occupational tax on gambling. The testimony was held relevant, not hearsay, and admissible as circumstantial evidence of the type of operations conducted on the premises. Further, the officer's impersonation of defendant was held not to constitute an "interception" under 47 U.S.C. § 605. See, also, *Rathbun* v. *United States,* 355 U.S. 107, 78 S. Ct. 161, 2 L. Ed. 2d 134 (1957).

The 1968 enactment of 18 U.S.C. § 2511 (2) (c) provides:

> "It shall not be unlawful under this chapter for a person acting under color of law to intercept a wire or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception."

As we construe this section, it cannot be said that the officer in the case at bar illegally intercepted the telephone communications.

A most recent case on this subject is *State* v. *Vizzini,* 115 N.J. Super. 97, 278 A. 2d 235 (1971). There the defendant was convicted of permitting his premises to be used to conduct a lottery. During a valid search of defendant's home an induction coil (like the one used in the case at bar) was placed on the phone to record incoming calls. The callers placed bets. The defendant objected, as here, to the introduction of the tape at trial. The New Jersey court held that no interception had taken place, making the same distinction that was utilized in interpreting the old act 47 U.S.C. § 605, *supra*:

> "Castellano's [the police officer] acquisition of the contents of the telephonic communications resulted from his answering the telephone when it rang, not 'through the use of any electronic, mechanical or other device.'
>
> "In answering the telephone when it rang, he did not 'intercept' the telephone calls in violation of the federal act." (See *Rathbun* v. *United States,* 355 U.S. 107, 78 S. Ct. 161, 2 L. Ed. 2d 134 (1957).)

Similarly, in the case at bar, the taped recordings were admissible since the incoming calls were not intercepted and recorded in violation of any federal act. We need not deal in fine distinctions as to the meaning of the word "intercept," since 18 U.S.C. 2511 (2) (c), *supra,* clearly states that no illegal interception takes place when an officer is a party to the communication acting under color of law. The device on the telephone receiver recorded conversations the officer legally heard and could have testified to from memory.

Nor can we agree with appellants' argument that presenting the taped conversations to the jury was a violation of their Sixth Amendment right to confront the witnesses against them. The officer, who took the incoming calls and recorded them, testified and was subjected to cross-examination. As previously discussed the tapes reproduced the voices of those placing bets and were admissible to show that such statements (calls) were made. We perceive no violation of the confrontation clause.

Appellants further contend that the trial court erred in refusing their instruction which would allow the jury to consider a conviction under Ark. Stat. Ann. § 41-2003 (Repl. 1964) (misdemeanor statute for keeping a gaming device). Appellants assert that they were entitled to this instruction because keeping a gaming device is a lesser included offense within the alleged offense of operating a gambling house.

The intricacies of lesser offenses in Arkansas were recently explored at length in *Caton & Headley* v. *State,* 252 Ark. 420, 479 S.W. 2d 537 (1972), and need not be repeated here. There we said that in order to find error in the refusal of the trial court to give a requested lesser offense instruction it must appear that the offense in the requested instruction was one necessarily contained within the higher offense and the evidence showed the existence of all the elements of the lesser offense. So in *Caton, supra,* it was not error to refuse a shoplifting instruction where the information did not charge that the merchandise taken was offered for sale by a store or other mercantile establishment which are elements required by Ark. Stat. Ann. § 41-3939 (Repl. 1964). In *Caton, supra,* we further said:

> "Unless the lower offense is necessarily included within the higher, there is no reason why the prosecuting attorney or the grand jury should not have the option of charging the more serious offense and ignoring the latter."

In the instant case defendants were charged with operating a gambling house. The mere possession of gambling devices is not necessarily included within that offense. One could be criminally liable under the statute for allowing gambling in his house but have no gambling devices there (for example, matching coins, tossing pennies, betting on football games or horse races). Even if we were to find that the evidence seized here constituted gambling devices, since the information did not so charge and since the misdemeanor statute is not necessarily included in the felony statute, we hold the trial court did not err in refusing the instruction although it would not have constituted error to give it.

As was noted similarly in *Caton, supra,* we are not saying that there cannot be a conviction for possession of gambling devices based upon a charge of operating a gambling house. Such a conviction might be possible if the charge alleges the elements of the lesser offense and the evidence would support the conviction. Furthermore, a defendant can always request a bill of particulars to determine the specific acts alleged to constitute the particular offense. Ark. Stat. Ann. § 43-1006 and § 43-804 (Repl. 1964).

Appellants also contend that the trial court erred in refusing their instruction to the effect that every man's house or place of residence is deemed in law as being his castle. Ark. Stat. Ann. § 41-2233 (Repl. 1964). This statute appears in the homicide section of Title 41 and is no doubt intended to emphasize the sanctity of the home in relation to self-defense and the retreat doctrine. The argument appellants present is novel. However, it is irrelevant because the conviction is based on substantial evidence which was lawfully seized. The trial court is not required to give abstract instructions which are not germane to a fact issue. *Stevens* v. *State,* 246 Ark. 1200, 441 S.W. 2d 451 (1969). Neither can we agree that appellants' counsel was erroneously stopped by the court from presenting the argument to the jury that one's home is his castle with the right to have and read racing forms since the record does not include that part of the proceedings or any portion of the arguments to the jury.

Finally, appellants assert that the evidence taken from Flaherty's home was based upon an illegal search. The search warrant was issued by the trial judge based upon an affidavit of a policeman and one by a deputy prosecuting attorney. At a hearing on a motion to suppress, the appellants adduced evidence from some witnesses who contradicted the statements made by the affiants. One of the affiants, the deputy prosecuting attorney, was called as a witness for the appellants. The deputy had stated in his affidavit that Flaherty was a known gambler. He testified at the hearing that to his knowledge neither appellant had ever been convicted of gambling and he had no personal knowledge of the cor-

rectness of the telephone bills attached to his affidavit. The appellee presented no witnesses and stood upon the affidavits. Appellants make the argument that there was no probable cause for the issuance of the search warrant. We cannot agree.

The officer's affidavit was to the effect that he and another officer had made an "extensive investigation of gambling operations" locally; he had information that a local printing company "printed parlay cards which were being used for betting on college and professional football games;" he had information that Flaherty had 1,250 parlay cards printed weekly by the local printer and Whipple "was a runner for Flaherty;" Whipple was observed leaving Flaherty's residence; Flaherty's car, driven by Whipple, had been followed and observed by him and another officer, stopping at various places picking up and leaving parlay cards; and Whipple was seen by him leaving the printing company with parlay cards in his hand. The deputy prosecuting attorney's affidavit was to the effect that during his four years as deputy he had "worked on several cases involving gambling activities" locally; the police had given him continuing reports about their investigation of local gambling activities; appellant Flaherty and his nephew, Billy Reeder, were co-defendants in 1969 on a charge of operating a gambling house; Flaherty was acquitted and Reeder was convicted, receiving a suspended sentence which was later revoked because of his continued gambling activities; that during the revocation hearing, there was evidence Flaherty and Reeder had maintained frequent telephone contacts with each other by intra-city or long distance calls; a charge of operating a gambling house against Flaherty in an adjoining county was dismissed because of a defective search warrant; and the current telephone records of Flaherty and Reeder reflected approximately 150 intra-city or long distance calls between them for about three months prior to the raid of Flaherty's premises. These current phone records were made a part of the deputy prosecutor's affidavit.

An affidavit based upon hearsay information can be a basis for the issuance of a valid search warrant. *Jones*

v. *United States,* 362 U.S. 257, 80 S. Ct. 725 (1960). There the court said:

> "We have decided that, as hearsay alone does not render an affidavit insufficient **** so long as there was a substantial basis for crediting the hearsay."

To the same effect is *Aguilar* v. *Texas,* 378 U.S. 108 (1964); *Spinelli* v. *United States,* 393 U.S. 410 (1969); *U. S.* v. *McClard,* 333 F. Supp 158 (E. D. Ark. 1971); *Glover* v. *State,* 248 Ark. 1260, 455 S.W. 2d 670 (1970).

The authorities, as succinctly reviewed in *McClard, supra,* are also to the effect that the affidavit for a search warrant is sufficient if it relates facts which are sufficient to persuade the examining court, acting as a reasonable person, to believe probable cause exists that a law violation is occurring on the premises to be searched. The affidavit need not assert facts which establish conclusively or beyond a reasonable doubt that a violation of the law exists on the premises. Probable cause exists where knowledge of facts or circumstances is imparted to the examining court sufficient to persuade an ordinarily prudent person to actually believe in good faith, as opposed to mere suspicion, that the facts asserted in the affidavit are true. The examining court has the right to give at least some credence and weight to an experienced law enforcement officer because of his expertise. The judicial determination by the examining court that probable cause exists for the issuance of a search warrant is entitled to considerable deference and weight by a reviewing court.

In the case at bar, the affidavits were based upon information acquired during an extensive and continuous investigation as well as upon personal observations of experienced law enforcement officials. We cannot agree that contradictory evidence adduced by appellants at the hearing on the motion to suppress vitiated the search warrant. See, *Liberto* v. *State, supra.* We hold that the affidavits constituted a substantial basis to support the examining court's judicial determination that probable cause existed for the issuance of the search warrant.

Finding no error, the judgment is affirmed.

Affirmed.

GERALDINE INMAN *v.* STATE OF ARKANSAS

CR 73-79 500 S.W. 2d 82

Opinion delivered October 1, 1973
[Rehearing denied November 5, 1973.]

Harold L. Hall, for appellant.

Jim Guy Tucker, Atty. Gen., by: *O. H. Hargraves,* Deputy Atty. Gen., for appellee.

FRANK HOLT, Justice. The jury convicted appellant of pandering [Ark. Stat. Ann. § 41-3208 (Repl. 1964)] and assessed her punishment at four years in the State Department of Corrections. Appellant first contends for reversal of the judgment that the evidence is insufficient to support the verdict.

The state's principal witness testified that she was a prostitute and had previously worked for the appellant. This witness stated that she called the appellant who told her that "everybody had been asking about me. . ." and "she asked me if I wanted to come back to work and I told her yes." The appellant told her she could make good money if she would work again. She then worked for the appellant as a prostitute at appellant's house and houseboat moored at the Arkansas Yacht Club. The appellant set the terms at a 60/40

fee splitting arrangement and also determined the price to be charged to the customers. In addition to providing the premises, the appellant furnished certain items, transportation back and forth from her house to her houseboat, and told the witness when to call the next day. Two other witnesses, who admitted they were prostitutes before working for appellant, testified that they also had worked for the appellant during the same year at her house and houseboat.

This evidence is amply substantial to support the jury's findings that the appellant procured, enticed and encouraged a female to remain a prostitute in violation of § 41-3208. By the comprehensive provisions of this statute, it is immaterial whether the female is virtuous or whether she consented to become or remain a prostitute. *Boyle* v. *State,* 110 Ark. 318, 161 S.W. 1049 (1913).

Other contentions for reversal were considered and determined adversely today in *Morgan* v. *State,* 255 Ark. 181, 500 S.W. 2d 83.

Affirmed.

BYRD, J., not participating.

BOBBY LOWERY *v.* WEST MEMPHIS TRANSPORTATION CO. AND HENRY ROBERTSON

73-98 500 S.W. 2d 375

Opinion delivered October 8, 1973

[Rehearing denied November 13, 1973.]

Hodges, Hodges & Hodges, for appellant.

Hale, Fogleman & Rogers and *Pickens, Boyce, McLarty & Watson* by *James A. McLarty,* for appellees.

CARLETON HARRIS, Chief Justice. Bobby Lowery instituted suit in the Jackson County Circuit Court, alleging personal injuries by reason of a car - bus collision which occurred on September 8, 1971. Appellees, West Memphis Transportation Company and Henry Robertson, filed a general denial on November 26, 1971, and on January 18, 1972, appellees filed a motion asking that the complaint be dismissed because of a lack of verification and alleging improper venue on the basis of the contention that Lowery was not a resident of Jackson County, Arkansas, but rather a resident of Florida; that the commencement of the action in such county constituted a fraud upon the court. Appellant responded, denying the allegations and asserting that the deposition of Lowery reflected that he was a resident of Jackson County on the day of the accident, and that the venue was proper. It was further asserted that any defect in venue had been waived by the filing of an answer and the taking of the discovery deposition of Lowery by the attorney for the appellees. In this pleading, Lowery also offered to make the verification "pursuant to an order of this court." On February 7, 1972, the court entered its order denying the motion to dismiss, but not ordering verification of the complaint. On September 25, 1972, a pre-trial conference was held at

which time the court propounded the question, "Are there any jurisdictional questions?" Counsel for appellant replied in the negative, stating, "The pleadings are settled and the issues joined." No response to this question was made by counsel for appellees and subsequently during the conference, both sides asked for a continuance. On November 21, 1972, at another pretrial conference, appellee, West Memphis Transportation Company, moved to dismiss its complaint against two third parties who had been brought into the case as third party defendants in April, 1972, and also moved to amend its previously filed answer so as to reflect appellees' admission of liability for appellant's damages resulting from the collision of September 8, 1971. The court granted both motions and the answer stood amended.

On February 15, 1973, the case was called for trial. Before proceeding into the courtroom, a motion in limine, made by appellant, was heard, and after discussion by the attorneys on each side, the motion was granted in part. Thereafter, a jury was selected and after being admonished, a ten minute recess was given to the jury and the court and parties returned to chambers where appellees moved the court, under the provisions of Ark. Stat. Ann. § 27-1109 (Repl. 1962) (no verification) to dismiss the complaint. Appellant again offered to verify, but after hearing argument of counsel, the court granted the motion, dismissed the complaint without prejudice, and dismissed the jury. From the order so entered, appellant brings this appeal. While four points are asserted for reversal, all are closely related, and will be discussed together in this opinion.

Ark. Stat. Ann. § 27-1105 (Repl. 1962) provides that "Every pleading must be subscribed by the party or his attorney, and the complaint, answer and reply must each be verified by the affidavit of the party to the effect that he believes the statements thereof to be true; ***." Section 27-1109 provides that where complaints are filed without verification, as required by § 27-1105, the action shall not on that account be dismissed, if the verification "be made on or before the calling of the action for trial."

Appellees assert that the question of verification is important because they contend that appellant is not a resident of this state, thus having no right to institute suit in Jackson County, and that his failure to swear to the allegations in the complaint, is accordingly most pertinent to that contention. We do not consider that argument appealing, since Lowery's discovery deposition was taken by counsel for appellees on January 4, 1972, at which time counsel thoroughly questioned Lowery on various matters relating to residence, including where he was registered to vote at the last election, where he paid personal taxes, where various items of property are assessed, with whom he lived in Arkansas and Florida, and many other related matters. At the very outset of the deposition, the record recites that Lowery was "first duly sworn to tell the truth, the whole truth and nothing but the truth ***." Accordingly, if false statements were willfully made, and such statements established, this would tend to show fraud upon the court as much, or even more, than the allegations in the complaint, and if Lowery were mistaken as to what constituted residence under the statute, he still would not be guilty of deliberate falsification.

The verification certainly is not absolutely essential to the validity of the complaint, i.e., it does not deprive the court of jurisdiction, nor, under our prior interpretations of the statute, does the failure to verify require dismissal of the action. In *Pinkert* v. *Reagan,* 219 Ark. 822, 244 S.W. 2d 961, we pointed out that the purpose of the statute in requiring verification is to prevent a judgment from being taken on an unverified pleading alone, without any evidence being introduced. See, also *Parker* v. *Nixon,* 184 Ark. 1085, 44 S.W. 2d 1088. The case of *Andrews* v. *Lauener,* 229 Ark. 894, 318 S.W. 2d 805, involved the failure to verify an answer. (While the present action involves a complaint, the principle is the same for § 27-1105 requires verification for the complaint, answer, and reply.) We said:

> "The appellants first argue that the court erred in refusing to strike the appellees' answer. On December 11, 1957, appellant B. B. Andrews verified the appellants' complaint and on the next day the

appellants filed a motion to strike the appellees' answer because it was not verified. This motion was not presented to the court until the appellants had completed their proof and the appellees had moved for dismissal on February 4, 1958. At that time the court permitted appellee W. E. Lauener to verify the answer in open court. We find no error in this procedure.

"In construing Ark. Stats. 1947, Sec. 27-1105, pertaining to the verification of pleadings, we said in *Bank of Dover* v. *Jones,* 192 Ark. 740, 95 S.W. 2d 92, that the court did not abuse its discretion in permitting the defendant to verify her answer when it became apparent that the plaintiff sought to take advantage of her failure to do so."

In *M. W. Elkins & Co.* v. *Ashley,* 195 Ark. 313, 112 S.W. 2d 627, appellant moved to dismiss the complaint because of the failure to verify, but we held the contention to be without merit, stating:

"Appellant's motion to dismiss for failure to verify was not filed until January 18, 1937. The depositions of Ross Mathis and W. P. Dawson, to be read in evidence on behalf of appellees, were filed September 14, 1936. The depositon of M. W. Elkins, a witness for appellant, was taken on notice dated March 24, 1936, and was filed January 11, 1937. All of the testimony on each side had been taken and the depositions filed before appellant's motion was made. If an oral motion were made prior to the time proof was taken, it is not shown by the bill of exceptions, and cannot be considered. It follows that, even if appellant's contention as to the effect of § 1437 [identical with § 27-1105] could be maintained, the irregularity was waived by the proceedings taken."

In the instant litigation, the discovery deposition of Bobby Lowery had been taken and filed, and interrogatories to appellant had been propounded, answered, and filed. The record reflects a notice to take depositions on December 1, 1972 of two other persons, but it is not clear whether these were actually taken. Of course, under

the order entered by the court, all time spent in preparation of the case by the attorneys and the parties, as well as the time of the witnesses, has been for naught; likewise, the time spent by the court in holding pretrial conferences has been fruitless.

Appellees argue that the statute permitted appellant to verify his complaint at any time before the "calling of the action for trial", and that accordingly, the court actually could not dismiss the complaint earlier. We are not impressed by this argument. When the first motion to dismiss was filed, the court certainly could have entered an order requiring the complaint to be verified before the case was called for trial; in fact, appellant offered to do so if the court so ordered. The record does not reflect why the court denied appellees' motion at that time, but between that date, and the date of the dismissal (over a year), two pre-trial conferences had been held. At the first of these conferences, in reply to a question by the court, counsel for appellant replied that the pleadings were settled and the issues joined, and no disagreement with this statement was expressed by counsel for appellees. At the second pre-trial conference, appellees amended their answer to reflect an admission of liability for appellant's damages. In other words, only the question of the extent and amount of appellant's damages was to be heard. The resolving of preliminary motions and the determination of issues are among the primary purposes of pre-trial conferences. Certainly, a view by appellant that verification was no longer an issue would be understandable. Though perhaps not intentional, it would somewhat appear that appellant was entrapped, since a second motion to dismiss was not made until after the jury was selected; even then, appellant offered to verify.

Whether it be on the basis of a waiver of the verification by appellees, or inappropriate action by the trial court, we think, under the circumstances herein set out, that the court erred in granting the motion,[1] and that Lowery is entitled to reinstatement of his complaint.

[1]Appellant also argues that under Ark. Stat. Ann. § 27-1111 (Repl. 1962), no verification of the complaint was required. That section reads as follows:

Reversed.

FOGLEMAN, J. not participating.

JIMMY WAYNE COX *v.* STATE OF ARKANSAS

CR 73-86 499 S.W. 2d 630

Opinion delivered October 8, 1973

"Verification by affidavit mentioned in the last section (§ 27-1105) shall not be required to the answer of a guardian (or committee) defending for an infant, or person of unsound mind, or imprisoned; nor in any case where the admission of the truth of the allegations of the complaint or answer might subject the party to a criminal or penal prosecution; *nor to pleadings affecting injuries to person* [our emphasis] or character; nor to complaints in actions founded on a note, bond, bill of exchange, mortgage or other written obligation of the defendant; nor to defense founded on the written obligation, release or written obligation of the plaintiff, unless the writing on which the action or defense is founded is lost, mutilated or destroyed."

We do not pass upon this argument since it does not appear that it was presented to the trial court, and we have stated that we do not consider points not first presented below. *White Company* v. *Bragg,* 168 Ark. 670, 273 S.W. 7 (1925).

Jimmy L. Featherston, for appellant.

Jim Guy Tucker, Atty. Gen., by: *O. H. Hargraves,* Deputy Atty. Gen., for appellee.

CARLETON HARRIS, Chief Justice. Jimmy Wayne Cox, appellant herein, on September 22, 1972, entered a plea of not guilty to a charge of burglary and grand larceny; however, on October 3, 1972, Cox, being represented by a retained attorney, changed his plea, entering a plea of guilty to the offenses charged and with being an habitual criminal. The Pike County Circuit Court sentenced Cox to twenty-one years for burglary and twenty-one years for grand larceny, the sentences to run concurrently. Approximately two weeks later, appellant prayed for an appeal from the sentence imposed, this being denied by the circuit court because of the plea of guilty. In November and December, appellant filed petitions for a Writ of Habeas Corpus and for a hearing under Criminal Procedure Rule I, alleging that his guilty plea was entered under duress; that the State failed to show a *prima facie* cause for arresting him; that he had been arrested on a misdemeanor charge and evidence obtained from an illegal search of his automobile resulted in the felony charges. A hearing was granted, and conducted on January 30, 1973, petitioner being represented by court-appointed counsel, the court pointing out, however, that it was only going to hear evidence on the allegation that the guilty plea was entered under duress. Evidence was taken and the petition was denied, and from the order denying relief, appellant brings this appeal.

Cox testified that he thought he would get a lighter sentence when he pleaded guilty, although he admitted that his attorney told him that he didn't know what amount of time he would receive; he also stated that he "had no idea" what sentence he would receive. Subsequently, however, he stated that he had been informed on the same morning of the sentencing that he was going to be sentenced to twenty-one years.[1] He also testified that he was placed under duress because he had learned that his brother, Jester Cox, would testify that he (Jester) had

[1]Of course, he received two twenty-one year sentences, but it was ordered that they run concurrently.

received the two guns, which had been stolen, from him (appellant), and he also stated that knowing that he would be sentenced as an habitual criminal placed him under duress. His testimony relative to this last is rather jumbled and it is not at all clear how this charge placed him under duress to plead guilty. Cox admitted that he was told that he was entitled to a jury trial. To practically every question asked by the court as to the proceedings on the date the plea was entered, appellant would simply answer that he was under duress. Jester Cox testified that he too was charged with burglary and grand larceny, and had originally told officers that he bought the two guns from a man on the highway, but after being told that "wouldn't work", changed his statement and implicated his brother. He said that he had stated he received the guns from his brother, but that actually he bought them from a man in Oklahoma. Jester Cox had received a three year suspended sentence. Retained counsel for Jimmy Wayne testified that the latter was advised of all of his rights and that appellant had told him in the presence of his brother that he desired to change his plea to guilty.

The record of the proceedings makes it quite clear that Cox was advised by the trial court of his right to a trial by jury, was advised that he was entering a plea of guilty to burglary and grand larceny as an habitual criminal, with the court specifically mentioning that it was alleged that he previously had been convicted of four or more felonies.

We very quickly hold that there is no showing that appellant entered his plea under duress. There is no proof, nor allegation, that he was "pressured" into entering the plea by any sheriff or policeman, member of the prosecuting attorney's office, his own counsel, or the court. It is not asserted that he was under duress from his brother, or any other individual. It simply appears that Jimmy Wayne decided the advisable thing to do was to plead guilty. Of course, there are many reasons why one may decide to plead guilty; he might learn that several persons that he had not known about had witnessed the commission of the felony; he might discover, contrary to his original belief, that he could be positively identified as a par-

ticipant in the crime, etc. The fact that another participant in the crime, even a brother, decides to change a plea of not guilty to guilty certainly does not establish duress, although it may well influence a defendant to change his plea. After all, it is to be doubted that any defendant would enter a plea of guilty if he thought he would be acquitted by a jury, or even if he thought he would receive a lesser punishment. So—it may well be that the brother's statement that he had received the guns from appellant, and the fact that he was charged with being an habitual offender, could have carried some weight in appellant's deliberations of whether a plea should be entered—but, as stated, there is not a line of evidence that anyone pressured Jimmy Wayne Cox into entering a plea; it seems entirely clear that this was his own decision.

As to his argument that an illegal search was made of his car, we have held repeatedly that a plea of guilty, which was not coerced or obtained under duress, waived any defenses that might have been interposed on trial. In *Rimmer* v. *State,* 251 Ark. 444, 472 S.W. 2d 939, this court said:

> "The plea of guilty, which is not shown to have been coerced, had the effect of waiving defenses that might otherwise have been interposed. *McMann* v. *Richardson,* 397 U.S. 759 (1970); *Brady* v. *United States,* 397 U.S. 742 (1970)."

See also *Treat* v. *State,* 253 Ark. 367, 486 S.W. 2d 16, where an argument somewhat similar to the one here presented was mentioned by this court. We said:

> "Finally, it is contended that the court erred in not setting aside the plea of guilty to the charge of kidnapping, it being argued that the negotiated plea of guilty to this offense was brought about by the untrue testimony of the prosecuting witness which had been responsible for his conviction of assault with intent to rape; in other words, if he had not been found guilty by the jury, he would not have entered a plea of guilty. We find no merit in this contention. The record reflects that no complaint was made by

> appellant concerning his representation and that the attorney who originally represented him explained thoroughly the effect of the plea of guilty to the charge; *** though it has no bearing on the legal question involved, it is noted that it was ordered that the sentence given under the plea of guilty was to run concurrently with the sentence rendered in accordance with the jury verdict."

It is next argued that there were only two lawful prior offenses alleged, and appellant was illegally sentenced under the Habitual Criminal Act. It is stated that Cox was first convicted as a juvenile, and this does not count as a felony conviction. This was a conviction on January 21, 1964, and the record shows that he entered a plea of guilty in the Pike County *Circuit* Court—and not in Juvenile Court. On April 7, 1965, there was another conviction for grand larceny, and there does not appear to be any question but that this constituted a felony conviction. On January 18, 1967, appellant entered a plea of guilty to three different counts of burglary, Cox being sentenced on each charge to a term of four years, sentences to run concurrently. The proof reflected that there were three distinct offenses, a burglary at O. D. Tipton's Grocery at Umpire, Arkansas, a burglary at Joda's at Nashville, Arkansas, and a burglary at Freel's at Nashville, Arkansas. It is argued that the plea of January 18 should be treated as one conviction. We do not agree. While the point was not directly passed on in *Thom, etc.* v. *State,* 248 Ark. 180, 450 S.W. 2d 550, there was some discussion of the contention. We said:

> "Here appellant argues that for purposes of imposing sentence under the habitual criminal statute, appellant should have been sentenced under sub-section 2 of Ark. Stat. Ann. § 43-2328 instead of sub-section 3. He then argues that we should adopt the reasoning of *State* v. *Simpson,* (Wash. 1929) 277 P. 998, which holds that a conviction under a habitual criminal statute on an information containing two or more counts arising out of acts committed simultaneously should amount only to one offense. The State on the other hand argues that we should follow those states holding to the contrary. Under the record here we find

that we need not answer either argument because of the nature of the record.

"The information to which appellant pleaded guilty alleges, '(T)hat defendant was convicted of second degree burglary and sentenced to two to five years in 1962 in the State of Indiana; defendant was convicted of two counts of burglary and one count of grand larceny in Sebastian and Scott Counties in 1966 and was sentenced to three years.' It is difficult for us to understand how a person could commit two burglaries simultaneously or commit two burglaries simultaneously in two different counties, even if we could construe the 1966 grand larceny charge as growing out of a simultaneous act committed in one of the burglaries."

Here, to paraphrase, it is difficult for us to understand how a person could commit two burglaries simultaneously in two different towns, or of two different establishments in the same town. Our habitual criminal statute (Ark. Stat. Ann. § 43-2328 [Supp. 1971]) refers to "any person convicted of any offense" *** the "second offense" *** the "third offense" *** the "fourth or subseuqnet offense." Certainly the burglaries at O. D. Tipton's Grocery in Umpire, Arkansas, Joda's at Nashville, Arkansas and Freel's at Nashville, Arkansas are all three different burglaries, i.e., different offenses, and the plea of guilty to each one constituted conviction for a different offense. We like the logic of the Louisiana Supreme Court in the case of *State of Louisiana* v. *Williams,* 77 So. 2d 515. There, Williams was accused of being a fourth offender, having previously been convicted and given consecutive sentences of three years each in three different cases, all convictions occurring on the same day. The trial court concluded that Williams could only be sentenced as a second offender, since it viewed the three previous convictions on the same day as constituting only one conviction. The Supreme Court reversed this holding, stating:

"The district judge, noting that the alleged three previous convictions occurred on the same day (although for separate crimes), reasoned that under the multiple

offender statute the 'Enhanced punishment for one who "commits" an offense *after* having previously done so, necessarily contemplates an interval between the previous "conviction", and the "commission" of the next offense.' Accordingly, he concluded that the defendant could be sentenced only as a second offender (he viewed the three previous concurrent convictions as constituting, for the purpose of the statute, merely one conviction); and he ordered 'that the State elect which one of the three previous convictions alleged to have occurred in the State of Alabama it will proceed upon, and insofar as the remaining two convictions, it is ordered that same (bill of information) be quashed, set aside, and held to be of no effect.'

"Alleging that the ruling of the trial court was contrary to our interpretation of the statute and our holding in *State* v. *Clague,* 224 La. 27, 68 So. 2d 746, 747, the state, by means of an application for remedial writs, successfully invoked our supervisory jurisdiction.

"In the *Clague* case (the factual situation of which was substantially identical with that presently under consideration) the defendant, immediately following his conviction on April 30, 1953 for simple burglary, was charged and sentenced pursuant to the provisions of the multiple offender statute as a triple felonious offender, he having been convicted and sentenced in 1951 for two similar crimes committed on the same date in adjoining premises of a double structure. At no time was he charged and sentenced as a second offender. In affirmation of the trial judge's action this court observed: 'We do not think that it is necessary for the defendant to have been charged as a double offender in order that he might be charged as a triple offender. What is mandatory is that he has been tried and convicted of two previous offenses. * * *

> 'The punishment is for the third crime, and it is heavier because the accused has become an habitual offender. The defendant becomes a third offender at the time he commits the third crime, and the punishment is incurred at that time. ***'

"With the view and for the purpose of having us overrule the *Clague* decision the argument is made that under multiple offender legislation, which is directed at recidivism, 'The increased penalties for habitual offenders are not intended to follow according to a numerical count of the offender's crimes, but are imposed for his successive failures to rehabilitate himself. The result is that two or more offenses of a contemporaneous nature amount to but one offense.'

"This argument might be effective if addressed to the lawmakers. But with respect to a judicial interpretation of the particular statute under consideration it has no merit."

We agree with the trial court that the petition was without merit.

Affirmed.

HYDE WHOLESALE DRY GOODS COMPANY *v.* JACK EDWARDS

73-94 500 S.W. 2d 85

Opinion delivered October 8, 1973
[Rehearing denied November 5, 1973.]

Ronald L. Griggs and *Camp & Thornton,* for appellant.

Shackelford & Shackleford, for appellee.

GEORGE ROSE SMITH, Justice. The appellant Hyde brought this foreclosure suit to enforce promissory notes and a real estate mortgage executed in the 1950's by Mrs. Katherine T. Edwards. As to Mrs. Edwards (who died while the suit was pending below) the debt was barred by limitations. Hyde joined Mrs. Edwards' son as a codefendant, asserting that he assumed liability for the debt, both orally and in writing. Edwards successfully moved for a summary judgment, disclaiming any legal responsibility for his mother's obligation. Hyde appeals.

The summary judgment was based upon the pleadings and upon affidavits filed by both sides. Hyde's counsel, in contending that the chancellor erred as a matter of law, relies upon three separate actions taken by Edwards.

First: In 1966 Mrs. Edwards' ownership of the mortgaged real estate prevented her from obtaining state welfare payments. According to the plaintiff's affidavits, on June 2, 1967, Edwards orally agreed with Hyde's attorney that if that attorney would help Edwards obtain welfare assistance for his mother, Edwards would assume and pay the debt. That oral agreement, standing alone, was barred by the three-year statute of limitations when the summons against Edwards was issued in this

case on May 30, 1972. Ark. Stat. Ann. § 37-206 (Repl. 1962).

Secondly: Pursuant to the plan to obtain welfare payments for Mrs. Edwards, she conveyed the mortgaged realty to her son on June 6, 1967, reserving a life estate. We are unable to agree with Hyde's insistence that Mrs. Edwards' deed amounted to a written assumption of the debt by her son. The conveyance was an ordinary warranty deed that made no mention whatever of the mortgage indebtedness. The situation is unlike that considered in *Kenney* v. *Streeter,* 88 Ark. 406, 114 S. W. 923 (1908), cited by Hyde. There the complaint asserted that Kenney in writing assumed the payment of the notes sued upon. While it was true that the deed to Kenney did not recite that he assumed the obligation, the court held that his failure to deny the allegation in the complaint justified the conclusion that he had assumed the debt by some other writing. In the case at bar there was no comparable failure by Edwards to deny the allegations of Hyde's complaint.

Thirdly: Hyde, to avoid Edwards' plea of limitations and the statute of frauds (Ark. Stat. Ann. § 38-101, subsection 2), relies upon certain correspondence between the parties. We do not find in the letters any such positive assumption of the debt as is required to satisfy the statute of frauds or to toll the statute of limitations. § 37-216. The letter most favorable to Hyde's position was written by Edwards to Hyde's attorney on September 8, 1967, and reads in part: "I plan to be back in El Dorado in November and hope to be able to make arrangements to take care of mortgage holders at that time and I would like to be able to have this welfare matter behind me at that time, if possible." It will be seen that the letter falls far short of binding Edwards to pay the debt personally. The suggested arrangements might have entailed various other possibilities, such as the payment of the debt by Mrs. Edwards or by the sale of her property. The letter contains no statement that Edwards bound himself to pay the debt.

In a second point for reversal Hyde argues that the entry of a summary judgment was error, because the

record discloses a genuine question of fact. That contention is based upon Edwards' own affidavit. There Edwards stated that in late November, 1966, Hyde's attorney telephoned him to say that some "token payment" on the debt had to be made at once to avoid foreclosure (as the statute was about to run). In answer to that demand Edwards sent a check for $10 directly to Hyde. Edwards' accompanying letter reads in part: "Enclosed is our check for $10.00, in payment on the mortgage held by you, on my Mother's property." In his affidavit Edwards went on to say: "By forwarding this sum to Mr. Camp [Hyde's attorney] I was simply complying with his request and in no means intended to assume the mortgage indebtedness of my mother."

As we understand counsel's argument, it is contended that Edwards' statement that he did not intend to assume the mortgage indebtedness would not necessarily preclude the chancellor from finding as a fact that Edwards did so intend. That argument is unsound. Edwards' affidavit established a prima facie basis for a summary judgment in his favor. The burden then shifted to Hyde, as plaintiff, to file a controverting affidavit. Since that was not done, the defendant was entitled to summary judgment. *Epps* v. *Remmel,* 237 Ark. 391, 373 S.W. 2d 141 (1963). Even though an interested party's statement is not to be taken as undisputed, that rule does not mean that his denial of a fact amounts to proof that the fact exists. It is our conclusion from the record that the appellant simply allowed the statute of limitations to run before filing suit.

Affirmed.

HARRIS, C. J., dissents.

ROY ROWLAND *v.* STATE OF ARKANSAS

CR 73-91 499 S.W. 2d 623

Opinion delivered October 8, 1973

Lloyd R. Haynes, for appellant.

Jim Guy Tucker, Atty. Gen., by: *James W. Atkins,* Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. The appellant was convicted of three violations of Ark. Stat. Ann. § 41-4501 (Repl. 1964), which reads in part: "Any person who shall wear or carry in any manner whatever, as a weapon, any dirk or bowie knife, or sword or spear in a cane, brass or metal knucks, razor, blackjack, billie or sap, ice pick, or any pistol of any kind whatever, shall be guilty of a misdemeanor." The trial court fixed the punishment for each offense at a fine of $50 and confinement for 30 days, the latter part of the sentences

to run concurrently. For reversal it is contended that the proof is insufficient to support the convictions.

Rowland was arrested in Little Rock in 1972 for a traffic violation. In his truck the officers found two shotguns with butcher knives attached to them and a loaded .38 caliber pistol. A chain was wrapped around the shotguns, passed through the trigger guard of the pistol, and secured with a padlock. Rowland had the key to the lock.

Rowland testified that in 1966 or 1968 a man cut him with a knife and another man threatened him with a pistol. According to Rowland, the prosecuting attorney refused to file charges in either case. Rowland testified that he was carrying the firearms and knives not as weapons but as a means of publicizing the injustices that he had suffered. He therefore argues that there was no violation of the statute, which forbids any person to carry "as a weapon" any of the articles specified in the act.

We hold that the proof presented a question of fact with respect to the pistol, which is one of the articles decribed in the statute. Whether a pistol is being carried as a weapon is ordinarily an issue of fact. *Clark* v. *State,* 253 Ark. 454, 486 S.W. 2d 677 (1972). We sustained a conviction upon proof that the defendant had a loaded pistol in the glove compartment of his car. *Stephens* v. *City of Fort Smith,* 227 Ark. 609, 300 W.S. 2d 14 (1957). The trial court was not required to accept Rowland's explanation of his conduct, not only because the carrying of firearms obviously did not bring his precise grievances to the attention of the public, but also because his explanation did not account for the pistol's being loaded. Hence there is substantial evidence to support the conviction upon the charge involving the pistol.

On the other hand, the State did not make a prima facie case with regard to the shotguns and butcher knives. Shotguns are not mentioned in the statute at all. Neither are butcher knives, but the State argues that a modern butcher knife is the same thing as a Bowie knife. We

cannot agree. Criminal statutes must be strictly construed, with doubts being resolved in favor of the defendant. *Stuart* v. *State,* 222 Ark. 102, 257 S.W. 2d 372 (1953). A butcher knife is certainly not a Bowie knife, as the latter is defined and illustrated in dictionaries. See the American Heritage Dictionary (1969) and the Random House Dictionary (1966). When the statute in question was adopted in 1818, Bowie knives were more commonly carried than they are today; so the legislation was needed. In 1909 the legislature added the reference to pistols. In 1941 the legislature further modernized the statute by including blackjacks, billies, saps, and ice picks, but the lawmakers did not find it necessary to mention butcher knives. In 1973, which was after the present charges had been filed against Rowland, the legislature amended the statute by deleting the reference to Bowie knives, which are no longer in current use. Act 54 of 1973. We also note that the State could have filed its charges with respect to the butcher knives under Act 457 of 1961, which refers specifically to any knife having a blade at least three and a half inches long. Ark. Stat. Ann. §§ 41-4521 and -4523. The State, however, chose to proceed under Section 41-4501, which we find to be inapplicable.

Affirmed in part and reversed in part.

T. S. SMITH *v.* CLAUDE W. CRUTHIS ET AL

5-6221 499 S.W. 2d 852

Opinion delivered October 8, 1973

Eubanks, Files & Hurley, for appellant.

Butler & Hicky, for appellees.

LYLE BROWN, Justice. This suit primarily concerns a boundary dispute. Appellees, Claude W. Cruthis and John H. Cruthis, are the owners of Section 34, Township 5 North, Range 1 West, in Woodruff County. Appellee John E. Cruthis was the tenant on the lands for 1970. Appellant T. E. Smith owns Section 3, Township 4 North, Range 1 West, in St. Francis County. Appellant's land lies immediately south of the Cruthis land; in other words the parties have a common boundary line which is also the line between the two counties. Claude and John Cruthis alleged that appellant came upon their side of the property line in 1970 and erected a levee which obstructed the natural drainage from the Cruthises lands. The Cruthises asked for a permanent injunction to prohibit the maintenance of the levee which was obstructing the natural flow of the surface water from their lands. Their tenant, John E. Cruthis, sought 1970 crop damages caused by the waters; the amount of damages was alleged to be $700. Appellant, Smith, denied the allegations of the complaint except as to ownership of the two sections. Affirmatively, appellant alleged that appellees, several years ago, dug a ditch from the northwest to the southeast across their lands in order to drain their lands and speed the flow of surface water and created a temporary lake for duck hunting; that the parties entered into an agree-

ment whereby appellees agreed to divert the water that was impounded by appellees' levee into a ditch which appellees dug on appellant's land with his permission; that the ditch emptied into a natural drain; and that appellees' damages resulted from their failure to keep the ditch unobstructed. Appellant also alleged that appellees promised to remove two pipes they had placed in the drain when they constructed the levee and that they would close the gaps in the levee when the pipes were removed.

Appellant Smith cross-complained against the appellees, the landowners. He asserted that appellees had twice trespassed on his lands in 1971 and cut his dikes and levee which he contended were on the boundary line; and that those acts cast impounded drainage water upon appellant's land and destroyed his rice crop consisting of thirty acres. For those alleged activities appellant prayed for actual and punitive damages.

The trial court first fixed the boundary line. If that line is correct then appellant Smith constructed what is designated as a new rice ditch (flume) east and west and substantially upon the acreage of the Cruthises. That ditch is not true east and west and protrudes at variable distances into Section 34 in Woodruff County. The protrusions vary from a very small distance up to, roughly, some 500 feet. The court directed that appellant remove the flume and levee which it found to be north of the established line; however, the court held that the parties were dealing with surface water and that landowners, appellant in particular, had the right to fend off surface waters by maintaining a flume and levee upon his own lands. The court denied damages to either party on the finding that the estimates of damages were too speculative.

Appellant designates four points for reversal:

I and II

The court was in error in its determination of the boundary line. The court was in error in ruling that

the extension eastwardly of an east-west roadway represented the recognized boundary between the properties.

III

The court erred in exercising jurisdiction over appellant's counterclaim.

IV

If the court did not err in exercising jurisdiction over appellant's counterclaim then it was error to deny damages sought by that claim.

The cross-appeal of the Cruthises asserts two points:

I

The court erred in refusing to permanently restrain appellant from erecting levees and obstructions on appellant's land which would interfere with the natural drainage of waters flowing from appellees' land through the slough or slash across appellant's lands into Flat Fork Creek.

II

The court erred in refusing to give judgment against appellant Smith for damages to crops on appellees' land for the crop year 1970.

We first approach the main issue of boundary dispute. We cannot say that the finding of the chancellor was against the preponderance of the evidence. Three surveyors testified: Sam Word, Billy M. Cline and Jack Mitchell. The court found that Word's survey, as shown in appellees' exhibit eight, represented the true line, and we approve that finding. Cline's survey was very much in agreement with the Word survey. The court found that the Mitchell survey, made on behalf of appellant, was in error. The court commented that the Mitchell survey of 1970 coincided with the determinations made by Word and Cline. However, Mitchell did additional surveying in 1971

and at that time he placed the boundary line quite a number of feet north of his 1970 survey. The court commented in its decree that the Cline and Word surveys represented an extension of an east-west road between the litigants; therefore, says appellant, the court was inconsistent. We do not agree. The court unequivocally held the Word survey, as shown by exhibit eight, "to be the correct boundary line between the Cruthises and Smith". Incidentally, that exhibit does show the Word line to be an extension of a farm road, which road the court said the parties had long recognized as the true line. What we have said disposes of appellant's points I and II.

Appellant's Point III is that the court erred in exercising jurisdiction over appellant's counterclaim. That point is based on the theory that the suit was filed in Woodruff County and that the crop damages arose in St. Francis County. Our counterclaim statute is mandatory. Ark. Stat. Ann. § 27-1121 (Repl. 1962). That statute says that in addition to a denial of the complaint the defendant "must set out in his answer as many grounds of defense, counterclaim or set-off, whether legal or equitable, as he shall have". In *Troxler* v. *Spencer,* 223 Ark. 919, 270 S.W. 2d 936 (1954), Justice Millwee had this to say about the reason behind the act:

> In recent years there has developed a wave of procedural reform which tends to brush aside traditional limitations on pleadings of counterclaims and set-offs in order that circuity and multiplicity of actions might be avoided and litigants enabled to settle all matters between them in a single action. Arkansas has been in the forefront of this movement. Prior to 1917 our Civil Code (Kirby's Digest, § 6099) defined a counterclaim as follows: "The counterclaim mentioned in this chapter must be a cause of action in favor of the defendants, or some of them, against the plaintiffs, or some of them, arising out of the contract or transactions set forth in the complaint, as the foundation of the plaintiff's claim or connected with the subject of the action." This section was amended by § 1 of Act 267 of 1917 which now appears as Ark. Stats., § 27-1123, and reads: "The counter-

> claim mentioned in this chapter may be any cause of action in favor of the defendants, or some of them against the plaintiffs or some of them." It is also now provided in the fourth subdivision of Ark. Stats., § 27-1121, that a defendant *must* set out in his answer as many grounds of defense, counterclaim, or set-off as he shall have, and we have held the provision mandatory. *Shrieves* v. *Yarbrough,* 220 Ark. 256, 247 S.W. 2d 193. We have repeatedly stated that the manifest purpose of the legislature in enacting the foregoing statutes was to permit litigants to settle all matters in dispute between them in a single unit.

We reiterate that the purpose of the compulsory counterclaim statute is to require all claims arising out of the same series of events to be settled in one suit rather than spawning a number of related claims. The wisdom of the rule should not be defeated by the breaking off of jurisdiction at a county line that lies between the litigating neighbors. See *Reasor-Hill Corp.* v. *Harrison, Judge,* 220 Ark. 521, 249 S.W. 2d 994 (1952).

Appellant's final point is that if the court had jurisdiction over his counterclaim for damages then the court erred in denying any damages. We have reviewed the evidence and we are unable to say that the finding of the chancellor is against the preponderance of the evidence.

By cross-appeal, appellees say the court erred in refusing to permanently enjoin appellant Smith from erecting levees and obstructions on Smith's own land which would interfere with the natural drainage of waters flowing from appellees' lands. The court specifically held that the parties were dealing with surface water and we cannot say it was error to so hold. The court held that the landowners had a right to build flumes and levees on their own lands to fend off surface waters. We recently said that a landowner "has the right to fend off surface waters, so long as he does not unnecessarily damage his neighbor". *Solomon* v. *Congleton,* 245 Ark. 487, 432 S.W. 2d 865 (1968). To the same effect see *Turner* v. *Smith,* 217 Ark. 441, 231 S.W. 2d 110 (1950); *Brasko* v. *Prislovsky,* 207 Ark. 1034, 183 S.W. 2d 925 (1944).

Finally, appellees assert that the court erred in not awarding $700 for crop damages. They point up the testimony of John E. Cruthis in that respect and say that the testimony was uncontradicted. In the first place, John's testimony was very sketchy and conclusionary. Furthermore, John was a party to the suit and it cannot be said that he was a disinterested witness. We find no merit in the point.

Affirmed on appeal and cross-appeal.

ARKANSAS STATE HIGHWAY COMMISSION *v.* M. C. RYE ET UX

73-90 499 S.W. 2d 624

Opinion delivered October 8, 1973

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

Donald Poe, for appellees.

LYLE BROWN, Justice. This is an eminent domain case. It concerns a tract of land consisting of 101 acres in Scott County approximately one mile north of the city limits of Waldron. The south sixty-one acres of the property fronted on the west right-of-way of U.S. Highway 71 for one-quarter of a mile. That portion of the property was improved with the owners' dwelling and outbuildings. The 2.96 acres was taken so the State could build the

Waldron by-pass. The acquisition was a strip of land along the entire Highway 71 frontage ranging in depth from 15 feet to 371 feet. Two, 50 foot access points were given to the remainder, one to the north and another to the south. The original driveway was destroyed by the acquisition. With the exception of the two access points, controlled access was imposed across the remaining frontage. Just compensation was fixed by the jury at $9000. On appeal the Highway Department contends the verdict was excessive.

The landowners presented the evidence of an expert witness, Charles Wilburn. His qualifications were impressive and unquestioned. He testified just compensation to be $12,285. Appellant abstracted only the testimony of this witness. He fixed the market value of the whole tract before the taking at $65,000 and set the value of the remainder at $52,915. He used several asserted comparables to justify the land values. To the 2.96 acres taken, the witness attributed a value of $1185. He fixed a figure of $1300 as damages to the landscaped area within the taking. To sustain that figure the witness related that the road would have to be changed to come out at a different point because of the interchange; that part of a highly improved driveway was destroyed; and that some thirty well-developed trees, along with a number of young pine trees, were in the taking. The witness attributed the balance of the damages—some $10,000—to placing the highway frontage under controlled access:

> I think that's a minimum it would sell for less, yes sir. My damages are because of the fence. Because of the limited access. He does have access on both ends of his property, but he don't have a quarter of a mile of paved access and this road winds around through there in such a position that if he was going to develop it, they'd have to re-do that road. If a developer had it, he'd re-do that road. He wouldn't use all that land that's in between there and the highway. You're talking about this access road up to the house; a developer couldn't use that road if he wanted to develop it because he wouldn't want to lose that acreage of land out in front there.

It was Wilburn's opinion that the land before the taking was ideal for homesites, being close to Waldron, having good terrain, and having unfettered highway frontage of a quarter of a mile. The witness also testified that, based on his experience, property located back of a controlled access fence sold for a lesser price per acre. He also related that a developer would have to build a new paved road behind the fence at substantial expense, and that expenditure would of course affect the price the developer would pay for the land.

When the freedom of access to a public highway is substantially affected by a taking so as to diminish the fair market value of the tract then compensable damages arise. *Arkansas State Highway Comm'n.* v. *Billingsley,* 247 Ark. 49, 444 S.W. 2d 259 (1969); *Campbell* v. *Arkansas State Highway Comm'n.,* 183 Ark. 780, 38 S.W. 2d 753 (1931).

We are unable to say that the damages fixed by Wilburn are excessive. He was conceded to be an expert with excellent credentials. The jury verdict was well within the range of his testimony. See *Arkansas State Highway Comm'n.* v. *Rhodes,* 240 Ark. 565, 401 S.W. 2d 558 (1966).

Affirmed.

CLAUDE S. "SANDY" CARTER, JR. AND THOMAS C. BURKHEAD *v.* STATE OF ARKANSAS

CR 73-82 500 S.W. 2d 368

Opinion delivered October 8, 1973

[Rehearing denied November 13, 1973.]

Jim Hooper, Harkness, Friedman & Kusin, and *Jack Lessenberry,* for appellants.

Jim Guy Tucker, Atty. Gen., by: *Philip M. Wilson,* Asst. Atty. Gen., for appellee.

JOHN A. FOGLEMAN, Justice. Appellants Carter and Burkhead were found guilty of sodomy, alleged to have occurred shortly after 11:00 p.m. in Carter's automobile which was parked at the public rest and tourist information facility adjacent to Interstate Highway 70, where other parties had parked trucks, automobiles and campers. Appellants admit the evidence is sufficient to sustain the jury verdict, if our sodomy statute is constitutional as applied to them. Thus, it will be unnecessary for us to set out the sordid testimony about the act, which appeared so revolting to one of the two deputies sheriff, who stated they observed it while patrolling the area, that he vomited thrice during the evening—the first time as an immediate reaction to his seeing what was taking place in the automobile, and the others while appellants were in custody and being "booked." Although both appellants flatly denied that they had engaged in the homosexual act related by the police officers, they contend that even if they had done it, the state's evidence only shows a consensual act in which two adult persons engaged. They were charged in the information on which they were tried with voluntary participation in an unnatural sex act in violation of Ark. Stat. Ann. § 41-813 (Repl. 1964).

The principal ground for reversal is that: the statute itself is an invasion of their right of privacy, which they allege to be protected by the First, Fourth, Fifth, Sixth, Ninth and Fourteenth Amendments to the United States

Constitution; the statute is so vague and ambiguous as to deprive them of rights guaranteed by the state and federal constitutions; the application of the statute to them serves no legitimate state interest and that enforcement of the statute constitutes cruel and unusual punishment. Appellants introduce their argument with a statement that they do not suggest the statute be declared unconstitutional in every application. They contend it is "only unconstitutionally overbroad as applied to consenting adults because all persons who engage in acts of sodomy are subject to prosecution under the terms of the statute, including husband and wife, consenting adults of the opposite sex, or consenting adults of the same sex, regardless of whether the act is committed in public or in private."

The very strong presumption of constitutionality attendant upon every statute, requiring that all doubt be resolved in favor of constitutionality, is enhanced by the highly persuasive fact that the statute was long unassailed. See *Stone* v. *State,* 254 Ark. 566, 494 S.W. 2d 715; *Williams* v. *State,* 253 Ark. 973, 490 S.W. 2d 117; *Poole* v. *State,* 244 Ark. 1222, 428 S.W. 2d 628. As we said in *Williams,* if such a statute were in violation of federal constitutional principles, surely the thought would have long since occurred to the many legal scholars and jurists of this state. Appellants have not, by their multifaceted attack, met their very heavy burden of showing that this statute is unconstitutional.

We recently had occasion to consider and reject an attack on the constitutionality of this same statute in *Connor* v. *State,* 253 Ark. 854, 490 S.W. 2d 114. We do not agree with appellants that the difference in the two cases is sufficient to justify a re-examination of our holding there. We will turn our attention to arguments asserted as new and to alleged distinctions. Appellants allege a minor was involved and consent was not established in *Connor.* No point was made of the participation of the minor in reaching our conclusion in *Connor.* The mere fact that a participant is a minor does not prevent his consenting to the act. See *Strum* v. *State,* 168 Ark. 1012, 272 S.W. 359.

We can reject all cases cited by appellants relating to acts committed in private out of hand. No such act is involved here, in spite of a rather frail argument that the act, if committed, was done in the privacy of Carter's automobile in a secluded area of a roadside park. In our opinion, the record simply does not support the idea that the act was committed in private, or in a rather remote area of the roadside park. Officer Phillips testified that the area was well lighted, and it was unnecessary for one to use a flashlight to observe people in the cars. The area is only 120 to 140 yards off the main interstate highway. It is approximately 40 to 60 yards wide. Burkhead described the area as quite crowded. He said there were a lot of people around and that some of the many cars parked in the area were near the Carter automobile. No greater degree of privacy than that shown in *Connor* can be said to have existed here.

We can just as readily dismiss those cases based on conduct between married persons and those rendered in jurisdictions where a "non-criminal physical relationship of homosexual nature" was involved. We do not find anything in citations to various "sex manuals" (even though they may have been best sellers) to be of such compelling force or effect that we may take judicial notice of the supposed data, arguments and recommendations of the authors, the expertise of some of whom is at least questionable. We likewise find nothing which persuades us that the *Connor* decision was wrong. If the legislative branch should, in the exercise of its investigative powers, find these works credible in considering statutory revision, we would acknowledge not only that the matter is, but that it should be, within its province. See *People* v. *Hurd,* 5 Cal. App. 3d 865, 85 Cal. Rptr. 718 (1970); *People* v. *Ragsdale,* 177 Cal. App. 2d 676, 2 Cal. Rptr. 640 (1960); *People* v. *Massey,* 137 Cal. App. 2d 623, 290 P. 2d 906 (1955).

In some mystical manner, appellants have woven together various unrelated decisions as support for their argument that the statute is an overbroad invasion of their right to privacy. These decisions all struck down some act as unconstitutional, and include those having to do with the education of children, compulsory sexual steriliza-

tion of habitual criminal offenders, interracial marriage and sexual relations, access to contraception information, private possession of obscene materials, and abortions. As we understand appellants' argument, these cases lend support to their position because they demonstrate that the expansion of the "right to privacy in matters of intimate personal preference" is based upon the courts' having taken cognizance of dramatic changes in social conditions which have made legal doctrines once appropriate become unsuited for contemporary society. If social changes have rendered our sodomy statutes unsuitable to the society in which we now live, we need not be concerned about the matter because there is a branch of our government within whose purview the making of appropriate adjustment and changes peculiarly lies. Since that branch has not acted, we adhere to the views expressed in *Connor.*

Appellants' argument, that there is no legitimate state interest to be served by applying the sodomy statute to them, is hinged to a very great extent upon the contention that somehow the statute is constitutionally forbidden by that clause of the First Amendment to the Constitution of the United States prohibiting laws respecting establishment of religion. We rejected this argument in *Connor* and reject it here, and for the same reasons. The appellants additionally assert that the state must articulate the secular, social interests the statute under attack seeks to protect, suggesting that the failure to do so shows that the only purposes served do relate to establishment of religion. We do not think a recitation of purpose in the statute is necessary. Even if we should concede, and we do not, that the state had no interest in the suppression or minimization of sexual perversion, the condition existing at the time of this offense is illustrative of a valid state interest. Officer Phillips testified that the site is often frequented by children. The two male appellants, purportedly unacquainted, met there and in only a few minutes were in an automobile in the well lighted area enjoying fellatio. On cross-examination, Officer Phillips was asked to read his arrest report. It disclosed that this area, constructed for enjoyment and rest by travelers, had come to be frequented by homosexuals and that the sheriff's office had received many complaints of such acts being observed and of visitors being approached by homosexuals. This

is a clear and sufficient indication of the public interest to be served by the sodomy statute. People who come to such places for rest, recuperation and relaxation have a right to be unmolested, particularly by those in search of the exercise of their claimed right to sexual perversion, and should not expect to find in such havens as this the type of activities with which appellants were charged.

The police power is very broad and comprehensive and embraces maintenance of good order and quiet of the community, and preservation of the public morals. *Williams* v. *State,* 85 Ark. 464, 108 S.W. 838, 26 L.R.A. (n.s.) 482, 122 Am. St. Rep. 47, aff'd 217 U.S. 79, 30 S. Ct. 493, 54 L. Ed. 673, 18 Ann. Cas. 865; *City of Helena* v. *Dwyer,* 64 Ark. 424, 42 S.W. 1071. Under it, the legislature may, within constitutional limitations, prohibit all things hurtful to the comfort, safety and welfare of the people and prescribe regulations to promote the public health, morals and safety. *Wright* v. *DeWitt School District,* 238 Ark. 906, 385 S.W. 2d 644; *Williams* v. *State,* supra; *Dabbs* v. *State,* 39 Ark. 353, 43 Am. Rep. 275. In its exercise the legislature has a wide discretion in determining what the public interest demands and what measures are necessary to meet these requirements, and is limited only by the principle that its acts must reasonably *tend* to correct some evil and promote some interest of the commonwealth not violative of any direct, positive or necessarily implied constitutional mandate, or opposed to natural right and fundamental principles of civil liberty. *Wright* v. *DeWitt School District,* supra; *Fiser* v. *Clayton,* 221 Ark. 528, 254 S.W. 2d 315; *Dabbs* v. *State,* supra. See also, *City of Helena* v. *Dwyer,* supra. It is the duty of the courts to resolve all doubts in favor of the legislative action and to sustain it unless it appears to be clearly outside the scope of reasonable and legitimate regulation. *Williams* v. *State,* supra; *Dabbs* v. *State,* supra. In *Williams,* we found a legitimate state interest in prevention of annoyance to travelers by drummers soliciting for physicians, bath houses, hotels, etc.

In any event, we consider the sodomy statute to be a legitimate exercise of the police power by the General Assembly to promote the public health, safety, morals

and welfare. See *State* v. *Rhinehart,* 70 Wash. 2d 649, 424 P. 2d 906 (1967); *People* v. *Hurd,* 5 Cal. App. 3d 865, 85 Cal. Rptr. 718 (1970).

Although appellants nowhere state, as a point for reversal, that our sodomy statute is void for vagueness, they somehow weave such an assertion into their argument that the statute serves no legitimate state interest. It is sufficient to say that whenever the definition of general words in a criminal statute, passed pursuant to the police power, may be adequately determined through reference to judicial decisions construing the statute, it is not void for vagueness. See *State* v. *Anthony,* 179 Ore. 282, 169 P. 2d 587 (1946). In *Connor,* we found the definitions in *Strum* v. *State,* 168 Ark. 1012, 272 S.W. 359; *Mangrum* v. *State,* 227 Ark. 381, 299 S.W. 2d 80; *Havens* v. *State,* 217 Ark. 153, 228 S.W. 2d 1003; and *Smith* v. *State,* 150 Ark. 265, 234 S.W. 32, adequate to meet this challenge, if the statute were otherwise subject to attack on this score. We again reject this argument.

Appellants also argue that since a maximum sentence of 21 years may be imposed upon consenting adults for sodomy, and the maximum punishment for a husband and wife engaging in normal sexual intercourse under the same circumstances would constitute nothing more than disorderly conduct, enforcement of the statute constitutes cruel and unusual punishment. Appellants call our attention to Ark. Stat. Ann. §§ 41-1432, 41-1401 and 41-2701 (Repl. 1964). Assuming, without deciding, that these statutes, and only these, would apply in the postulated case, the greatest possible punishment would be a fine of $300 and a jail sentence of one year. In order to sustain appellants' argument here, whether it be based on cruel and unusual punishment or equal protection criteria, we would have to accept their arguments hereinabove rejected as a premise. This we cannot do. It is within the province of the legislative branch to classify crimes and determine the punishment therefor. *Stout* v. *State,* 249 Ark. 24, 458 S.W. 2d 42; *Thom* v. *State,* 248 Ark. 180, 450 S.W. 2d 550. No punishment authorized by statute, even though severe, is cruel and unusual unless barbarous or unknown to the law, or so wholly disproportionate to the nature of the offense as to shock the moral sense of the

community. *Davis* v. *State,* 246 Ark. 838, 440 S.W. 2d 244. We cannot say that either appellants' eight-year sentence or the 21-year maximum fails to meet any of these tests for constitutionality.

It is a long-standing rule of this court, and generally of other courts, that in order for one to have standing to challenge the constitutionality of a legislative act, the act must be unconstitutional as applied to him. If appellants' attack, as stated and restated by them, is hinged, in substantial part, upon the assertion that the statute draws no distinction between acts committed in public and acts committed in private, the very absence of the element of privacy of the act should deprive appellants of any standing to question the constitutionality of the statute. Certainly they have no standing to challenge its constitutionality as applied to husband and wife or consenting adults of opposite sexes. See *May* v. *State,* 254 Ark. 194, 492 S.W. 2d 888; *Connor* v. *State,* supra; *Lienhart* v. *Burton,* 207 Ark. 536, 181 S.W. 2d 468; *Connor* v. *Blackwood,* 176 Ark. 139, 2 S.W. 2d 44; *Ferguson* v. *Hudson,* 143 Ark. 187, 220 S.W. 306. See also, *City of Ft. Smith* v. *Scruggs,* 70 Ark. 549, 69 S.W. 679, 58 L.R.A. 921, 91 A.S.R. 100.

We have held that a statute long in existence, under which many cases have been prosecuted and its validity inferentially sustained, should not be held invalid except for very cogent reasons and, then, only on the attack of one injuriously affected by it. *Swaim* v. *State,* 184 Ark. 1107, 44 S.W. 2d 1098. Here we do not find cogent reasons to invalidate this act, which has existed for over 100 years, except for a reduction of the minimum punishment in 1955, and under which many prosecutions have been sustained. We further find that appellants have not been injuriously affected by its application.

We note that there are other jurisdictions which have rejected similar assaults on the constitutionality of such acts. See, e.g., *Everette* v. *State,* 465 S.W. 2d 162 (Tex. Cr. App. 1971); *Pruett* v. *State,* 463 S.W. 2d 191 (Tex. Cr. App. 1970); *State* v. *White,* 217 A. 2d 212 (Me. 1966); *State* v. *Rhinehart,* 70 Wash. 2d 649, 424 P. 2d 906 (1967); *People*

v. *Hurd,* 5 Cal App. 3d 865, 85 Cal. Rptr. 718 (1970); *People* v. *Roberts,* 256 Cal. App. 2d 488, 64 Cal. Rptr. 70 (1967); *People* v. *Ragsdale,* 177 Cal. App. 2d 676, 2 Cal. Rptr. 640 (1960); *People* v. *Massey,* 137 Cal. App. 2d 623, 290 P. 2d 906 (1955); *Washington* v. *Rodriguez,* 82 N.M. 428, 483 P. 2d 309 (Ct. App. 1971); *Jaquith* v. *Commonwealth,* 331 Mass. 439, 120 N.E. 2d 189 (1954).

We find no error in the trial court's sustaining the prosecuting attorney's objection and motion to strike testimony of the professed fiancee of Burkhead in response to the question "Have you ever known Tom Burkhead to have any tendencies toward being a homosexual?" We do not take this response to be a statement of the witness' opinion of either the physical or mental condition of Burkhead, as argued by appellants. The inquiry is more nearly equated with one as to this appellant's character. We have defined character to be "what a person is" and to include natural and acquired traits. *Biddle* v. *Riley,* 118 Ark. 206, 176 S.W. 134. Proof of character cannot be made except by showing general reputation and not by specific acts or conduct. In *Henson* v. *State,* 239 Ark. 727, 393 S.W. 2d 856, the defendant presented the testimony of three young women, each saying that she had been alone with the defendant and he had never attempted to make any advance to her. The state rebutted this testimony by testimony of two other women that defendant had raped them. This court reversed the conviction, saying that none of the women should have been allowed to testify, because their testimony constituted an effort to show the character of the defendant by specific acts and was, therefore, erroneously admitted. We said that the evidence offered by the defendant was clearly inadmissible. The analogy is certainly sufficient to justify the exclusion of this testimony in the case before us.

In addition, however, we find authorities in other states have treated the particular question directly. In *Berger* v. *State,* 179 Md. 410, 20 A. 2d 146 (1941), the refusal to permit the wife of a defendant charged with an unnatural and perverted attack on another woman to be asked if her husband had ever shown any sexual abnormalities was held proper. In *State* v. *Sinnott,* 24 N.J. 408,

132 A. 2d 298 (1957), a sodomy case, the court refused to allow psychiatric testimony that the defendant did not have sexual deviate traits. Both courts held that such inquiries went to the character of the defendant, which could be proved only by general reputation of the accused and not by evidence of particular acts or conduct or testimony of intimates. Attempted showing of good character of one charged with taking indecent liberties with females under the age of 15, by showing a lack of previous incidents, was also held improper in *State* v. *Fairbanks,* 25 Wash. 2d 686, 171 P. 2d 845 (1946). We find ample authority for the rejection of the testimony in the cases cited and find textual support in 22A C.J.S. 898, Criminal Law, § 691 (39).

Appellants also assert that reversible error was committed by the prosecuting attorney in cross-examining Carter, and that their motion for mistrial on that ground was erroneously denied. The questioned interrogatory was asked after Carter had declined to answer when asked if he was a homosexual unless the word be defined by the questioner. When this occurred the cross-examiner propounded and received a negative answer to the following question:

> . . . Is it not a fact, and I want to remind you that you are under oath now; is it not a fact that in another matter in this very court room, on that stand, that you testified under oath that you were, and are, a homosexual?

At the outset we do not agree with appellants that this form of question constitutes a stronger assertion of fact than it would had it begun with the words "Did you know that . . .?" We do not consider the question as worded to constitute an assertion of fact at all, particularly since the matter was not pursued when a negative answer was given. Neither do we agree that there is any assertion that Carter was involved in another prosecution. "[A]nother matter in this very court, on that stand" could as easily be taken to refer to a civil case as to a criminal one, and if taken to be the latter, to the prosecution of someone other than Carter.

In the light of Carter's evasion of preceding questions, we find no error here. Carter was subject to the same latitude of cross-examination as any other witness. But appellants contend that Carter could be impeached only under Ark. Stat. Ann. §§ 28-707 and 708 (Repl. 1962). Appellants misapprehend the proper application of these statutes. They are only a limit on the introduction of evidence to impeach or contradict the witness, but not upon his cross-examination. See *Wilson* v. *Thurston National Insurance Company,* 251 Ark. 929, 475 S.W. 2d 881; *Bockman* v. *Rorex,* 212 Ark. 948, 208 S.W. 2d 991. These statutes probably would have come into play had the state attempted to contradict the negative answer given by Carter. See *Holcomb* v. *State,* 218 Ark. 608, 238 S.W. 2d 505; *Bockman* v. *Rorex,* supra.

Appellants argue that there was reversible error in that the trial judge, court reporter and counsel for both state and appellants went into the jury room for the purpose of answering an inquiry by jurors. We hasten to point out that this occurred before our decision in *Martin* v. *State,* 254 Ark. 1065, 497 S.W. 2d 268. The record discloses an identical procedure here and in *Martin.* We hold that the error was not reversible on the authority of *Martin.* We trust that the caveat there is adequate to point up the hazards involved in such a procedure, and are confident that resort will not be had to it in the future.

Since appellants have failed to demonstrate that there was any reversible error, the judgment is affirmed.

ERA SEALES *v.* EUGENE DUCKETT ET UX

73-89 499 S.W. 2d 626

Opinion delivered October 8, 1973

[redacted]

David J. Porter, and *Potter & Potter,* for appellant.

Ed Alford, for appellees.

J. FRED JONES, Justice. This is an appeal by Era Seales from a chancery court decree establishing a boundary line between her property and that of Eugene Duckett and wife.

Mrs. Seales and her deceased husband acquired approximately five acres of land by metes and bounds description in 1935. Their deed is not in the record but the south 205 feet of the tract apparently extended east *to* the county road and was bounded on the east by a county road and on the south by a state highway. The south end of the tract measured 390 feet. Mr. and Mrs. Seales sold approximately one-third of an acre by metes and bounds description, from the southeast corner of the tract, and a store building was built thereon. The deed description of this one-third acre started at the same point where the description in the Seales' deed started, which was the southeast corner of the Seales' tract and recites as follows:

> Run thence west 80 feet, thence north 65 feet, thence west 30 feet, thence north 75 feet, thence east 110 feet, thence south 140 feet to the point of beginning.

The evidence is uncontradicted, that in laying out this one-third acre tract, Mr. and Mrs. Seales and their grantees

first measured the north 110 foot boundary line by beginning at its east end in the center of the county road. The store building was erected on the south 65 feet of this irregularly shaped plot and was located within the area measuring 65 feet north and south and 80 feet east and west. The Seales home is located on the south portion of the acreage they retained and is west of the store building located on the one-third acre they sold. The one-third acre with the store building thereon changed hands by mesne conveyance several times after Mr. and Mrs. Seales first sold it to a relative in 1951. Mr. and Mrs. Duckett first acquired title to the the property in 1967. They sold it in 1970 and reacquired it later that year under the same legal description as follows:

> Part of the E ½ of the SW ¼ of the NE ¼ of Section 15, Township 5 South, Range 28 West beginning at the SE corner of said forty acres and run 270 feet West, thence North 318 feet to point of beginning, thence West 80 feet, thence North 65 feet, thence West 30 feet, thence North 75 feet, thence East 110 feet, thence South 140 feet to point of beginning containing one-third acre, more or less.

The Ducketts tore down the old store building on the property and erected a new combination grocery store and gas station building thereon. Mrs. Seales filed the present suit against the Ducketts alleging that the north and south line between her property and that of the Ducketts was seven feet west of the old store and station building and that the Ducketts, in constructing their new building, had encroached on her property. She alleged that from 1951 until 1967 when the Ducketts first purchased the property, the dividing line between the two parcels of land had been agreed upon, considered and accepted by all parties concerned, as running seven feet west of the old store building, and that she had exercised continuous adverse possession of the property west of such division line. She alleged that within the past two years the Ducketts had torn down the old building and station and had erected a new building and station at least three feet west of said division line and on her property. She prayed for an injunction against the Ducketts from using

any of the property west of the new station and grocery store.

The Ducketts denied that their building or improvements encroached on Mrs. Seales' land and denied the existence of a mutual ageement as to the west boundary line. They admitted they had constructed a new building on the site of the old building but denied they had been using any part of Mrs. Seales' land. The Ducketts alleged affirmatively that in August, 1970, Mrs. Seales executed an affidavit of adverse possession regarding the lands in question in which she stated that the Ducketts, and those under whom they held, had had actual and undisputed possession of the lands described in the deed for more than 30 years, and they argued that Mrs. Seales was estopped to deny their possession.

The chancellor found that upon the north portion, the 75x110 foot portion of the tract involved, a home was built over 20 years ago and a fence was erected on the 75 foot west boundary line by the owners, and that this fence was agreed by the owners as being on the west boundary line of this portion of the tract. The chancellor also found that a fence had been built from the southwest corner of this portion of the tract for a distance of 30 feet east to the northwest corner of the south portion, or the 65x80 foot portion of the tract, and that this constituted the boundary line. The chancellor found that there was much evidence that the west or 65 foot boundary line of the south, or 65x80 foot portion of the tract, was seven feet west of the west wall of the old store building by agreement of the parties concerned, but no fence or other monuments had ever been erected along this line.

The chancellor found that Duckett tore down the old store building and built a new one with its west line being four feet further west than the west wall of the old building. The chancellor observed in his findings that Duckett testified that he claimed 15 to 20 feet west of the old store building but that Duckett's wife agreed that Mrs. Seales had always gathered the pecans from the pecan trees in this area. The court then found the true western boundary line immediately west of the old store building to commence at an old corner post 30 feet east

of the southwest corner of the north 75x110 foot portion of the tract, and to run south seven feet from the old store building. The chancellor found that Mrs. Seales had established a right to the property west of this line by adverse possession. As to the "lower part of the 65 feet," the chancellor found from Duckett's testimony that he built a new store four feet further west than the old one and that he claimed 15 to 20 feet west of the old store. The chancellor then found the proper division line to this area to be 11 feet west of the new store's west edge.

The chancellor's findings are not clear to us for the reason that the plat offered in evidence as plaintiff's exhibit No. 1 and from which all parties testified, simply shows the metes and bounds description as above set out but does not indicate where either the old or new store building is located on the south 65x80 foot portion of the tract. In any event, the chancellor amended his original decree and fixed a boundary line as follows:

> "Commence at the northwest fence corner of the Duckett property and run south along the existing fence 75 feet; thence run east to within one foot of the west wall of the new store; thence south to a point one foot west of the southwest corner of the ice house at the southwest corner of the new store; thence west 20 feet; thence south to the State Highway."

Mrs. Seales testified that the true boundary line was seven feet west of the old store building and when the Ducketts rebuilt the store building and gas station, the structure was built three feet west of the true boundary line and on her property and in doing so they ruined one of her pecan trees. She said, however, that she never did mention the matter to Mr. and Mrs. Duckett during the course of construction. All the owners of the one-third acre tract prior to the Ducketts, testified that the west boundary line of the south portion of the property was seven feet west of the old store building. Mr. Oscar Young, who first sold the property to the Ducketts in 1967, said he told Duckett that the boundary line ran seven feet west of the store building. This was denied by Duckett. The appellant has assisted us considerably on trial de novo

because she does not question the chancellor's decree in its entirety but states the issue in her argument as follows:

> "The sole issue contested is the line drawn from a point '1 foot West of the Southwest corner of the ice house at the Southwest corner of the new store; thence West 20 feet; thence South to the State Highway.' "

The appellant then argues that there is no evidence to support this erratic change in direction of the boundary line and we are forced to the conclusion that the appellant is right in this contention. A survey was attempted in an effort to locate the boundary line of the property involved but admittedly the survey was of no probative value.

The Ducketts contend that the problem arose by reason of the Sealeses laying out the boundaries of the one-third acre from the center of the county road on the east side of the property rather than from the west side of the road as called for in the deed description, and they contend that Mrs. Seales' affidavit of adverse possession above referred to, estops her from contending otherwise. Mrs. Seales as well as Mr. Turner, who owned the property at the time, and for whose benefit the affidavit was made, testified that Mrs. Seales stated at the time she made the affidavit that the west boundary line of the one-third acre tract ran seven feet west of the old store building. The affidavit simply referred to the deed description of the property and we conclude that the chancellor did not err in holding it did not work an estoppel under the evidence in this case.

From the record before us it would appear that the west line of the 65x80 foot south portion of the tract ran within seven feet of the old store building that had been on the property, and that the new building was built with its west wall extending to some extent west of this boundary line. It is apparent from the record that Mrs. Seales acquiesced, or at least she did not object, to the Ducketts building their building with its west wall extending onto her property and, as a matter of fact, she does not contend that the building should be removed

from the property but seems to acquiesce in accepting the chancellor's decree that the west line of the 65x80 foot tract should extend within one foot of the new store building. Apparently none of the parties, in preparation of this case for trial, measured the distance from either the center or the west side of the county road to the west wall of the store building, and the record does not show the distance from the southwest corner of the new store building south to the highway.

Apparently the chancellor based that portion of his decree complained of by Mrs. Seales in this case, on adverse use by Duckett and his predecessors in title, but we find no evidence in the record that would sustain this portion of the decree. No one ever questioned Mrs. Seales' ownership of the property to within seven feet of the west wall of the old store building until Duckett purchased the property in 1967. Duckett said he built his new building with its west wall extending approximately four feet further west than the old building, but that he claimed and exercised dominion over an area 15 or 20 feet west of the old building. This testimony falls far short of proving adverse possession sufficient to establish title to the area involved. It is admitted by all parties concerned that trucks make deliveries of merchandise to the rear or west end of the store building on the property, but certainly there is no evidence that any one ever claimed title to this area adverse to Mrs. Seales until the claim made by Mr. Duckett after he purchased the property in 1967, well within the past seven years. As a matter of fact Mr. Young, from whom Mr. Duckett first purchased the property, testified that he attempted to purchase the area involved from Mr. Seales; that Mr. Seales refused to sell at any price but permitted him to use the area.

We are of the opinion that the evidence establishes that the old store building was constructed seven feet from the west boundary line of the south 65x80 foot portion of the tract or else that boundary line was established seven feet west of the old store building. Whatever the situation in this regard, it would appear that the true west boundary line should extend its entire length of 65 feet to the south line of the original tract. In any event,

we find no evidence in the record that Duckett has acquired title by adverse possession or otherwise to that portion of the property from "1 foot west of the Southwest corner of the ice house at the Southwest corner of the new store; thence West 20 feet; thence South to the State Highway."

We conclude, therefore, that this case should be remanded to the chancellor for the entry of a decree fixing the boundary lines in a manner not inconsistent with this opinion.

Reversed and remanded.

GLENN D. MCENDREE *v.* FLORA B. MCENDREE

6053 499 S.W. 2d 596

Opinion delivered October 8, 1973

Edgar R. Thompson, for appellant.

Bailey, Trimble & Holt, by *Jack Holt Jr.,* for appellee.

CONLEY BYRD, Justice. This appeal arises out of a property division made in a divorce decree between appel-

lant Glenn D. McEndree and appellee Flora B. McEndree. For reversal appellant contends:

> "I. Appellee did not prove that she was a partner in this business and never made any showing that any of the property was in her name and the court erred in awarding her more than a dower interest in and to the property.
>
> II. Monies furnished by Charles S. McEndree Brother of Glenn D. McEndree found their way into the one-half of the net proceeds of the estate awarded to Mrs. McEndree and the court disallowed any credit for sums owed by Glenn D. McEndree to Charles S. McEndree and those sums should have been deducted in determining her interest, if any.
>
> III. The court erred in making a distribution of the assets without receiving from the receiver a full accounting on which to base such distribution."

I. We find no merit in the first contention. Appellee testified that they acquired the property in question and lived in a house trailer until they constructed their house. When they moved into the house they rented the house trailer and accumulated nine or ten more trailers which they rented. She stated that she helped in the operation of the trailer park. Appellant at first admitted that he and appellee owned the Tanglewood Mobile Manor Trailer Park and that after they moved into their house they started acquiring the other trailers. However, he testified that the other trailers were acquired from the accumulated rentals from a trailer owned by his brother. As we view the testimony, the issue before the trial court was one of credibility, and we cannot say that the chancellor's findings were against a preponderance of the evidence.

II. We cannot say that the trial court, in dividing the property, erred in disallowing credit for monies allegedly furnished by appellant's brother. In the first place it is difficult to follow appellant's testimony to determine how much or what part of the brother's money found its way into the trailer park. In the next place appellee denied any

knowledge of any money belonging to the brother going into the business. Furthermore, the proof shows that between the time of the filing of the complaint for divorce and the service of the summons appellant removed certain funds from the parties' savings accounts and mortgaged the trailers for $10,000 and that those funds have not been accounted for by appellant. When appellant's testimony is considered in light of his conduct, we cannot say that the chancellor's finding that the debt to appellant's brother was the sole and separate obligation of appellant is contrary to a preponderance of the evidence.

III. We find no merit in the contention that the trial court erred in making a distribution of the assets without a full accounting from the receiver. We do not find an abstract of the order of distribution. Furthermore, the receiver is not a party to the appeal.

Appellee's attorneys are awarded an additional fee of $1,000 for their services on appeal.

Affirmed.

HOLT, J., not participating.

MARY JO BURCHFIELD, INDIVIDUALLY AND AS ADMINISTRATRIX OF THE ESTATE OF JANE SMITH, DECEASED *v.* THOMAS F. CARROLL ET AL

73-100 499 S.W. 2d 620

Opinion delivered October 8, 1973

Howell, Price, Howell & Barron, by: *Richard J. Orintas,* for appellant.

Wright, Lindsey & Jennings, for appellees.

CONLEY BYRD, Justice. Appellant Mary Jo Burchfield individually and as administratrix of the estate of Jane Smith, deceased, brought this wrongful death action against appellees Thomas F. Carroll, Ronnie Colbert and Royal Crown Bottling Company, a/k/a Basil Snyder Bottling Company, Inc. After the witnesses on the liability issue had completed their testimony, the trial court directed a verdict in favor of the Royal Crown Bottling Company and its truck driver Ronnie Colbert. After a discussion with counsel a directed verdict was also entered as to appellee Carroll. For reversal appellant contends:

> "I. The trial court abused its discretion in directing a verdict for appellees and deprived the appellants of a determination of the facts by a jury when there was sufficient and substantial factual evidence submitted by appellants on which a jury could have found negligence and damages against appellees.
>
> II. The trial court abused its discretion in directing a verdict for appellees before the close of appellants case in chief."

Appellee Colbert being called as an adverse witness testified that upon entering the residential area of Gravel Ridge on Highway No. 107, he observed, about a quarter of a mile away, two elderly women proceed from their house toward the highway apparently for the purpose of crossing it. He began slowing down because he didn't know what they were going to do. About the time he brought his truck to a stop and turned on his flasher lights the two ladies started across the road. One of the ladies went on across but the other one, appellant's dece-

dent, turned and went back to the side of the road and then again started across. Appellee Carroll's automobile struck appellant's decedent before she got across the road. Although Colbert here testified that he was only stopped for a moment before the woman was struck, he admitted that when asked on a deposition if he was stopped for less than two minutes that he had stated that it was less than two minutes. Colbert admits that he had not seen Carroll in his rear view mirror prior to the time the woman was struck.

Carroll testified that he had been following behind the Royal Crown truck in a 1963 Comet for some time, and that, when the truck started slowing down on the straight stretch of the highway, he pulled out to pass it at the first opportunity. Admittedly, Carroll did not see the two women prior to the time he pulled out to pass. He says that when he pulled out to pass, the truck had not completely stopped. When he saw the first woman go across the road, he applied his brakes and then speeded up before he saw the other woman that he hit. He estimated his speed at the time of impact at less than 45 miles per hour. He also testified that he did not see the flasher lights on the truck.

Appellant's principal reliance for reversal is based upon the proposition that Colbert by stopping the truck under the circumstances was in violation of Ark. Stat. Ann. § 75-647 (Repl. 1957), providing as follows:

> "(a) Upon any highway outside of a business or residence district no person shall stop, park, or leave standing any vehicle, whether attended or unattended, upon the paved or improved or main traveled part of the highway when it is practical to stop, park, or so leave such vehicle off such part of said highway, but in every event a clear and unobstructed width of at least 20 feet of such part of the highway opposite such standing vehicle shall be left for the free passage of other vehicles and a clear view of such stopped vehicle be available from a distance of 300 feet in each direction upon such highway.
>
> (b) This section shall not apply to the driver of any vehicle which is disabled while on the paved or im-

proved or main traveled portion of a highway in such manner and to such extent that it is impossible to avoid stopping and temporarily leaving such disabled vehicle in such position."

We find no merit to appellant's contention. In the first place the evidence shows that the collision occurred in a residential district. In the next place the statute does not apply to stops arising out of the exigencies of traffic. See *American Bus Lines, Inc.* v. *Merritt,* 221 Ark. 596, 254 S.W. 2d 963 (1953).

After the trial court had directed the verdict for Colbert and the Royal Crown Bottling Company, Carroll's attorney then made a motion for a directed verdict. Counsel for appellant then made what we consider to be a practical decision and told the court: "Judge, if you are going to dismiss (the Bottling Company and its driver) you might as well grant (Carroll's) motion, too."[1] Upon this record we do not believe that appellant is entitled to a reversal as to Carroll unless we should also find that the trial court erred in granting a directed verdict as to the Bottling Company and its driver.

Appellant now contends that the trial court erred in granting the directed verdict before all of her proof was in. In the trial she conceded that she had called all of her witnesses on the liability issue and did not raise the objection now urged. Thus, not having raised the objection in the trial court it comes too late on appeal.

Affirmed.

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[1]We take the statement to mean that a judgment against Carroll would have no value. By proceeding in this manner appellant saved the expense of proving her damages.

CARL A. MOORE *v.* EUNICE (MOORE) SMITH

73-84 and 73-85 499 S.W. 2d 634

Opinion delivered October 8, 1973

Milton G. Robinson, for appellant.

No brief for appellee.

FRANK HOLT, Justice. Appellant sought custody of his 12-year-old son which the court denied. The custody of the boy was continued with the appellee mother. On appeal appellant contends that the chancellor's findings are not supported by the evidence. We think the appellant is correct. We review the evidence, as abstracted, since the appellee does not favor us with a brief.

We first observe that the controlling principle in child custody cases, which are always difficult, is focused solely upon the best interest of the child. In *Stephenson v. Stephenson,* 237 Ark. 724, 375 S.W. 2d 659 (1964), we held:

> "In custody matters the unyielding consideration is the welfare of the children. It matters not to this court which of the parties 'wins' custody, so long as the children are the ultimate winners of good care and home."

Appellant and appellee were divorced in 1963 at which time the appellee was given custody of their 2-year-old son, Carl, Jr. This was appellee's second of five marriages. It appears the appellant and appellee continued to live in the same vicinity. The appellant had enjoyed visitation rights with his son and maintained support payments. For about three months before this litigation, the boy had lived with the appellant father with appellee's consent. The appellee brought contempt proceedings against the appellant at the end of the three months alleging that he had refused to return their son to her. Appellant, by counterclaim, sought custody. The court found that the appellant was not in contempt and continued the custody of the child with the appellee. The appellant appealed from the denial of custody to him. About two weeks after this hearing, the appellant instituted another action seeking custody of his son alleging, *inter alia,* that the appellee mother had physically abused their son and the boy had fled to the shelter of appellant's home, whereupon the appellant took his son to the police and left him in their care. The police, at the direction of the chancellor who had received two telephone calls from appellee seeking advice, returned the child for the time being to the father.

Upon a hearing the court again continued the custody with the appellee. The two adverse decrees as to custody are consolidated on appeal.

In the first custody proceeding, as abstracted, the appellee testified that her son would not mind her although "he minded his father;" her son loves his father more than her; he wanted to live with his father; the father had bought him a mini bike, a Honda, and a sword; she was receiving $93 a month in Social Security payments from appellant for maintenance of the boy until appellant stopped payment to her after she let their son live with appellant for three months; because she had to leave for work at 6:30 a.m., she yielded to appellant's request about three months before this litigation to let the boy stay with the appellant; and this permission was solely for the welfare of the child because the father, who was retired, could let him sleep longer, take him to and pick him up from school. She further testified that the father had kept his agreement with reference to child support; she had never heard the appellant encourage the boy not to mind her, although she could not make the child mind her and that he had no respect for her; and her son had reported to the police that she had "beat" him.

One neighbor testifying for the appellant, stated she had two children approximately the same age as appellant's son and they played together; Carl, Jr., is high strung, high tempered and hard to approach; after he had spent more time with his father his attitude was better; and he played with other children without throwing fits. For the past several months this neighbor had observed a car parked in front of appellee's house on numerous occasions and at times the car was there in the morning; Carl, Jr., said the man's name was Bill; her little girl had made curious inquiry as to why this man was staying there so much; Carl, Jr., was having problems with his grades, although he attended school regularly; and appellee kept Carl, Jr., clean.

The appellant testified that he took his son on short trips with appellee's knowledge; appellee had brought

their son to live with him stating he could live there as long as he wanted to; appellee never asked him to return their son to her during the three months until the day he had the $93 Social Security check stopped being sent to her; he had understood they had a binding agreement that their son would live with him and he had refused to allow the child to return because of her living with Bill, her paramour. On legal advice, however, he permitted the boy to return to appellee with the understanding that she would "stick to her agreement" about not living with Bill; the night the boy was returned to appellee he went to the police because the appellee had whipped him and the police brought the boy to him; he loves his son very much and when his mother brought their son to him in March to live with him, their son was sick and disturbed; after a few hours he "calmed down;" appellee admitted to him Bill was staying with her and it was no one's business except hers. The boy needed orthodontic care which would cost $1,500 or $2,000.

The appellant, again testifying, said that after the boy had lived with him for three months he gained weight but lost weight upon his return to his mother; a few days before this first hearing he had taken him to a doctor who had prescribed medicine for the boy's nerves and another prescription for his stomach; the boy had made failing grades until he reached the sixth grade where he made nearly a "C" average because he had had three months opportunity to work with him; the appellee admitted to him that it was making their son nervous when she lived with her husband, Max Smith, to whom she was twice married and divorced, inasmuch as they were "having fusses and fights almost continuously."

A playmate of Carl, Jr.'s, testified that a man named Bill lives with the appellee; Bill sometimes stays with the appellee at night and that he had seen them "laying down in bed together," once with their clothes on and another time "they were up under the cover." He further testified that once when he spent the night with Carl, Jr., he awoke and saw Bill going to the bath-

room clothed only in his undershorts. He admitted that he and Carl, Jr., were good friends and had enjoyed shooting guns together. He said appellant had promised to give him a gun. However, he denied it was in relation to the trial.

Carl, Jr., testified that a Bill Andrews lived at their house; he had seen him in the bedroom with his mother and observed him leave her bedroom unclothed. When he complained to his mother about the presence of Bill, she told him it was not any of his business; he was afraid of Bill and had told his mother he wanted to live with his father. Carl, Jr., again testifying, stated that he was in the 6th grade; his father had been carrying him to school for the last two or three years when his mother had left him with his father as she went to work; he ate breakfast with his father and that his father picked him up after school and fed him; his father helps him with his school work and his mother never assists him; his father takes him to Sunday School and that his mother never does so; he had heard his mother cursing his father as well as a subsequent husband, one to whom she was married twice; she and this husband were constantly fussing and fighting; he had observed her drinking; and that he had never heard his father curse or observe him keeping or drinking intoxicants at his apartment. Carl, Jr., testified several times emphatically that he preferred to live with his father.

A juvenile court officer testified that she had observed Carl, Jr., on two occasions and noticed he had a "nervous mannerism consisting of twisting his hair." This caused bald spots on the front of his head. The minister of a local church testified that the appellant was a member of his church, attended with reasonable regularity, and he had observed the appellant bring his son with him. The home of the appellant, who lived alone, was clean and well kept. There was other testimony that Bill was seen at appellee's house where drinking occurred; that appellee had attended local night clubs with Bill as well as being unescorted and dancing with strangers.

Appellee's son, by her first marriage, testified that his mother provides a nice home for Carl, Jr., loves him and takes good care of him. On cross-examination, he admitted that when he had lived in his mother's home, with his mother's knowledge, he was dating a married woman, who was pregnant by him, and further she had spent several nights there. She was later divorced and he married her. He further admitted that during the time appellant and his mother were married, appellant supported his mother as well as himself and his sister.

There was evidence by one witness, who was related by marriage to the appellee, that preceding the first hearing appellant had mentioned $500 to her after her husband said to appellant he was "broke." However, she said no one heard appellant make that statement to her and "they had not been talking about this case."

Appellee adduced evidence from her daughter (appellant's stepdaughter) and another witness that appellee maintained an attractive home and environment, had good meals, and Carl, Jr., was well cared for. The appellee denied that she was living with any man; she considered herself a "good mother" and although she has attended various taverns, she does not drink to excess and always left her son in the care of his father because he is "in good hands;" she was married and divorced five times; she could not control her son and he told her he was going to live with his father because he loves him more than he does her; because he cried and wanted to live with his father she had permitted him to stay there three months "until you get yourself straightened up;" and her son would "lie."

The court continued the custody of the child, as previously indicated, with the appellee mother. Approximately a week following this hearing the appellant, as indicated previously, renewed his petition for custody of the child. At a hearing upon that petition the child testified that a few days after his custody was continued with his mother she became angry with him when he told her, in response to a question, that his love for

his father was greater than for her and that he didn't love her. She struck him and started pulling his hair. As she tried to find a belt he escaped and ran to his father's house and his father took him to the police station; his mother came and took him to his father's where he lived about a week and then had to go back to his mother's; that presently, when his mother leaves at 6:30, she leaves him with his half sister who takes him to school at an early hour resulting in his having to wait at the schoolyard until the building opens.

The appellant testified that when the boy appeared at his home after the altercation with his mother his eyes were red and his hair messed up. He complained that his mother had mistreated him. Appellant took his son to the police station. The appellee later brought the boy from the police station to his house stating that the judge had advised her to do so. The chancellor verified that he had suggested this solution to the appellee since she had called twice saying her son was "out of her control" and she wanted his advice. The appellee admitted that she slapped the boy because he would not mind her and that he left saying "I still hate you and I am going to live with my dad." Again, Carl, Jr., testified and urgently reiterated that he wanted to live with his father and the three months he lived with him were the "happiest" time he had ever had in his life.

It is true that in custody proceedings the mother is ordinarily favored and this maternal inclination entertained by the courts is based on the child's needs especially at an early age. However, we have said "[T]hat 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." *Qualls* v. *Qualls,* 250 Ark. 328, 465 S.W. 2d 110 (1971). As indicated in *Stephenson* v. *Stephenson, supra,* the courts are primarily concerned with the welfare of the child and if the father seems to be the better parent for the child's best interests then the courts will vest custody in the father. *Jackson* v. *Smith,* 250 Ark. 923, 467 S.W. 2d 704 (1971), *Campbell* v. *Richardson,* 250 Ark.

1130, 468 S.W. 2d 248 (1971). The attitudes and wishes of the child, although not controlling, are proper for the consideration of the chancellor in making an award of custody. *Campbell* v. *Richardson, supra.* We have recently approved a change of custody of a 15 year-old-girl to her father where the girl expressed a strong desire to return and live with her father and three brothers. *Ray* v. *Manatt,* 250 Ark. 230, 465 S.W. 2d 111 (1971). In that case the change of custody was approved even though the mother was ". . . shown to have been a dedicated and devoted mother making every effort to meet her daughter's special problem . . ." and she was a ". . . very wise, discerning and unselfish mother."

Of course, chancery cases are tried de novo on appeal and the decree will not be disturbed unless it is against the preponderance of the evidence. We also give particular importance to the chancellor's findings in these cases because of his position to observe the witnesses, their credibility, and the affection or lack of affection demonstrated by the competing parents or parties. *Wilson* v. *Wilson,* 228 Ark. 789, 310 S.W. 2d 500 (1955). However, if the preponderance of the evidence indicates that the chancellor did not award custody to the parent who could best provide for the future welfare of the child, we must reverse. *Cox* v. *Tucker,* 251 Ark. 714, 474 S.W. 2d 675 (1972). In the case at bar, we definitely are of the view that the future welfare and best interests of the child are with the father. The appellee, the mother, has been married and divorced five times—three times following the divorce from Carl, Jr.'s, father. Two of these marriages and divorces were to the same man and it appears undisputed that both of these marriages were characterized by constant cursing and fighting. Carl, Jr., failed in his grades although it appears from the testimony that he was socially promoted. According to Carl, Jr., only his father ever helped him with his studies and took him to Sunday School. It does not appear that his mother denied this. There was evidence that his mother permitted her paramour to live in her home and apparent illicit relations were observed by Carl, Jr., and a playmate. Appellee denied this and presented evidence she maintained a "spotless" house and properly cared for her son.

It could be that the father competed for the love and custody of his son by influencing him and his playmate as to their testimony. Also, that the parties' 12-year-old son lied as his mother stated he would do. The mother admitted however, that she could no longer discipline the boy and he was "out of control." A disinterested witness, a juvenile court officer, described him as a nervous child who twisted his hair to such an extent bald spots resulted. A doctor furnished a prescription for his nervousness and another for his stomach. Suffice it to say that Carl, Jr.'s, nervous conduct is a persuasive manifestation of the insecurity and instability generated by his unstable homelife. The emotional and physical impact of his experiences living with his mother, coupled with his unequivocal desire and demonstrated efforts to live with his father is sufficient together with the other circumstances, to clearly establish that the evidence preponderates in favor of the child's custody being awarded to his father.

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***.

That reasoning is particularly applicable in the case at bar.

Appellant next contends that the chancellor erred in ordering the defendant to pay attorney's fees for appellee's counsel, since there was no showing of need on her part or ability to pay by appellee. The award of attorney's fees is within the sound discretion of the trial court in a child custody case even though an aftermath of a divorce. *Hydrick* v. *Hydrick,* 224 Ark. 712, 275 S.W. 2d 878 (1955). In the case at bar the chancellor heard the testimony concerning the wages earned by Mrs. Smith. Appellant misplaces the burden of proof here. The burden is on appellant to show that the chancellor abused his discretion. Appellant does not demonstrate he is

unable to pay the fees nor that appellee's financial needs did not require the allowance.

The award of custody is reversed and remanded for proceedings not inconsistent with this opinion. The allowance of attorney's fees is affirmed.

Affirmed in part and reversed in part.

GREGORY ALLEN SPENCER *v.* STATE OF ARKANSAS

CR 73-84 499 S.W. 2d 856

Opinion Delivered October 15, 1973

Harold L. Hall and *Garner L. Taylor Jr.,* for appellant.

Jim Guy Tucker, Atty. Gen., by: *O. H. Hargraves,* Deputy Atty. Gen., for appellee.

CARLETON HARRIS, Chief Justice. Gregory Allen Spencer was convicted in the Pulaski County Circuit Court of the crime of first degree rape, the jury fixing his punishment at life imprisonment in the Arkansas Department of Correction, and from the judgment entered in accordance with that verdict, appellant brings this appeal. For reversal, two points are asserted; first, that the trial court erred in refusing to give appellant's Requested Instruction No. 2, and second, that the evidence was insufficient to support the verdict. For convenience, the second point will be first discussed.

Carolyn Jean May, 17 years of age, testified that she left her home at 1515 Cumberland in Little Rock about 5:00 A.M. to walk to her mother's home in Highland Court several miles away. At 14th and High Streets, appellant and a friend of his were engaged in conversation and she talked with them. Appellant's friend walked across to a liquor store, purportedly to buy cigarettes, and the witness stated that subsequently Spencer placed a knife to her throat and told her that if she did as he said, he wouldn't hurt her in any way. Mrs. May stated she was scared, shaking, and begging him to take the knife away from her throat, and that he told her to put her arms around him and do as he said. They then went to his apartment where she stated that she was raped. When interrogated as to whether she tried to escape, she said that she looked out of the windows, saw that the roof was too high, and slanted, and that while Spencer did not have the knife on her at the time, she was fearful that he would draw it again. Spencer was living with another girl, Angie Lee Roberts; after the alleged rape, Mrs. May told appellant that she had to go to the bathroom, and in the bathroom she asked Angie to help her get away, but the latter refused, stating that she was afraid and "they would all come up missing". At that time Spencer came to the door and inquired what was taking so long. Spencer then went to the store to get cigarettes and returned to the Spencer apartment where appellant, Mrs. May, Angie Lee Roberts, and Larry

Metz (the person who had been with Spencer on the street) played cards. The witness stated that they all then went to a store to buy cold drinks, and that she tried to "motion" someone in the store in order to convey her predicament, but could not get anybody's attention. After returning from the store, they went across the street to the apartment of Metz. There, Mrs. May, according to her testimony, still looking for an opportunity to escape, stated that her feet were cold and she wanted her shoes (which were still at the Spencer apartment). Appellant, at first, was unwilling to let her go, and kept whispering to Angie. Finally, he agreed and the two girls then started to the Spencer apartment but before reaching it, the witness talked Angie into letting her go.

There was corroboration of some of this evidence by Angie Lee Roberts. She said there was a window in the bathroom, but it was too small to go through, and that when she had first arrived at the apartment, Larry had told her not to go upstairs. She said that Spencer told her not to let Mrs. May go; that the prosecutrix had begged, but that she (Angie) was afraid of Spencer. She said she had told Mrs. May not to say anything when they went into the store and that she heard Spencer tell Larry Metz, "Watch her." She testified that Spencer told her "not to let her [Mrs. May] go at all *** to hold her to keep her from going." She was then asked what happened after she let the prosecutrix leave, and she stated that Spencer was very angry and that the two of them circled several blocks looking for her; that on their return to the apartment, Spencer "tore into me", striking her for permitting Mrs. May to leave.

Spencer admitted intercourse, but said it was voluntary on the part of Mrs. May. Appellant, of course, argues that there was no rape, Mrs. May consenting, and it is vigorously contended that she had opportunities to mention her predicament to others (at the store and on the street) and that this establishes that no rape was committed. We do not agree. The matters mentioned, of course, were facts to be argued to the jury, including the failure to make outcry, but the

jury was the sole judge of the credibility of the witnesses and it was within its province to believe or disbelieve the witnesses, and to determine whether Mrs. May was acting under duress and fear during the period of time that she was with the appellant and the others. In other words, there is no evidence in the case that establishes, as a matter of law, that no rape was committed. If the jury believed Mrs. May, the testimony was sufficient for conviction. We have said many times that corroboration is not necessary in a rape case. *Harrison* v. *State,* 222 Ark. 773, 262 S.W.2d 907, and cases cited therein. For that matter, as previously pointed out, there was, to a degree, corroboration of the testimony of the witness by Angie Roberts.

Appellant offered the following instruction:

> "You are instructed that force is an essential element in any crime of Rape and it must be committed forcibly and against the will of the female. It is not the persistence with which the party accused intended to prosecute his alleged illegal design, but the force actually used that is the element in the crime of Rape.
>
> "Before you can find this defendant guilty of the crime of Rape, you must find that the prosecutrix was actually under the influence of such alleged force at the time the act was committed. If there is a reasonable doubt, then you must acquit the defendant."

The court refused to give this instruction, stating that it was incorrect. We agree. The phrase, "It is not the persistence with which the party accused intended to prosecute his alleged illegal design, but the force actually used that is the element in the crime of Rape" is incorrect, for this implies that the force must take place at the moment of the criminal act. As long ago as 1878, this court, in *Bradley* v. *State,* 32 Ark. 704, said:

> "It is often a matter of great difficulty in trials for rape, and of assaults with intent to commit rape, to determine whether the act complained of was

done with or without force, and whether with or without the consent of the party complaining, and this arises from the peculiar character and surroundings of the offense charged.

"Force is an essential element in the crime of rape. The term is general, and in its application the quantum of force is not to be taken into consideration, *provided the act be consummated against the will of the female.*" [Our emphasis.]

Aside from that, appellant's theory was completely covered by other instructions given by the court. For instance, appellant's Requested Instruction No. 1, which was given, states:

"You are instructed that before you can find this defendant guilty of the crime of Rape, you must first be convinced beyond a reasonable doubt that there was in fact forcible compulsion upon the alleged victim, and that the said alleged act of sexual intercourse was without her consent.

"If you should find that there was no forcible compulsion on the part of the defendant, then you should find the defendant not guilty."

Appellant's Requested Instruction No. 3, given, reads as follows:

"While it is not essential that the prosecutrix make an outcry either before or after the alleged act is committed, you are instructed that the failure of the prosecutrix to make an outcry or to make it known to other persons or strangers that she has been the victim of a Rape, should be considered together with all facts and circumstances as tending to show a want of resistance."

Appellant's Requested Instruction No. 4, also given, told the jury that it had a right to consider the subsequent silence of the prosecutrix as bearing on the question of whether or not she consented to the act of intercourse.

The State's Requested Instruction No. 1 was amended after objection of appellant, and given as follows:

> "The defendant in this case is accused of the crime of Rape in the First Degree. First Degree Rape is the carnal knowledge of a female forcibly and against her will. A male is guilty of rape in the first degree when he engages in sexual intercourse with a female by forcible compulsion.
>
> "If you find beyond a reasonable doubt that the defendant in this County and State, sometime before the filing of this information, did have carnal knowledge or actually penetrated the private parts of the prosecuting witness with his private parts, and that this was done by forcible compulsion and against her will, he is guilty of First Degree Rape.
>
> "Now with regard to the force used, it may be violence or it may be putting the woman in fear, physically or mentally. In other words, the test is—was it against the will of the party upon whom the act was committed."

These instructions certainly covered the law relative to the offense charged and there can be no legitimate complaint that the jury was not properly instructed.

Affirmed.

CHESTER KING SR *v.* CLYDE LOVELL, JR. ET UX

73-106 499 S.W. 2d 859

Opinion delivered October 15, 1973

J. Harrod Berry, for appellant.

Matthews, Purtle, Osterloh & Weber, for appellees.

GEORGE ROSE SMITH, Justice. The outcome of this litigation between neighbors turns upon whether Treadway Road, in Pulaski county, is a public road or a private road. The chancellor found it to be private and entered a decree allowing the appellees to maintain at its entrance a sign reading: "Private Road—Use Only By Permission or Right." The appellant insists that Treadway Road is actually a public road and that therefore the sign should be taken down.

The road in question, only 660 feet long, runs north from Faulkner Road, an east-west county road. The appellees' property is on the west side of Treadway Road, a little more than 200 feet north of Faulkner Road. The appellant's property lies slightly farther to the north and about 500 feet east of Treadway Road. For a number of years Treadway Road has provided access to the houses owned and occupied by the parties.

In 1967 the appellant King and three other landowners brought this suit to enjoin various defendants

from obstructing Treadway Road. The appellee Lovell, joined as a defendant, filed an answer asserting that Treadway Road was in fact a private driveway in which the plaintiffs had no "rights of egress and ingress." The appellant King, as a plaintiff, then filed a reply stating that "in truth and in fact the said Treadway Road is a private driveway, and plaintiff [King] has no rights arising by virtue of prescription." Apparently the other three plaintiffs did not join in King's concession that the road was a private driveway.

On March 18, 1968, the chancellor entered a decree dismissing the suit as to Lovell's codefendants and making this finding with respect to Lovell and King: "That under the evidence in this case the defendant, Clyde Lovell, Jr., should be permanently restrained and enjoined from interfering with the use by Chester King, Sr., (and his successors in title) of the road known as Treadway Road as a means of egress and ingress from and to his property to and from Faulkner Road, and he is hereby so restrained from interfering with such use." There was no appeal from that decree.

In 1972 King filed the present petition, asserting that Lovell was interfering with King's use of Treadway Road and asking that Lovell be held in contempt of court and be enjoined from further interference with King's rights. At a hearing the parties introduced testimony bearing upon the public or private character of Treadway Road. The chancellor, as we have said, found the road to be a private one and permitted the Lovells to erect a sign so stating.

We agree with the chancellor. In the first place, the 1968 decree appears to be conclusive as between King and Lovell. The binding effect of a judgment is to be determined by the pleadings as well as by the judgment itself. *Webb* v. *Herpin,* 217 Ark. 826, 233 S.W. 2d 385 (1950). Here both King and Lovell had filed pleadings averring that Treadway Road was a private driveway. The chancellor evidently adopted that view, because the decree recognized King's rights in the road only as a means of egress and ingress from and to his

property. That limitation in the decree is not in harmony with King's present assertion that Treadway Road is a public thoroughfare in which he has unlimited rights.

In the second place, the chancellor again found, in the supplementary decree now before us, that Treadway is a private road. That finding is not contrary to the weight of the evidence. The fee title to the strip occupied by the road is privately owned. There has been no formal dedication of a right of way to the public. It does not clearly appear that the road has been used by the public in general other than as a means of access to a few homes in the vicinity. Such a restricted user could be regarded as giving rise to a private easement rather than to a public one. See *Barbee* v. *Carpenter,* 223 Ark. 660, 267 S.W. 2d 768 (1954). Although certain witnesses living on Lawson Road testified that they used Treadway Road as a means of access to the upper Hot Springs highway, the relationship of the three roads to one another is so inadequately described that we are unable to follow the appellant's argument in this respect. Upon the record as a whole the decree does not clearly appear to be against the preponderance of the proof.

Affirmed.

BILL WADE *v.* CLEO MOODY, COUNTY JUDGE ET AL

5-6228 500 S.W. 2d 593

Opinion delivered October 15, 1973
[Rehearing denied November 19, 1973.]

Bob Scott and *Robert D. Smith III,* for appellant.

Jim Guy Tucker, Atty. Gen. by: *Lonnie A. Powers,* Asst. Atty. Gen., for appellee.

LYLE BROWN, Justice. A complaint was filed in the Lawrence County Chancery Court by Cleo Moody, County Judge, and David Hodges, Prosecuting Attorney, who are the appellees. By their complaint they sought to enjoin the appellant, Bill Wade, from interfering with the use of a road by the public. Appellant was so enjoined and hence this appeal. The issues joined on appeal concern (1) whether the court should have dismissed the complaint, (2) whether it was proper for the trial court to strike the testimony of one of the witnesses, (3) whether it was proved that the road was used by the public adversely to the rights of the landowner, and (4) whether the public had abandoned the use of the road.

The road in dispute was designated by the witnesses as Ridge Route Road. It runs roughly north and south

and is said to be approximately three and one-half miles long. It is not a part of the county road system. It connects on each end with east and west roads which are a part of the county road system. A substantial portion of the road traverses lands owned by appellant. The record in this case consists of approximately 1000 pages of testimony introduced by 52 witnesses, and a multitude of maps and pictures. The abstract of the testimony consists of 119 pages. A recount in this opinion of the substance of all testimony of all witnesses will not be made for obvious reasons. We shall later refer to some of the evidence as we resolve those points wherein the evidence is relevant.

Appellant first contends that his motion to dismiss the case should have been granted because it was not brought in the name of the State of Arkansas. He refers us to Ark. Stat. Ann. § 17-302 (Repl. 1968). It is there provided that actions by counties may be brought in the name of the state for the use of the county. The motion was oral and out of time. It was made on the morning of the trial and, of course, after the case had been set for trial. See Rule 2, Uniform Rules for Circuit and Chancery Courts, March 1, 1969. Furthermore, the court's refusal to consider the oral and untimely motion suggests no prejudice to appellant; in fact the motion went to a matter of form rather than substance.

Appellant next contends the court erred in striking the testimony of Donna Lee Bacon. The case was tried intermittently over a period of months. The rule on the witnesses was invoked at the beginning of the trial. Mrs. Bacon was asked by appellant to come to the trial a week prior to her testimony. The court questioned the witness when her testimony was challenged on the ground that she had not been in the witness room. She conceded that she had been told by appellant and his wife, in general, what previous witnesses had testified, and more particularly that the appellees' witnesses had testified that the old road had existed for many years. We have grave misgivings about the ruling of the court under the circumstances, however Mrs. Bacon's testimony was placed in the record and it is

very clear that it was cumulative to the testimony of a number of other appellant witnesses. It was particularly similar to the testimony of her father, Leland Killebrew. We are unable to say the appellant was prejudiced.

The third of appellant's contentions is that the trial court should have ruled as a matter of law that appellees had failed to prove that the road was used by the public adversely to the rights of appellant. One of our leading cases on this point is *Fullenwider* v. *Kitchens,* 223 Ark. 442, 266 S.W. 2d 281 (1954). There it is stated: "All our opinions are in harmony on one point, *viz.:* Where there is usage of a passageway over land, whether it began by permission or otherwise, if that usage continues openly for seven years after the landowner has actual knowledge that the usage is adverse to his interest or where the usage continues for seven years after the facts and circumstances of the prior usage are such that the landowner would be presumed to know the usage was adverse, then such usage ripens into an absolute right".

Witness Robert Taylor, 84 years of age, said he had lived on the south edge of Ridge Route Road for the past 60 years. He said the road went north to Woodrow Bratcher's cabin, then on north to Gilbert Sandford's home, thence further north to Virgil Brown's home and there it joins an east and west public road; that the county grades Ridge Route Road and has done so since 1962; and that people have traveled the road over the past sixty years. He related that at one time there was a church on the road.

John Bratcher testified that his father owned the Wade lands before the latter bought them; that he was thoroughly familiar with Ridge Route Road and that it had been there for many years; that he bladed the road for the county in 1962; that the road was widened in 1965 by a man hired by the county; and that some twelve years ago appellant cut some trees across the road but the witness and some other men removed them within a week.

Robert Smith testified that he had been familiar with the road since the late thirties and that it generally follows the same route as always. He said that sometimes he used the road two or three times a year and at other times he would skip four or five years before going back. He said sometimes a car could not use the road because of the weather.

Witness Ed Bilbrey, 63 years of age, said he had been familiar with the road for about 50 years; that he had used it from one to twenty times a year; that the public used the road unobstructed except for the short period when appellant constructed the gate.

Ed Bilbrey, Jr., said he had been familiar with the road since 1957 and since that time had traveled it two or three times a year.

Witness Dot Foley lives within a mile of Robert Taylor's house. He said that for the most part the road was used by people fishing and hunting and by the few people living in the area of the road. He said the road was on approximately the same roadbed it was during the last fifty-four years.

Witness Bill Flippo is employed by the Game and Fish Commission and covers the area in question. He said he had traveled Ridge Route Road continuously for the past twenty-one years, mostly checking on hunters. He conceded that Mr. Brown had a cattle guard at his end of the road on the north but said he had never seen a gate at the north entrance. He said at one time there was a logging operation near the road and that fact made it difficult to get through with a car or truck.

Witness Leslie Clements said he first went over the road in 1923 and continued to travel it regularly until about 1950; that his travels since that time have been restricted to hunting. He said the road starts on the south at Mr. Taylor's house and comes out on the north at Mr. Brown's house and has been approximately in the same position, although slightly varied in spots.

Virgil Brown lives at the north end of the road and has known about Ridge Route Road since 1960. The public entered his unlocked gate to use the road. The road ended at Mr. Taylor's house.

Cebe Burrough said he had been familiar with the road for the past seventeen years and used the road on an average of three times a year. "The road has always been passable and people went through there, but in the winter time it would get real bad where you couldn't hardly get through there at all in a car."

Witness Earl Rorex is 68 years of age and a game warden. "I have been traveling Ridge Route Road for the last 25 or 30 years when I was a game warden and used the road so that I could check on hunters and fishermen in the area."

We could continue to recite the testimony of a number of other witnesses who used the road. The other evidence of appellees' witnesses, both on direct and then on rebuttal (eleven in number), follows generally along the lines of identification and use as related by the witnesses from whom we have recited. This does not mean that all the evidence favored appellees. In fact appellant produced some seventeen witnesses to sustain his position. However, we have weighed the evidence and we are unable to say that the finding of the chancellor was against the preponderance of the evidence. The point is, we conclude that the evidence preponderantly establishes public use for such a time as to bring into play the rule enunciated by *Fullenwider*, namely, that the usage was so long as to ripen into an absolute right.

Finally, it is argued that there was insufficient evidence to support the court's finding that the road had not been abandoned. Again, this is a fact question. We shall not abstract the evidence on the point, some of which was concededly offered by both sides. The essential testimony which sustains the finding of the chancellor is that of Robert Taylor, who said people have traveled Ridge Route Road "to the open road over the last sixty years", and that the road has been under

care of the county for eight years. There was evidence obstructions placed in the road by appellant had been shortly removed (even the gate had been taken down). Then there was the testimony of Woodrow Bratcher, who testified that since 1962 he had annually graded and dozed the road; and finally, there was evidence that some federal governmental agency had worked on part of the road. On the whole, we are unable to say the chancellor erred in finding no abandonment. Furthermore, the burden of establishing abandonment was on appellant. Once color of title was established by adverse possession, it became incumbent on appellant to show abandonment. *Wilson* v. *Spring,* 38 Ark. 181 (1881).

Affirmed.

NATHANIEL BARKSDALE *v.* STATE OF ARKANSAS

CR 73-95 499 S.W. 2d 851

Opinion delivered October 15, 1973

Robert F. Morehead, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Philip M. Wilson,* Asst. Atty. Gen., for appellee.

LYLE BROWN, Justice. This is an appeal from a robbery conviction. Appellant advances five points for reversal. We find them to be without merit.

In January 1973, a neighborhood grocery in Pine Bluff was robbed by two men. City Officer Bobby Simmons happened to be patroling in the area at about the time of the robbery and heard a report of the incident over his radio. He spotted appellant and another man walking across the school grounds and radioed for help. Officer Keintz answered the call and when he arrived the two men were running across a field. Appellant and his companion were apprehended. A brown bag containing money was found along the trail used by the two men. Appellant gave the officers a fictitious name. The victim of the robbery shortly went to police headquarters and identified appellant as the man who held the gun on him. The argument of appellant that the evidence does not support the verdict has no validity.

Appellant says the court erred in denying his motion for a continuance. On the morning set for the trial appellant moved for a continuance to enable him to get another lawyer. He told the court that the two lawyers defending him and his codefendant were not familiar enough with the case and that "he just did not want them". This was the first knowledge the court or appellant's attorneys had that such a motion would be made. The attorneys conceded that they were ready to try the case. One of the attorneys complained that appellant had not paid his fee but the court advised that the fee would be paid by the county. In denying the motion for continuance the

court said: "The jury is here, you have had ample time to notify the Court and if we were to permit a man to come into court every time his case is set for trial and discharge his attorneys we never would try anybody". The court certainly did not abuse its discretion. *Hill* v. *State,* 250 Ark. 812, 467 S.W. 2d 179 (1971).

The court properly denied appellant's motion for a mistrial on the grounds that he was wearing prison garb. The record shows that appellant was wearing bell-bottom white trousers, a gold shirt, a white and brown striped jacket, and house shoes. There was no evidence of any name or number on the apparel. Nor do we find any merit in the allegation that appellant was brought handcuffed in full view of the jury. The record shows that appellant was handcuffed but the cuffs were taken off outside the doorway of the courtroom. In the first place, there is no showing that any prospective juror saw the appellant so shackled. Secondly, the officers had a right to take such precautions as would be reasonably necessary to prevent an escape. *Rayburn* v. *State,* 200 Ark. 914, 141 S.W. 2d 532 (1940). Appellant was brought to Pine Bluff from the penitentiary for trial; also, there was proof on behalf of the state that appellant was unusually belligerent.

In the course of examining Officer Worley, a witness for the State, the prosecutor asked Worley if he had questioned the defendant. Worley replied in the affirmative. At that point the court inquired if the prosecutor planned on introducing a statement, to which the prosecutor replied in the affirmative. The officer proceeded to say that appellant gave the name of Leroy Williams and that appellant desired not to make any further statement. Appellant here contends that the prosecutor was erroneously indicating to the jury that he had a written statement, which in fact he did not have. The point is hardly in the category of being rational. The officer said appellant made the statement that his name was Leroy Williams; then, almost in the same breath, the officer said appellant declined to make any further statement. Certainly the jury was not misled. When appellant took the stand he admitted to having given the officer a fictitious name.

Affirmed.

JOE A. ARNOLD *v.* ALL AMERICAN ASSURANCE COMPANY

73-92 499 S.W. 2d 861

Opinion delivered October 15, 1973

W. K. Grubbs Sr., for appellant.

Richard E. Griffin and *Robert J. Johnson,* for appellee.

JOHN A. FOGLEMAN, Justice. This appeal questions the propriety of a summary judgment recovered by appellee insurance company against Joe A. Arnold, its agent in Eudora. The liability asserted by appellee arose through the issuance by Arnold of eight certificates of credit life insurance for a total of $11,163.04 on the life of Van B. Austin, who died on January 8, 1972, while all were in force. Appellee's recovery was based upon the issuance of certificates in excess of $10,000, the limit on Arnold's authority. Because of evidence of appellee's ratification of the agent's acts, we agree with appellant that the summary judgment against him was erroneous.

Arnold was an officer of The Eudora Bank. The certificates issued by him were coincident with loans made to Austin by that bank. The numbers, dates and amounts were as follows:

Certificate No.	Date	Amount
3695S	1/20/70	$ 3,489.84
698S	3/5/71	3,416.76
632S	3/26/71	800.00
1883S	6/14/71	856.44
1782S	8/17/71	1,000.00
1783S	8/17/71	800.00
1784S	8/17/71	200.00
1785S	8/17/71	600.00
TOTAL	11,163.04	

These were all issued under a credit life master policy issued by appellee to the bank on April 21, 1969, on which date Arnold was appointed as appellee's agent. Under the provisions of the policy, the insurance on the life of the bank's borrower was effective simultaneously with the making of the loan if the name of the debtor was furnished and the insurance premium paid. The policy limited coverage to $10,000 on the life of any one debtor. It provided for payment, upon death of an insured debtor, to the bank to the extent of its interest, and since the certificates were "level term" any excess was then to be paid to the estate of the debtor.

By letter of September 4, 1969, appellee directed Arnold's attention to the limitation on his authority to issue certificates on the life of one debtor. Appellee furnished its agent a form for reporting certificates issued under the master policy and remitting the premiums. These reports were made monthly. The form did not provide a place for listing names of debtors, but about the twenty-fifth day of each month a copy of each certificate was transmitted to appellee along with the report and remittance for the total premiums involved.

Appellee promptly paid $10,000 to the bank, but did not pay the excess to the executrix of Austin's estate until after she had filed suit and obtained judgment against appellee. Appellee defended on the basis of the master policy limits, and cross-complained against Arnold for any amounts it was required to pay Austin's estate, alleging that he had exceeded his authority. Arnold defended by pleading estoppel and waiver of both the policy limita-

tion and the limitation on his authority. Both appellant and appellee then filed motions for summary judgment based upon the pleadings, answers to interrogatories and requests for admissions. The circuit court granted appellee's motion and rendered judgment for $800.

It was disclosed that appellee, after paying the bank, tendered the return premium on certificates 1784S, 1785S and for partial cancellation of 632S exactly two months after Austin's death. No explanation is made for the apparent random selection of policies on which to return the premium, but it is clearly indicated that the $10,000 payment included certificate number 1783S, issued on the same date as 1784S and 1785S. There is no indication that issuance of certificate number 632S was unauthorized, because the amount of credit life insurance on Austin outstanding prior to the issuance of this $800 certificate was only $6,906.60. Arnold stated in his affidavit that he never received notice of issuance of certificates on Austin's life in excess of limits until after claim was made on the policies by Austin's executrix. Appellee admitted that, prior to the death of Austin, it had not notified either the bank or Austin of any over-issue of certificates. By answers to interrogatories, appellee stated that, under its procedures, each individual certificate is reviewed to determine compliance with the terms of the master policy. It also informed the court that a data processing control system to disclose issuance of certificates in excess of $10,000 on the life of one person had been established after January 1, 1972, but that the system was new and still in the process of being perfected. Appellee admitted receipt before September 1, 1971, of Arnold's report and premium remittance dated 8/24/71 covering the period from July 29, 1971, to August 24, 1971, together with copies of certificates 1782S, 1783S, 1784S and 1785S.

The circuit judge held that appellee was entitled to recover $800 from Arnold, as a matter of law. We do not agree. The judgment was based upon the court's finding that appellee advised Arnold of the cancellation of excessive certificates as soon as it knew of the over-issue. Apparently, the judgment was limited to the face amount of certificates 1784S and 1785S, because the issuance of certificate 632S did not result in an over-issue.

We do not know how the court arrived at the finding that, as a matter of law, appellee acted to cancel the excess certificates as soon as it knew of the over-issue. It is admitted that a full report of the issuance of each certificate on Austin's life had been in the hands of the insurance company for at least four months prior to Austin's death. The information included the date and term of the certificate, its amount, the name of the debtor insured and a designation of the master policy. Consequently, appellee had been informed of everything Arnold knew relating to these particular certificates. Even when appellee remitted $10,000 to the bank on February 23, 1972, it did not then tender any return premium or attempt to cancel any certificate. It waited for two weeks thereafter to do so, at which time demand for payment of the excess had been made by the attorney for Austin's estate.

At the outset, we point out that appellee's argument that the judgment should be affirmed because there is substantial evidence to support it has no application to a summary judgment in its favor. The only conditions that justify granting a summary judgment are those under which the moving party is entitled to judgment as a matter of law. *Borden, Inc.* v. *Wommack,* 253 Ark. 1067 (1973), 490 S.W. 2d 781; *Weathers* v. *City of Springdale,* 239 Ark. 535, 390 S.W. 2d 125; Ark. Stat. Ann. § 29-211 (Repl. 1962). These conditions exist only when there is no genuine issue as to any material fact and when, even though the facts are undisputed, reasonable, fair-minded persons could only draw one conclusion from them. *Borden* v. *Wommack,* supra; *Wilson* v. *McDaniel,* 247 Ark. 1036, 449 S.W. 2d 944; *Mason* v. *Funderburk,* 247 Ark. 521, 446 S.W. 2d 543; *Harvey* v. *Shaver,* 247 Ark. 92, 444 S.W. 2d 256; *Bergetz* v. *Repka,* 244 Ark. 60, 424 S.W. 2d 367. We do not find such a condition to prevail here. The burden was upon appellee to show its entitlement to summary judgment, and if there is any substantial evidence on which a contrary result could be reached, the judgment should be denied. *Widmer* v. *Modern Ford Tractor Sales,* 244 Ark. 696, 426 S.W. 2d 806; *Wirges* v. *Hawkins,* 238 Ark. 100, 378 S.W. 2d 646; *Reddell* v. *Missouri Pacific Railroad Company,* 238 Ark. 753, 384 S. W. 2d 486. See also, *Knox* v. *Goodyear Stores,* 252 Ark.

530, 479 S.W. 2d 875. Appellee failed to meet this heavy burden.

Appellant contends that since he had made full disclosure to his principal of all information he had relating to the issuance of the Austin certificates, appellee had all the knowledge appellant had of the over-issue; and, by failing to protest and keeping the premiums until claim was made on the certificates by Austin's estate, it waived the limitation on his authority, ratified his acts in the premises and is estopped to seek reimbursement from him. Insofar as the evidence disclosed by the record relied upon on the motions for summary judgment is concerned, we agree with appellant. To say the least, there is a genuine, material issue of fact raised by appellant's defense.

In the law of agency the concept of ratification is closely related to the doctrine of estoppel, even though the two may be distinguished. The matter is discussed by the authors of Corpus Juris Secundum. They say:

> Ratification is a doctrine of agency, which is well-established in the common law, and it refers to the express or implied adoption and confirmation by one person of an act or contract performed or entered into in his behalf by another without authority. * * * The substance of the doctrine of ratification is the idea of confirmation after conduct, and the doctrine is based on evidence of such complex factual elements as knowledge of the facts, acceptance of benefits, change of position, agency, and approval of conduct. Ratification proceeds upon the assumption that there has been no prior authority and constitutes a substitute therefor; it is in the nature of a cure for authorization and is equivalent to original, prior or previous authority.[1]
>
> Although it has been observed that in the literature of the law there has often been little disposition to distinguish between ratification and estoppel in pais, they are, nevertheless, distinguishable, * * *.

[1] 2A C.J.S. 646, Agency, § 63

> The substance of ratification, as distinguished from that of estoppel which is the inducement to another to act to his prejudice, is confirmation after conduct. Although acts and conduct amounting to an estoppel in pais may also amount to a ratification, the elements of an estoppel in pais are not, as such, required to be present in order to have a complete ratification. Hence, where there exists, in fact, a sufficient ratification, there is no need of invoking the doctrine of estoppel.[2]

> * * * notwithstanding their capability of being distinguished, ratification and estoppel are closely allied; the legal effect thereof is the same; the abstract difference between them may not render it improper to consolidate them, or to include one in the other, in the concrete consideration of the facts of a particular case; and the terms "ratification" and "estoppel in pais" are sometimes used in a way which seems to ignore any distinction between them.[3]

> The agent may sometimes invoke estoppel against his principal when the latter seeks to hold him responsible for unauthorized acts. If the principal upon being informed of them does not promptly repudiate them, he will be estopped to deny the agent's authority, and this is so where he has knowledge of such acts and accepts the benefit of them.[4]

While it cannot be said that Arnold was induced to exceed his authority by any act of his principal, we will consider the matter in the light of the interrelationship of the two principles rather than according to the strict abstract distinctions between them. The facts pleaded and shown on motion for summary judgment are sufficient in our opinion to raise the questions of waiver, estoppel and ratification.

It is well settled in Arkansas law that when the principal has knowledge of the unauthorized acts of

[2] 2A C.J.S. 649, Agency, § 64
[3] 31 C.J.S. 377, Estoppel, § 60
[4] 2A C.J.S. 638, Agency, § 61

his agent, and remains silent, when he should speak, or accepts the benefit of such acts, he cannot thereafter be heard to deny the agency but will be held to have ratified the unauthorized acts. *St. Louis-San Francisco Railway Co.* v. *Lee Wilson Company,* 212 Ark. 474, 206 S.W. 2d 175. It is also clear that ratification may be implied, rather than express, and implied ratification may be inferred from the acts and words of the principal. *Kirkpatrick Finance Company* v. *Stotts,* 185 Ark. 1089, 51 S.W. 2d 512. It has been said that affirmance of an unauthorized transaction may be inferred from a failure to repudiate it, or from receipt or retention of benefits of the transaction with knowledge of the facts. Restatement of the Law, Second Edition, Agency, §§ 94, 98, 99; 3 Am. Jur. 2d 560—564, Agency, §§ 175, 176, 178. Of course, less is required to constitute a ratification as between the principal and a third party than between principal and agent. *Kirkpatrick Finance Company* v. *Stotts,* supra. However, it seems to be well recognized that ratification of unauthorized acts of an agent acting in excess of his powers releases the agent from liability to the principal for violation of his duty, if the principal has full knowledge of all the circumstances at the time of the ratification and has not been obliged to affirm the act to protect his own interests or induced to do so by misrepresentation or duress of the agent. Restatement of the Law, Second Edition, Agency, § 416; 3 Am. Jur. 2d 571, 587, Agency, §§ 186, 210.

A fundamental requirement to finding ratification, at least when the principal has not received any benefits from the transaction, is that the principal have full knowledge of all material facts connected with the transaction and not merely an opportunity to know them. *McCarroll Agency* v. *Protectory for Boys,* 197 Ark. 534, 124 S.W. 2d 816; *City National Bank* v. *Riggs,* 188 Ark. 420, 66 S.W. 2d 293; *Bank of Hoxie* v. *Wollen,* 181 Ark. 843, 28 S.W. 2d 61; *Coffin* v. *Planters Cotton Company,* 124 Ark. 360, 187 S.W. 309. But failure to object may constitute acquiescence or ratification, if from the facts and circumstances adduced in evidence, it can be said that the principal must have known, or

had knowledge of facts to put him on notice, of the agent's unauthorized actions. *Brown* v. *Maryland Casualty Company,* 246 Ark. 1074, 442 S.W. 2d 187; *American Mortgage Company* v. *Williams,* 103 Ark. 484, 145 S.W. 234. See also, *Johnson* v. *Wynne,* 76 Ark. 563 89 S.W. 1049. Ratification is a question of fact for a jury whenever the facts are in dispute or are such that reasonable men could draw different conclusions therefrom, and is a question of law only when the facts are undisputed and unequivocal. See *Johnson* v. *Wynne,* supra; 3 Am. Jur. 2d 564, 779, Agency, §§ 178, 359. See Restatement of the Law, Second Edition, Agency, p. 244, § 94, Comments a, b; p. 254, § 98, Comments c, d.

Even though it is ordinarily true that the principal must have knowledge and not mere notice of the facts and circumstances relating to the agent's action before there can be a ratification of them, the principal is charged with such knowledge, when benefits accrue to or are retained by him, if from all the facts and circumstances in the case he knew or could have known the material facts. *Lakeside Bridge and Steel Company* v. *Duvall,* 179 Ark. 963, 19 S.W. 2d 1107.

If it is inferable from all the facts and circumstances that appellee accepted or retained the premiums on the questioned certificate with full knowledge of all the facts, or with knowledge of facts sufficient to put it on notice of the over-issue, a factual issue was presented. *Alexandria Refining Company* v. *Harper,* 173 Ark. 1180, 292 S.W. 135; *Johnson* v. *Wynne,* supra. If, from all the circumstances in evidence, appellee could have known that the agent had exceeded his authority and still retained the benefits accruing to it, a jury would be justified in inferring that appellee actually had sufficient knowledge upon which to base a finding of ratification. *Lakeside Bridge & Steel Company* v. *Duvall,* supra. See also, *Johnson* v. *Wynne,* supra.

We find a close parallel to this case in *Neeley* v. *Wilmore,* 131 Ark. 328, 198 S.W. 710, which puts to rest any doubt about the propriety of a summary judgment

in this case. There the principal sought to recover from its plantation manager the amounts he paid its bookkeeper as salary in excess of the amount due. The payments were made by drafts signed by the manager which showed upon their face that they were for salary. Annual statements of the account on which the drafts were drawn were furnished to the principal. The manager testified that the books were open to inspection by the principal when he visited the farm and that the annual statements included the checks drawn in favor of Harrison on his salary account. The circuit judge instructed the jury to the effect that continuing to pay the drafts if the principal knew, or by the exercise of reasonable care should have known, that the salary account was overdrawn constituted ratification. We said:

> If any examination had been made by appellants they would have seen at the end of each year that Harrison had overdrawn his account. By continuing to pay drafts for his salary when they knew that his salary accounts were overdrawn, or were in possession of facts which would lead to such knowledge, they ratified the action of appellee. It was the duty of appellants to have examined the drafts showing overpayments of salary to Harrison, and they will be deemed to have been in possession of the knowledge which such an examination would have imparted to them. The continued payment of drafts drawn by appellee in favor of Harrison for his salary after this, as above stated, constituted a ratification of appellee's action. Hence the instruction was not erroneous.

The only excuse offered by appellee for not having full actual knowledge of the over-issue is that the certificates were filed by it under the name of the creditor holding the master policy, so that it had no means of determining whether multiple certificates on one life had been issued in excess of the limits of the master policy and of the agent's authority. To put the matter most favorably to appellee, the determination whether it was charged with knowledge of the over-issue under these circumstances would pose a jury question.

Upon this view of the matter, the judgment must be reversed and the cause remanded for further proceedings consistent with this opinion.

JACK L. LESSENBERRY *v.* RICHARD B. ADKISSON AND JAMES R. HOWARD, JUDGES

73-95 499 S.W. 2d 835

Opinion delivered October 15, 1973

Leon B. Catlett, for petitioner.

Jim Guy Tucker, Atty. Gen., by: *O. H. Hargraves,* Deputy Atty. Gen., for respondents.

Amicus- Curiae Arkansas Association of Criminal Defense Lawyers, by: *Wm. R. Wilson Jr.* and *Floyd J. Lofton.*

Amicus Curiae Professional Ethics and Grievance Committee of Arkansas Bar Association, by: *E. B. Dillon Jr.*

J. FRED JONES, Justice. The regularly elected judge of the Pulaski County Circuit Court, Fourth Division, ordered Jack L. Lessenberry, a practicing attorney in Little Rock, to represent Bonnie Jo Tenpenny at her jury trial on a charge of delivering a controlled substance consisting of heroin in violation of the state law. Lessenberry failed and refused to represent Mrs. Tenpenny at the trial presided over by a special judge. He was held in contempt by the special judge and a fine of $1,000 was assessed against him. The matter is now before us on certiorari.

The pertinent facts appear as follows: On March 5, 1973, Bonnie Jo Tenpenny was arrested and placed in jail charged with the sale of heroin. She was first arraigned in municipal court where Mr. Lessenberry appeared with her and assisted in obtaining her release from custody on bond. Mrs. Tenpenny was arraigned in circuit court on March 19. Mr. Lessenberry appeared with her at the arraignment, entered her plea of not guilty, requested a jury trial and also a bill of particulars. The case was passed to April 18, 1973, for a jury trial and the oral motion for a bill of particulars was granted. On April 9, 1973, Attorney Lessenberry wrote a letter to the presiding judge, Honorable Richard B. Adkisson, with carbon copies to Jeff Pence, Esq., Hon. Byron Southern and Mrs. Bonnie Tenpenny, which states as follows:

"Dear Judge Adkisson:

I appeared with Mrs. Tenpenny for arraignment and at that time, you set the case for a jury trial for April 18, 1973.

I had represented Mrs. Tenpenny in Municipal Court. I told her, however, that I would not handle the matter in circuit court, especially in view of the trial date. I referred her to Jeff Pence and he has told me that Mrs. Tenpenny did not keep her appointment with him.

> I wish to be relieved of this matter because I have so many obligations I am unable to satisfactorily discharge them all.
>
> Please advise me what I must do to cause my name to be removed as Mrs. Tenpenny's attorney."

This letter was filed in the circuit clerk's office on April 10, 1973, and on the same date the record shows the following notation:

> "The Court doth hereby deny Jack L. Lessenberry's request to be relieved as attorney of record in the above styled cause."

On April 10, 1973, Mr. Lessenberry wrote another letter to Judge Adkisson with copies to Hon. Byron Southern and Mrs. Bonnie Tenpenny as follows:

> "I wrote you on April 9 advising you that I desired to be relieved from any obligation to represent Mrs. Tenpenny in the forthcoming trial of the above referenced case. In that letter, I requested your assistance and instructions as to what must be done to accomplish this. In that letter, I set forth some of the reasons why I did not wish to represent Mrs. Tenpenny. There are other reasons which I did not think it appropriate or necessary to mention.
>
> This morning I received a telephone call from your clerk notifying me that time was short and that I was expected to appear with Mrs. Tenpenny for trial of the case of April 18.
>
> After due consideration of all of the circumstances, I will, of course, be present in court on April 18 as you directed, but I have decided that I will not represent Mrs. Tenpenny in this trial.
>
> I have absolute respect for the court in general and in you particularly. In this regard, I will gladly serve the court in any professional and reasonable way, but I will not sacrifice what I believe to be overriding professional and personal standards."

This letter was filed in the clerk's office on April 11, 1973, and on the same date the trial judge entered an order as follows:

> "On this 11th day of April, 1973, is presented the matter of the motion of the attorney for the defendant to be relieved as counsel of record.
>
> The Court finds that on March 19, 1973, Mr. Jack L. Lessenberry appeared as attorney with and on behalf of the defendant at plea and arraignment at which time this case was set for a jury trial on April 18, 1973, at his request; and on April 10, 1973, Mr. Lessenberry filed a motion to be relieved as attorney of record in this case which motion was denied on the same day; and on April 11, 1973, by letter delivered to this Court, which is filed and made a part of the record herein, stated his intentions not to represent the defendant although his motion to be relieved as counsel was overruled.
>
> THEREFORE, the Court being well and sufficiently advised, Mr. Jack L. Lessenberry, is ordered to appear in this Court on April 18, 1973, and represent defendant on the trial of this case."

This order was filed on the following day, April 12, 1973, and a bill of particulars was mailed to Attorney Lessenberry on April 16. The record of the proceedings for April 18, 1973, recites as follows:

> "This day comes the State of Arkansas by James Neal, Deputy Prosecuting Attorney, and comes the defendant in proper person and by her attorney, Jack L. Lessenberry, and the defendant having previously entered a plea of not guilty, the State announces ready for trial and Mr. Lessenberry announces that the defendant is without counsel and not ready for trial; whereupon the Court doth reset the case for a Jury Trial on July 12, 1973."

The trial court then entered an order appointing the Public Defender to represent Mrs. Tenpenny and the Public Defender was advised by letter that he or one

of his deputies was that date appointed to represent the defendant in a jury trial to be held on July 12, 1973. The proceedings had on April 18, 1973, as above set out were held before the Honorable James R. Howard, Special Judge, the regular judge, Honorable Richard B. Adkisson, not being present. Following the April 18 proceedings as above set out, a hearing was conducted on the matter of contempt and from the evidence submitted, the court found as follows:

> "[T]hat Jack L. Lessenberry appeared with Bonnie Jo Tenpenny on March 19, 1973, as her regular, privately employed attorney, but that on April 9, 1973, he wrote the court requesting that he be relieved and that on April 10, 1973, the court denied the motion and, thereafter, by its order of April 12, 1973, Jack L. Lessenberry was to appear and represent the defendant on the trial of the case. The court further finds that Jack L. Lessenberry is, as a consequence, in contempt of court and should be punished accordingly."

Mr. Lessenberry testified that he had previously represented Mrs. Tenpenny on a misdemeanor charge in North Little Rock Municipal Court and that he was contacted by the defendant's husband who requested him to represent her on the drug charge. He said he advised her husband that he would be unable to represent her because of other commitments and that he suggested that they employ other counsel. He said that Mr. Tenpenny returned to his office requesting him to represent Mrs. Tenpenny and that he consented to represent her in municipal court for a fee of $250. He said he was only paid $100 but that he appeared in municipal court with the defendant and procured her release from custody on a reduced bond. He said that the first notice he had that Mrs. Tenpenny was being arraigned in circuit court was when Mrs. Tenpenny called him by phone and advised that she was then before Judge Adkisson on arraignment. He said that he had never agreed to represent Mrs. Tenpenny in the circuit court case and had not been advised of her arraignment. He said he was concerned, however, about the possibility that Mrs. Tenpenny might be under the erroneous impression that he was to represent her in circuit court, so he hurried over to circuit court where

she was being arraigned. He said Mrs. Tenpenny's case was immediately called after he arrived in court, and that he entered a plea of not guilty for her. He said he was asked if the defendant wanted a jury trial and he advised the court that she did. He said that he then requested that the defendant be provided with a bill of particulars and a sample of the substance she was alleged to have sold for chemical analysis. He said that the case was then set for jury trial on April 18 and that following these proceedings Mrs. Tenpenny attempted to pay him a fee but he refused to accept it.

Mr. Lessenberry said he does not recall whether he advised Mrs. Tenpenny at the arraignment that he would not represent her, but that he did advise her to bring her husband and come to his office as soon as possible, and that Mr. and Mrs. Tenpenny did come to his office two or three days later. He said that in the meantime, he had discussed the case with the prosecuting attorney and reviewed the file in the prosecuting attorney's office. He said that when Mr. and Mrs. Tenpenny returned to his office, he advised them of the essence of what the prosecutor's file contained and told Mr. and Mrs. Tenpenny that he very definitely could not accept employment in the case.

Mr. Lessenberry said that the prosecuting attorney asked him to sign a waiver of request for a formal bill of particulars in order to obtain access to the prosecuting attorney's file, but that he refused to sign the waiver. He said he told the prosecuting attorney that he could not represent Mrs. Tenpenny at the trial and did not want to do anything that would prejudice the rights of the attorney who might follow up his oral request for a bill of particulars. He said that when he advised the Tenpennys that he could not represent Mrs. Tenpenny, he assured them that he would assist them in getting a good, competent attorney, and that he would turn his entire file over to such attorney. He said he did call another attorney and made an appointment for the Tenpennys to talk with him, and that the attorney agreed to assist Mrs. Tenpenny. He said he does not remember whether he mentioned the trial date to the other attorney but that he did advise the other attorney that it was an urgent matter.

He said he then directed the Tenpennys to the office of the other attorney, and they left his office going to the other attorney's office. He said he heard nothing further concerning the matter until about April 6 when Mr. Byron Southern, as assistant to the prosecuting attorney, called and advised that he had prepared, and had available, a bill of particulars in the case. He said he advised Mr. Southern that he did not represent Mrs. Tenpenny, but that attorney Jeff Pence represented her. He said he knew that arrangements had been made for Mrs. Tenpenny to be represented by Pence and that she was supposed to pay Mr. Pence an agreed fee. He said he talked with Mr. Pence later on the afternoon of April 6 and that Mr. Pence advised him that Mrs. Tenpenny had not come to his office with his fee as she had agreed to do, and that he did not represent her. He said this all occurred on Friday, April 6, and on the following Monday, April 9, he wrote a letter to Judge Adkisson asking what he should do to be relieved as attorney of record in the case. He said that he did not hear directly from Judge Adkisson but that on the following day he received a telephone call from Judge Adkisson's clerk, Gayle Peters, advising him that Judge Adkisson had received his letter but was denying his request, and that he would have to go to trial in the case on April 18. He said that upon receipt of this information, he wrote the letter dated April 10 to Judge Adkisson. He said he delivered the letter April 10 to Judge Adkisson in person and discussed the matter with him for about 30 minutes on that date. He said he offered to disclose *in camera* the full reasons why he could not ethically represent Mrs. Tenpenny at the trial, but that Judge Adkisson closed the discussion by leaving for another appointment.

Mr. Lessenberry testified that Mrs. Tenpenny and her husband were fully aware that he was not representing them; that they had offered to pay him a fee to do so and he refused to accept it. He testified that he honestly believed that he could not adequately represent Mrs. Tenpenny and at the contempt hearing he offered to dictate into the record at a later date the specific reasons why he thought he would be unable to ethically and adequately represent Mrs. Tenpenny. The special trial judge then inquired as to whether or not Mr. Lessenberry was aware

of the order from Judge Adkisson requesting that he be in court that day to represent Mrs. Tenpenny and Mr. Lessenberry responded that he was.

Attorney Jack Holt, Jr. testified that Mr. Lessenberry called him on March 22 in regard to representing Mrs. Tenpenny. He said that Mrs. Tenpenny came to his office; that he introduced her to Jeff Pence, a young attorney in his office, and that Mr. Pence arranged for another attorney, Mr. Alexander, to assist Pence in representing Mrs. Tenpenny. He said that Pence advised him that he had discussed the matter with Mrs. Tenpenny and agreed on a fee of $500, which Mrs. Tenpenny had agreed to bring to the office. He said Mrs. Tenpenny subsequently advised that she was unable to obtain the money for the fee and that he then recommended to Mr. Pence that he check back with Mr. Lessenberry, or advise Mrs. Tenpenny to get in touch with the Public Defender.

Mr. Jeff Pence testified that he first met Mrs. Tenpenny on March 22 when she, together with her husband, came to his office upon referral first by Mr. Lessenberry and then by Mr. Holt. He said that he and attorney Hubert Alexander interviewed Mrs. Tenpenny on March 27 and they agreed on the amount of a fee. He said Mrs. Tenpenny advised them she did not have the money to pay their fee but that she probably could obtain it, so they set up another appointment for the following Friday at 4 p.m. when Mrs. Tenpenny said she would bring at least a part of the fee. He said that when Mrs. Tenpenny failed to keep that appointment, he so advised Mr. Lessenberry by telephone. He said he assumed that he did not represent Mrs. Tenpenny since she had not retained him to represent her. He said Mrs. Tenpenny later called and advised that she did not have any money and that he referred her to the public defender's office.

Mr. John Earl, assistant prosecuting attorney, testified that as a general practice in the prosecuting attorney's office, when a bill of particulars is requested by a defendant, the entire prosecutor's file is turned over to the defense attorney for copying in lieu of preparing a formal bill of particulars but in doing so, the defense attorney is required to sign a waiver of demand for a bill of par-

ticulars. He said he discussed such waiver with Mr. Lessenberry but that after he and Mr. Lessenberry went over the file, Lessenberry refused to sign the waiver form. He then testified as follows:

> "He [Lessenberry] was uncertain at that time as to whether he would take the case, and he didn't want to waive any rights of a later attorney that might take the case."

Mrs. Tenpenny testified at the contempt hearing. She said that her husband paid Mr. Lessenberry $100 to represent her in municipal court and that she never did pay him anything else except the $100. She said she received a copy of the letter dated April 9 from Mr. Lessenberry to Judge Adkisson, and that upon receipt of the copy of that letter she called the public defender's office and was advised that the Public Defender could not represent her unless the Judge said he could. She said that prior to that date Mr. Lessenberry had told her he was not going to represent her and referred her to Mr. Pence. She said she agreed to pay Mr. Pence a fee but when she was unable to get the money, she so advised Mr. Pence and he suggested she call the Public Defender. She said that after talking with the Public Defender, as above set out, she talked with Judge Adkisson by phone and he said for her and Mr. Lessenberry to be in court on the 18th.

At the conclusion of the above testimony at the contempt hearing, Special Judge Howard made the following findings and observations in part as follows:

> "I don't know why Judge Adkisson insisted on this situation that developed here, but I'm looking at an order here that directs him to appear and try this case and based on this letter and his statement, he's in violation of the order. And I'm also looking at an oath that I took this morning that said, 'I'll faithfully discharge the duties of the office.' I tend to agree with Jack Holt and Jack Lessenberry about their attitudes toward representing certain people under certain circumstances. I've been in the same predicament. * * * I just don't see where I can do anything, as much as I hate to, but find you in violation

of this order and in contempt of court. I'll say this. You've got reasons, as Mr. Catlett observed, they're a little obscure at this point and it probably should remain that way because of the defendant's rights. He shouldn't be testifying here in public about something he might know that would be prejudicial to the defendant's case in the future. So, what I'll, the best way I know out of it is to find him in contempt, enter a fine without prejudice to his right to petition the judge that made this order. It's not my order. But without prejudicing him petitioning Judge Adkisson for a rehearing based upon any facts you'd like to dictate in private into this record. And further I would direct the clerk not to order any execution on this judgment until such time as you petition this court. And if you don't get any relief there, then I hope the Supreme Court will grant a Writ of Certiorari for review. But I know of no other authority other than but to do that. That'll be a Thousand Dollar fine."

The statement referred to was sealed in an envelope marked as exhibit 3 to Lessenberry's testimony and was made a part of the record. The envelope had not been opened when the record was filed in this court. The substance of the statement was to the effect that Mr. Lessenberry had never accepted representation of anyone he believed to be engaged in the sale or use of "hard" drugs. He said he advised Mrs. Tenpenny of the probable evidence that would be presented against her and that while she denied to him that she had made the specific sale to the police officer involved in the particular case, he concluded from his interviews with her that it would be necessary to prepare a completely fictitious defense in order to represent her as she desired to be represented. He said he honestly believed he could not provide her with effective representation, but that he did not relate to her the specific reasons why he could not accept employment from her.

The record in this case presents an unfortunate series of misunderstandings that simply should not arise in a court of law. A client, of course, who has contracted for the services of an attorney, may discharge his attorney

with or without cause (*Gentry* v. *Richardson,* 228 Ark. 677, 309 S.W. 2d 721) and it goes without saying that an attorney has the right to withdraw from his contract with a client when he does so with the client's consent and approval and when the rights of others, or the administration of justice, are not affected by such action. Both sides in the case at bar cited the Florida case of *Fisher* v. *State,* 248 So. 2d 479, which was a civil case in which an attorney attempted to withdraw as counsel during the course of litigation and the trial court required him to continue to represent his clients. The Florida Supreme Court held that it was beyond the power of the trial court to require the attorney to continue to represent the clients in that particular case; and the Supreme Court did hold in essence, that a trial court has the power to enforce the orderly conduct of the business of the court and has inherent power to require attorneys who appear in cases before the court, to conduct themselves in such manner, and follow such procedures, that the attorneys' actions do not interfere with, or unduly delay, the handling of the cases. In *Fisher* the Supreme Court said:

> "This power, however, derives from the responsibility to effectively conduct the business of the Court. It does not mean that the requirement of consent by the Court to such withdrawal includes the power to compel an attorney to continue in the representation of a party when he complies with rules for withdrawing or gives due notice to his client of his intention to withdraw, unless *unusual circumstances* exist which would interfere with the orderly processes of the Court. . . . "

Most of the cases dealing with the subject are based on attempted withdrawal of an attorney either without the consent of the client or at such time that a withdrawal interferes with the orderly conduct of court business. In the Colorado case of *Riley* v. *District Court In & For Second Judicial Dist.,* 507 P. 2d 464, the court stated the general rule as follows:

> "As a general statement, an attorney who undertakes to conduct an action impliedly stipulates that he will prosecute it to a conclusion. He is not at liberty

to abandon the suit without reasonable cause. Furthermore, an indigent defendant cannot dismiss appointed counsel without permission of the court. Likewise, counsel for an indigent defendant cannot withdraw without permission. Although never explicitly stated by this court, it seems to be the well-stated rule of law that motions for withdrawal of counsel are addressed to the discretion of the court and will not be reversed unless clear error or abuse is shown. We agree with those statements contained in People v. Wolff, 19 Ill. 2d 318, 167 N.E. 2d 197, wherein it was said:

' * * * A motion by an attorney for leave to withdraw for any reason is addressed to the sound discretion of the court and, like all motions, it may or may not be meritorious. For that reason, a burden rests with the moving party to prove to the court's satisfaction the legitimacy of the request, and when the petitioner either fails or refuses to do so, the court may properly deny the motion. * * * ' "

See also *Foley* v. *Peckham,* 256 So. 2d 65; *Singleton* v. *Foreman,* 435 F. 2d 962; *Phoenix Mut. L. Ins. Co.* v. *Radcliffe on the Del., Inc.,* 266 A. 2d 698.

It would appear from the record before us, that Attorney Lessenberry as well as the defendant Mrs. Tenpenny never considered Lessenberry as having been employed to represent her. It would also appear, however, that at her arraignment in circuit court the trial judge had ample reason to believe that Mr. Lessenberry had been employed to represent the defendant, and that he was in the performance of his duty under such employment in entering her plea of not guilty and requesting a jury trial and a bill of particulars. This arraignment was on March 19 and on that date the case was set for jury trial on April 18. It appears that after Mr. Lessenberry ascertained the evidence the state proposed to present against the defendant, and after conferring further with her, he concluded that he could not properly, conscientiously and adequately represent Mrs. Tenpenny and he so advised her on or about March 22. It appears from the record that Mr. Lessenberry reasonably believed he had

fulfilled his obligation to Mrs. Tenpenny as a practicing attorney by helping her procure other counsel who would represent her at the trial.

It is apparent from the full record before us, that by March 22 Mr. Lessenberry had learned from the defendant matters he was unwilling to reveal to the trial judge as reasons he could not properly represent the defendant in view of the possibility that the defendant, through other counsel, might still waive a jury trial and be tried by the judge sitting as a jury. If Mr. Lessenberry was convinced of the defendant's guilt to the extent he could not properly represent her, and if she was insisting that he prepare a fictitious defense in her behalf, he of course was correct in requesting that he be relieved as attorney of record; and, perhaps Judge Adkisson was hasty in summarily refusing to honor Mr. Lessenberry's request even as late as April 9 without discussing the matter with Lessenberry.

It must be remembered in this case that Judge Adkisson did not *appoint* Mr. Lessenberry to represent the defendant, but simply ordered Lessenberry to appear in court and represent the defendant on April 18. Even though Mr. Lessenberry's letter of April 9 was some twenty days after he appeared as attorney for Mrs. Tenpenny at plea and arraignment, it was also nine days prior to the trial date and there is no evidence in the record before us that his withdrawal on that date would have interfered with the orderly conduct of the court's business.

The Texas case of *Ex Parte Mays,* 212 S.W. 2d 164, was a case in many respects much like the case before us. In that case an attorney was *appointed* to represent the accused as an indigent person. The trial judge had been unable to get in touch with the attorney prior to the appointment and the attorney asked to be relieved from the appointment because he had participated in the investigation of the case and his familiarity with the facts convinced him of the defendant's guilt and made it impossible for him to properly and conscientiously represent the defendant. The trial court refused to relieve the attorney and following a contempt hearing a fine of $100 was assessed against him. The Court of Criminal Appeals on certiorari, held that in order to hold the attorney guilty

of contempt, he must have refused to do the particular act commanded by the court and *which ought to have been done,* and in that case the court said:

> "In the present matter, as the record now stands, we do not think the trial court had authority to cause relator to do a thing which was contrary to good conscience and for which no man ought to be punished for failing to do."

In the absence of evidence pertaining to interference with the orderly conduct of the court's business, other than the mere fact the case was set for jury trial on April 18, we conclude that the trial court should not have summarily refused Mr. Lessenberry's request to be relieved as attorney of record without first ascertaining the status of his supposed employment, or the full reasons for his refusal to accept employment to represent the defendant. The judgment of the special trial judge holding Lessenberry in contempt is therefore reversed, and the cause dismissed.

Reversed and judgment quashed.

FOGLEMAN, J., not participating.

BILLY W. BOWEN, BY HIS FATHER AND NEXT FRIEND, ROBERT L. BOWEN *v.* RICHARD CLINTON SAXTON AND MARY CARPENTER

73-104 499 S.W. 2d 867

Opinion delivered October 15, 1973

Mike Wilson and *Kenneth C. Coffelt,* for appellants.

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

J. FRED JONES, Justice. Billy W. Bowen, a 12 year old minor, by his father and next friend Robert L. Bowen, brings this appeal from a judgment of the Pulaski County Circuit Court entered on a jury verdict for personal injury damages in the amount of $3,100. Young Bowen assigns five points for reversal as follows:

> "The verdict of the jury and judgment of the Court is contrary to both the law and the evidence.
>
> The verdict is a nullity, and legal judgment could not, and was not, entered thereon.
>
> The trial court erred in accepting the verdict and refusing to order the jury to further deliberate.
>
> The case should be reversed, because the jury failed to return a verdict for Robert L. Bowen for the Doctors, Hospital and Medical bills expended for Billy Bowen.
>
> It is clear the jury intended for the plaintiffs to recover more money than the $3100.00, and it was without authority to compensate in the form of attorney's fees, as the jury attempted to do, and the error could not be corrected by the trial court in the manner in which it attempted to do."

Young Bowen sustained rather severe injuries when his bicycle collided with an automobile owned by Miss

Carpenter and being driven from a parking lot by Mr. Saxton. Young Bowen enumerated his injuries in his complaint and by amendment alleged that he had incurred medical and surgical expenses in the amount of $1,910.39 and would incur further medical expenses in the amount of approximately $2,250. The complaint prayed total damages in the amount of $50,000. The answer admitted that an accident occurred on the date involved but alleged that any injuries and resulting damages suffered by young Bowen were occasioned, or contributed to, by his own negligence. The case was submitted to the jury on general verdict forms. The jury found for young Bowen and used the form originally prepared as follows:

> "We, the jury, find for the plaintiffs and assess their damages as follows:
>
> Robert Bowen $_____.
> Billy Bowen $_____."

This form as returned by the jury reads as follows:

> "We, the jury, find for the plaintiffs and assess their damages as follows:
>
> Robert Bowen $_____.
> Billy Bowen $3100.00, plus costs and lawyer's fees."

The trial court entered judgment on the verdict for young Bowen in the amount of $3,100 and court costs.

It was stipulated by the parties that after the foreman of the jury returned the above verdict and before the jury was discharged, the plaintiff's attorney objected to the verdict and requested that the jury be instructed by the court to retire and reconsider its verdict; that the objection and request were made in chambers outside the hearing of the jury and were overruled by the court, after which the jury was discharged.

The parties agree that attorney's fees were not prayed for in the complaint or recoverable in a tort action of this nature. The appellant argues, however, that the verdict for attorney's fees was fatal to a valid verdict upon which judgment could be rendered and the trial court erred in returning judgment for the $3,100 plus court costs with the elimination of the attorney's fee provision of the verdict. The appellees agree that the attorney's fee part of the verdict was a nullity but argue that the trial court correctly eliminated that item as a mere surplusage, and was correct in entering judgment for the $3,100 damages plus court costs. We agree with the appellees.

The appellant argues that it was clearly the jury's intention to award attorney's fees in addition to the damages young Bowen had sustained and we agree, but the simple fact is that an attorney's fee is not an element of damage in a case of this nature. The jury was clearly instructed as to what did constitute the elements of damage in this case and it had no authority to add an attorney's fee to the damages so found. The appellant's request for reconsideration by the jury would have, in effect, required the jury to return a verdict increasing the amount of damages they had found in sufficient amount to cover a reasonable attorney's fee. We are of the opinion, and so hold, that the trial court was correct in treating the attorney's fee portion of the verdict as surplusage and entering judgment for the amount of damages found by the jury.

The appellant argues that the case should be reversed because the jury failed to return a verdict in favor of Robert L. Bowen, the father of Billy, for the doctors, hospital and medical bills expended for young Billy. The answer to that contention lies in the fact that the father did not sue as a separate party plaintiff for the amount he had expended in medical expenses for his son. He alleged that the plaintiff (Billy W. Bowen) had suffered serious permanent and disfiguring injuries to his person and had incurred medical and surgical expenses in a definite amount of $1,910.39, and would

incur further medical expenses in the approximate amount of $2,250.

The court gave the plaintiff's requested instruction No. 17, AMI 2213, which reads in part as follows:

> "If you decide for Billy Bowen on the question of liability against any party he is suing, you must then fix the amount of money which will reasonably and fairly compensate him for any of the following elements of damages which you find were proximately caused by the negligence of Mr. Saxton or Miss Carpenter. . . .
>
> B. The reasonable expense of any necessary medical care and treatment received and the present value of such expense reasonably certain to be required in the future."

Under this, plaintiff's instruction No. 17, the jury was simply told to find the amount of damages sustained by young Bowen, and all the elements of damages they were to consider were clearly spelled out in the instruction. We have no way of determining, and it is not within our province or that of the trial court to attempt to determine, how the jury arrived at its verdict of $3,100. The explanation why the verdict was not in a greater amount might well lie in defendant's instruction No. 4, AMI 2102, given to the jury without objection. This instruction reads in part as follows:

> "If you should find that the occurrence was proximately caused by negligence of both plaintiff and defendants, then you must compare the percentages of their negligence.
>
> If the negligence of plaintiffs is of less degree than the negligence of defendants, then plaintiffs are entitled to recover any damages which you may find they have sustained as a result of the occurrence after you have reduced them in proportion to the degree of their own negligence.
>
> On the other hand, if defendants were not negligent or if the negligence of plaintiffs is equal to

> or greater in degree than the negligence of defendants, then plaintiffs are not entitled to recover any damages."

As to the evidence of comparative negligence considered by the jury, we quote briefly from the appellant's abstract. Young Bowen testified:

> "I was on my righthand side of the road as close to the cars as I could get when he popped out in front of me and we collided, and I don't know anything else after that. I was riding my bike in the Jacksonville Shopping Center. I do not recall seeing Mr. Saxton's car."

One of the defendants, Mary Carpenter, testified as abstracted by the appellant:

> "I knew there was going to be a collision as soon as I saw the bike. Right when I saw the bike it happened. The bike hit the car. He was not looking at me. He had his head down. He was over close to the rear of the parked cars."

Mr. Saxton, the driver of the automobile, testified, as abstracted by the appellant:

> "I was heading east and was going probably 5 miles an hour, and I started to make the lefthand turn and I looked up and I saw the line of cars and I saw a young boy on a bike pedaling, leaning forward with his head down. He looked up like this, (indicating) and then hit the car."

The judgment is affirmed.

H. DAVEY WYATT, ET AL *v.* PAUL G. MILLER

73-80 500 S.W. 2d 590

Opinion delivered October 15, 1973
[Rehearing denied November 19, 1973.]

Hodges, Hodges & Hodges, for appellants.

Murphy, Arnold & Blair by: *H. David Blair,* for appellee.

FRANK HOLT Justice. The appellee instituted this action seeking specific performance of a contract for conveyance of land. Incidental damages were also sought. In response the appellants asserted primarily that they were bona fide purchasers and raised other subsidiary issues. The chancellor found the issues for the appellee and from that decree comes this appeal. We first consider appellants' contention for reversal that the chancellor erred in holding appellants had actual notice of appellee's contract to purchase.

On May 19, 1971, after extended negotiations, appellee contracted to purchase 32 acres of land from appellants Ethyl Jennings and Vaden Wammack for the sum of $27,750. The appellee gave his personal check for $500 as earnest money and on that date the husband of appellant Jennings cashed it. Appellants Wyatt and Lamb, brothers-in-law, had also negotiated with the appellant owners to purchase their property. On May 20, 1971, early the morning following appellee's purchase contract, appellant Wyatt appeared at the Jennings' premises and renewed negotiatons for purchasing the property for $27,500. He was advised a "better offer" was made. During that day a partnership was agreed upon between appellants Wyatt and Lamb. That afternoon Wyatt returned with a notary and secured a warranty deed for the sum of $30,000 for the property from the appellants Jennings and Wammack without being advised of the previous contract with the appellee.

Appellant Lamb testified that his brother-in-law Wyatt, came to the store on May 20 (the day following appellee's purchase contract) and told him "[O]ur offer [$27,500] has been upped on the Jennings property." "If we are going to buy it, we are going to have to . . . be near $30,000. . ." According to appellant Lamb,

they were aware that "a lot of people were dealing on it" and he "knew things were getting pretty hot. . ." He testified that he went to the Jennings' premises on the morning following appellee's purchase contract. Appellants Wyatt and Lamb testified that they did not know about the appellee's contract and that the owners did not apprise them about it. Mrs. Wammack did not testify. Her sister, Mrs. Jennings, testified that they did not acquaint Wyatt and Lamb about signing appellee's purchase contract the previous day. Appellants Wyatt and Lamb acknowledge they learned of the purchase contract before filing their deed.

The night of May 20 (date of appellant purchasers' deed) the appellee took his contract of purchase to the home of the county recorder who accepted and recorded the instrument the next day or May 21. Appellee's contract was improperly acknowledged and, therefore, defective for recordation purposes. Becaue of "town talk" appellants had someone inspect the county records on May 22 and learned of the existence of appellee's purchase contract. Appellants Wyatt and Lamb's deed was not recorded until May 24, 1971.

In consideration for the warranty deed issued to appellant purchasers, Wyatt tendered the following: a check in the amount of $9,500 payable to Ethyl Jennings dated May 20, 1971; a check in the amount of $10,000 by an agent of Lamb's made payable to Wammack and dated May 20, 1971; and a $10,500 negotiable promissory note dated May 20, 1971, by both appellants made payable to Jennings and secured by a mortgage. At the time the checks were tendered, there were insufficient funds in both bank accounts to cover the checks. However, appellants made sufficient deposits in their accounts so that the checks were paid when presented a week later. The promissory note was not negotiated and was sequestered at trial.

Ark. Stat. Ann. § 49-211 (Repl. 1971) requires that an instrument in writing must be properly acknowledged for recordation purposes. It is undisputed that appellee's contract was defective in this respect. Therefore, as the chancellor correctly found, appellee's pur-

chase contract did not constitute constructive notice to the appellant purchasers. *Prince* v. *Alford,* 173 Ark. 633, 293 S.W. 36 (1927). However, in the case at bar, the appellant purchasers had actual knowledge of the recordation of appellee's purchase contract within two days following its execution and two days before they filed their own deed. We have held that knowledge of the recordation of a defective instrument is a factual matter which can be considered in determining whether a subsequent purchaser had actual notice. *Prince* v. *Alford, supra.*

Our cases are uniform in holding that if the second purchaser had actual knowledge of a prior deed or contract at the time of purchase, the junior conveyee cannot establish himself as a bona fide purchaser. *Collins* v. *Heitman,* 225 Ark. 666, 284 S.W. 2d 628 (1955), *Henderson* v. *Ozan Lumber Co.,* 216 Ark. 39, 224 S.W. 2d 30 (1949), *Millman Lumber Co.* v. *Bryant,* 213 Ark. 277, 209 S.W. 2d 878 (1948), and *Valley Planing Mill Co.* v. *Lena Lumber Co.,* 168 Ark. 1133, 272 S.W. 860 (1925).

In *Woods* v. *Wright,* 254 Ark. 297, 493 S.W. 2d 129 (1973), we held that the second purchaser will be deemed to have actual notice if the senior conveyee shows "by a preponderance of the evidence that [the second purchaser] had notice of such facts and circumstances as would put a man of ordinary intelligence and prudence on inquiry which, if diligently pursued, would lead to knowledge of his rights. ****Whatever is notice enough to excite attention, put a party on guard and call for inquiry is notice of everything to which the inquiry might lead, and whenever one has sufficient information to lead him to a fact he shall be deemed conversant with it." Also see *Kendall* v. *J. I. Porter Lumber Co.,* 69 Ark. 442, 64 S. W. 220 (1901). Proof of sufficient notice to place the junior conveyee on inquiry may be established by circumstantial evidence. *Woods* v. *Wright, supra.*

In the case at bar, when we consider the direct and circumstantial evidence, together with the appellants' knowledge of the recordation of appellee's de-

fective purchase contract, we hold that the chancellor correctly found the appellants had actual notice and, therefore, are not bona fide purchasers. Further, the chancellor correctly ordered appellee to reimburse the appellant Lamb for his $10,000 check which was paid to appellants Jennings and Wammack, the owners of the land; appellee pay appellant Wyatt and his wife the sum of $9,500 for reimbursement of their personal check which was paid to appellant landowners; $7,500 or the balance of appellee's $27,750 purchase agreement be paid to appellant Jennings, less the $500 held in the court registery which was ordered returned to appellant Jennings; appellant purchasers' $10,500 promissory note be cancelled; appellants Wyatt and Lamb execute a deed conveying the 32 acres to appellee and appellee have judgment against appellant Wyatt for damages resulting from cutting and removing hay from the 32 acres.

As to the latter item about damages, appellant Wyatt contends that it was error for the chancellor to hold him liable for $217.50 as a result of cutting and removing hay from the 32 acres. Appellant Wyatt is liable for anything of value which he removed from the property. *Garner* v. *Horne,* 219 Ark. 762, 245 S.W. 2d 229 (1952). In the case at bar, we cannot say that the chancellor's finding is against the preponderance of the evidence that appellant Wyatt is liable by acquiescing in the cutting and removing of the hay from the property by his father.

We have considered and find no merit in appellants' other subsidiary contentions. Since we hold that the appellant purchasers had actual notice of appellee's contract to purchase the land, we deem it unnecessary to discuss other related issues appellants assert for reversal.

Affirmed.

BYRD, J., not participating.

DAVIS DUTY *v.* CITY OF ROGERS, ARKANSAS AND BENTON COUNTY, ARKANSAS

73-87 500 S.W. 2d 347

Opinion delivered October 22, 1973

Appellant, Pro Se.

J. Wesley Sampier, for appellees.

CARLETON HARRIS, Chief Justice. On January 1, 1971, appellant, Davis Duty, assumed his duties as Municipal Judge of the City of Rogers, appellee herein. At that time, the salary for the office was the legally authorized maximum of $4,800 per year. On March 30, 1971, Act 456 of the 1971 General Assembly (Ark. Stat. Ann. § 22-704.1 [Supp. 1971]) became law. The act authorized a maximum salary for various municipal judges in the state. Pertinent portions of this act provide as follows:

> "The annual salary of the Judge of the Municipal Court situated within the city or town hereinafter designated shall be retroactive to and from and after January 1, 1971, as follows:"

Here follows a long list of cities, the county in which said city is located, and the salary authorized for the

various municipal judges. The maximum salary provided for Rogers is $7,500 per year. However, there is a subsequent paragraph as follows:

> "Provided, that the salaries of the judges of the municipal courts of Bentonville, Rogers and Siloam Springs, Benton County, as now established by law may be increased in such amounts not to exceed the maximum salaries authorized herein, only as approved by the Quorum Court of the County and the governing body of the respective cities."

On November 2, 1971, the City of Rogers enacted Ordinance No. 682 which increased the municipal judge's salary from $4,800 per year to $6,000 per annum, retroactive to January 1, 1971, and also established a salary of $7,500 per annum, to become effective on January 1, 1972. Duty was paid the $1,200 retroactive pay (difference between $4,800 and $6,000) for the year 1971; from January 1, 1972 through June 30, 1972, at which time appellant resigned from the office, he was paid at the rate of $7,500 per year, or the amount of $3,750 for the six months served. Appellant instituted suit against the city and county for $1,500 (the difference between the $6,000 paid in 1971 and the $7,500 which he claimed to be due under the provisions of Legislative Act 456). Appellees demurred, said demurrers being sustained, and appellant declining to plead further, the complaint was dismissed with prejudice. From the judgment so entered, appellant brings this appeal. For reversal, it is asserted that the court erred as a matter of law in finding that the salary increase (to $7,500) granted to appellant was not automatically retoractive to January 1, 1971.[1] We proceed to discuss this contention.

Appellant, of course, relies upon the first sentence of the legislative act, quoted in this opinion, providing

[1]It is also asserted that there being no genuine issues of material fact to be decided, the court erred as a matter of law in denying appellant's motion for summary judgment. Under the view taken herein, this point becomes moot, and for that matter, the denial of a motion for summary judgment is not an appealable order. See *Widmer* v. *Ft. Smith Vehicle & Machinery Corporation,* 244 Ark. 971, 429 S.W. 2d 63.

that the salary granted shall be retroactive, and he points out that the city ordinance set the salary at $7,500 (though this amount was not the original increase but only became effective in the year 1972). Appellant recognizes that the proviso, with reference to the authorization of $7,500, also herein quoted, appears to modify the sentence relied upon, and he spends some time in his breif quoting grammatical authorities, citing Fernald, *English Grammar Simplified* (Rev. Ed. 1963). The citation deals with restrictive and non-restrictive clauses, and attention is called to the fact that there is only one comma in the disputed portion of the provision, such comma being located before the word "only". We need not discuss this argument for we have held many times that the primary rule in the construction of statutes is to ascertain and give effect to the intention of the Legislature. *Koser* v. *Oliver,* 186 Ark. 567, 54 S.W. 2d 411. We have also held that the true meaning of the General Assembly must be ascertained from a consideration of the whole act. *Koser* v. *Oliver,* supra; *Bailey* v. *Abington,* 201 Ark. 1072, 148 S.W. 2d 176; and *Berry* v. *Gordon,* 237 Ark. 547, 376 S.W. 2d 279. Still further, in *Koser,* we pointed out that when the intention of the General Assembly is manifested. "The court will not permit punctuation to control, but will disregard punctuation or will repunctuate, if necessary, to give effect to what otherwise appears to be the proper and true meaning of the statutes. ***Whenever such intention can be discovered, it ought to be followed with reason and discretion in the construction of the statute, although such construction seems contradictory to the letter of the statute." In *Bailey,* we said:

> "It often happens that the true intention of the lawmaking body, though obvious, is not expressed by the language employed in a statute when that language is given its literal meaning. In such cases, the carrying out of the legislative intention, which, as we have seen, is the prime and sole object of all rules of construction, can only be accomplished by departure from the literal interpretation of the language employed. Hence, the courts are not always confined to the literal meaning of a

> statute; the real purpose and intent of the Legislature will prevail over the literal import of the words. When the intention of a statute is plainly discernible from its provisions that intention is as obligatory as the letter of the statute, and will even prevail over the strict letter. The reason of the law, as indicated by its general terms, should prevail over its letter, when the plain purpose of the act will be defeated by strict adherence to its verbiage. It is frequently the case that, in order to harmonize conflicting provisions and to effectuate the intention and purpose of the lawmaking power, courts must either restrict or enlarge the ordinary meaning of words. The legislative intention, as collected from an examination of the whole as well as the separate parts of a statute, will prevail over the literal import of particular terms, and will control the strict letter of the statute, where an adherence to such strict letter would lead to injustice, to absurdity, or contradictory provisions."

Appellant's argument is simply that the General Assembly set his salary at $7,500 per year and that Act 456 declared such salary to be retroactive to and from January 1, 1971; that when the salary was increased to that figure, he became entitled to that amount. Appellant agrees that there could be no argument if neither the city nor quorum court acted at all, leaving the salary at $4,800. Obviously, there would be no argument if the city and county quorum court had approved the salary increase to $6,000, and left it at that figure. We cannot agree with appellant for we think that the language of the act, beginning with the word "Provided", makes it very evident that the Legislature only intended for the Municipal Judge of Rogers to receive any amount *up to* $7,500, the amount being determined by the city and quorum court of the county. There could be no other reason for the insertion of that clause. We consider that it is clearly shown that the General Assembly intended for a municipal judge to receive whatever amount, up to $7,500, the city and county desired and could afford to pay. This is certainly the logical view to take. Perhaps the revenues of the city

would support a salary increase of $1,200 for 1971, but not a salary increase of $2,700 for that year;[2] however, anticipated revenues would support the $7,500 salary beginning in January, 1972. The unsoundness of appellant's contention can be demonstrated by a hypothetical illustration. Let us say that the General Assembly passes no further salary act for the next several years; that the City of Rogers and the County were not financially able to increase the salary to $7,500 until January 1, 1976. Under appellant's view, he could then contend that he was due retroactive pay from January 1, 1971 until January 1, 1976, a total of five years—and, if appellant's present contention is sound (that he is due retroactive pay of one year), there is no reason why the hypothetical contention would not be sound.

Affirmed.

CHARLIE BROOKS *v.* KATIE McGILL

73-93 500 S.W. 2d 343

Opinion delivered October 22, 1973

[2]It might even be that a larger salary increase could have caused the city or county to run afoul of provisions of Amendment 10 to the State Constitution.

Odell C. Carter, for appellant.

George Howard Jr., for appellee.

CARLETON HARRIS, Chief Justice. This is the second appeal of this case. See *Brooks* v. *McGill,* 250 Ark. 534, 465 S.W.2d 902, where we reversed the chancellor and remanded the case for transfer to the Circuit Court of Lincoln County, Arkansas. On the second trial, the jury returned a verdict for Katie McGill, appellee herein, and from the judgment entered in accord with the verdict, appellant Charlie Brooks brings this appeal. For reversal, it is first asserted that the evidence does not support the verdict of the jury, and second that the court erred in striking certain testimony of the appellant, and in commenting upon the evidence. We proceed to a discussion of these points.

The litigation relates to the ownership of Lot 9 of Paul's Addition to the Town of Grady. In September, 1946, Sam Bass and wife conveyed to Ira McGill and Katie McGill, land described as Lot 9, Block 3, of Paul's Addition, and in November, 1951, Lem Mosley and wife gave a warranty deed to Charlie Brooks, conveying land described as Lots 5 and 8 in Block 3 of Paul's Addition. Subsequent deeds from the State and Southeast Arkansas Levee District were obtained by Mrs. McGill to Lot 12 of the same block and addition to the Town of Grady, and her present residence is located on this lot. This suit was instituted by Mrs. McGill wherein it was alleged that Brooks had entered upon her property without her consent, had used the property for his own purposes, and interfered with her enjoyment and use of it. Brooks an-

swered, first alleging that the action was purely an ejectment action (which we sustained in reversing the case), and then asserting that he had been in possession of the land at issue for twenty years; that he had planted a garden thereon and used same for a number of years, and was the owner of the land. The testimony was what is commonly referred to as a "swearing match" between the witnesses on each side. In addition to appellee, seven witnesses testified on her behalf, and, in addition to Brooks, six witnesses testified on his behalf. Of course, this being a case at law, we are only interested in whether there was substantial evidence to support the verdict. Appellee testified that at the time Lot 9 was purchased, a dwelling house was located thereon, and that she and her husband moved into the house and lived there for approximately three years, when it was torn down and rebuilt on an adjacent lot (Lot 12); that at the time Lot 9 was acquired, it was surrounded by a wire fence and that this fence had existed up until the time Brooks started removing it in 1968. Appellee further stated that she had told appellant not to interfere with the fence and lot. The witness said that while Brooks was living over at his mother's house, and thought to be separated from his wife, she had permitted Mrs. Brooks, with whom she was friendly, to cultivate a garden on Lot 9. Other witnesses corroborated the location of the wire fence and other facts relating to appellee's ownership, Charlie Boulware stating that he personally saw Brooks remove the fence; he also testified that he heard Mrs. McGill tell appellant to move his lumber off Lot 9 sometime during 1968. Appellant's case was based on the alleged fact that Brooks had lived on the property since 1946, and had always held himself out as the owner of Lot 9. His witnesses corroborated his claim of possession, his stepdaughter testifying that her mother had rented the land from Lem Mosely, and that Brooks had lived there since 1948. As earlier stated, the testimony was very much in conflict, but, in such event, as we have said on numerous occasions, the matter of which witnesses are correctly stating the facts is solely a question for the jury to determine, and if there is any substantial evidence to support the jury finding, we will not dis-

turb such finding on appeal, even if we might think the jury reached the wrong conclusion. Here, under the version given by appellee and witnesses, there was substantial evidence to support the jury verdict.

Appellant asserts that both appellee and Boulware committed perjury, and he cites instances of alleged conflicts in the evidence given by these parties in the chancery case, heretofore mentioned, and the circuit court case, here under consideration. Apparently, it is his contention that we should consider these purported conflicts and reverse the case on that basis. No such procedure is followed by this court, nor is any authority cited to that effect. In fact, we have held to the contrary. See *Magnolia Petroleum Company* v. *Saunders*, 193 Ark. 1080, 104 S.W.2d 1062. The same contention, i.e., that a witness testified in the second trial contrary to testimony in the first trial was there raised, but we said:

> "It is settled policy of law that witnesses are not bound in a second trial by testimony given in a former proceeding, and that prior statements or admissions may, in a subsequent action, be used only for the purpose of testing credibility.

The court also pointed out that when testimony of witnesses is out of harmony and the explanations they make are contradictory, the controversy is properly referable to the jury. Of course, there was nothing to prevent, and appellant probably did, argue any inconsistencies in the testimony of these witnesses to the jury.

Nor do we agree with appellant in his second contention. The record reveals the following during direct examination of Charlie Brooks.

> "Q. Charlie, now your deed calls for Lot 5 and 8 in Block 3 of Paul's Addition to the Town of Grady, Arkansas.
>
> A. Yes sir.

Q. Now, did you look at this land before you bought it?

A. Yes sir, I looked at it.

Q. And what were the natural boundaries of the property that you bought?

A. Well, the boundaries of the property that I bought was ..."

Here, counsel for appellee objected on the basis that the answer given would be hearsay, "What somebody said", unless it was shown that Mrs. McGill was present. Further:

"MR. CARTER: Your Honor, this is not hearsay, he is telling what he bought and the deed describes the piece of property. It doesn't show anything except just the lot numbers, how he viewed the property, he bought the property after he saw it, I think he is entitled to testify what he bought.

MR. HOWARD: May I say this? The deed speaks for itself, Lot 5 and 8. This lawsuit is about Lot 9. Now what somebody told him out here in the absence of Mrs. McGill would be hearsay.

MR. CARTER: Your Honor, it is not a question of what somebody told him, it is a question of what he bought.

THE COURT: Well, I am going to sustain the objection. This apparently is to vary the terms of a written instrument. I would think, if he knows the boundaries there is a variance of what the actual description is, is that right?

MR. CARTER: Yes, sir. There is a variance of what the actual description is according to the plat and I think he is entitled to testify to what he was buying.

THE COURT: I believe an engineer could testify as to what the boundaries are.

MR. CARTER: Your Honor, I am not asking him to testify what the boundaries are, I am asking him to testify as to the physical property which he bought.

THE COURT: Your question was for him to describe the boundaries of the property.

MR. CARTER: Okay, well, I will rephrase my question.

Q. When you bought the property what, how much land were you buying?

MR. HOWARD: Now, if Your Honor please, I would object unless he lays a foundation. It has to be based upon what somebody told him, he is going to vary the face of that deed. We have a written instrument.

THE COURT: Sustain the objection.

MR. CARTER: Note our exceptions.

Q. Okay, you bought the land in 1951, I mean, you said you bought it in 1949 and the deed shows that you got the deed in 1951?

A. Yes sir, that's right.

Q. Now this property between your house and the McGill house has been identified as Lot 9; now, when you bought your property in 1949 what property did you take possession of?

A. I taken possession of Lot 9, Lot 8 and Lot 5, I bought a hundred and fifty foot front, and 120 back.

MR. HOWARD: If Your Honor please, I will object and ask the Court to respectfully advise, to

instruct the jury to disregard his statement about what he was suppose to get because it is based on what somebody said unless Mrs. McGill was present at the time.

THE COURT: I will sustain the objection and instruct the jury that the instrument has been introduced which indicates that this witness bought Lots 5 and 8 in Paul's Addition to the Town of Grady. *Disregard his testimony as to its size or this last statement as to its footage.*" [Our emphasis].

Thereafter, Brooks did testify without objection as to his possession of all of Lot 9, stating that he and his sister-in-law dug out weeds, Johnson grass, and vines, from this lot and testifying that the first year he raised a potato patch, and the next year grew vegetables on Lot 9, including corn, peas, greens, butter beans, okra and watermelons. In fact, he said that every year, he had grown something on that particular property.

Appellant argues that the statement of the court to the jury to disregard his testimony effectively killed his claim of adverse possession. In his brief, appellant states:

"It is well settled in this state that where a person mistakenly takes possession of land that he thinks he owns and holds the same, for the statutory period holding himself out as owner and claiming adversely, will acquire title by adverse possession. The comment of the Court stating that his deed indicated that he bought Lots 5 and 8 prevented the appellant from establishing his claim of adverse possession even though he mistakenly thought that he had record title to the property.

"Therefore, Appellant, Charlie Brooks, had a right to tell a jury that he entered upon Lot 9 under the belief that he owned it, and that he had continuously had possession of it since he bought it, or at least thought he bought it, in 1951. The remarks of the court, and his instruction to the

Jury upon the law as hereinabove stated, could not have left him with any hope of obtaining a favorable jury verdict, if the jury followed the instructions of the court which they apparently did."

We cannot agree with this argument. The court did not rule out the statement of Charlie Brooks that he took possession of Lot 9, but only told the jury to disregard the testimony as to the size and footage (which was purportedly the total of the three lots).[1] That the statement about taking possession of Lot 9 was not ruled out is shown by the fact that immediately after the court's ruling, Brooks testified extensively as to what he and his sister-in-law grew on Lot 9 throughout the years. He also testified about cutting a ditch on a part of Lot 9. Let it be remembered, Brooks has never, in any of his pleadings, contended that he had any record title to Lot 9.[2] His full contention has been that he went into possession of it in 1949, and claimed it as his own from that time. Nor is there any assertion by either party that one had possession of a part of Lot 9 and the other the balance, so the amount of footage is immaterial; appellant simply testified that he took possession of *all* of the lot.

Appellant says that the remarks of the court, quoted herein from the record, were comments upon the evidence, all being to the prejudice of the claim of adverse possession by appellant. He apparently refers to the court's statements relative to an engineer testifying about the boundaries and a reference to varying the terms of a written instrument. The statement about the engineer was made because the court understood counsel to be asking Brooks to testify to boundary lines, counsel later rephrasing his question. The other comment was in the nature of a question, but neither comment could have prejudiced the contention of appellant, viz., that he took possession of Lot 9 and held it ad-

[1]Actually, on cross-examination, appellant testified about this 150 ft., and it was permitted in evidence.

[2]As far as record title to Lot 9 is concerned, same was in Sam Bass, who deeded the property to appellee and husband in 1946, and if appellant's grantor, Mosely, indicated to Brooks that he owned Lot 9, relief would be properly obtained from Mosely.

versely thereafter. After all, what the deed recited as to the lots being conveyed, had no bearing on the land Brooks claimed, since his sole claim to title was by adverse possession. As shown by the quoted record, it was admitted that the conveyance received from Mosely only gave him title to Lots 5 and 8.

The court gave the jury several instructions on adverse possession, telling the jury that Charlie Brooks claimed title to the land by adverse possession and that adverse possession ripens into ownership when there are seven years actual, open, notorious, peaceable, continuance, hostile and exclusive possession, with the intent to hold adversely. The jury was specifically told that notice of adverse possession may be actual or may be inferred from facts and circumstances, and that neither payment of taxes nor color of title is essential to establish a claim of title to improved lands by adverse possession where the claimant and predecessors are in actual possession. In other words, the contentions of Brooks were specifically and properly given to the jury, and we find no prejudicial error.

Affirmed.

BYRD, J. dissents.

BAILEY REYNOLDS *v.* BAKEM CREDIT UNION

73-75 500 S.W. 2d 355

Opinion delivered October 22, 1973

R. David Lewis, for appellant.

W. J. Walker, for appellee.

GEORGE ROSE SMITH, Justice. The appellee brought this action upon a $750 promissory note executed by the appellant Reynolds and by a co-maker whose debts have been discharged in bankruptcy. Reynolds has not denied his liability for the principal amount of the note. He did, however, file a counterclaim, individually and as the asserted class representative of other borrowers from the plaintiff, asserting that the plaintiff had violated the Truth in Lending Law, 15 U.S.C.A. § 1639, by failing to disclose the amount of its finance charges and its annual percentage rate. This appeal is from an order sustaining the plaintiff's motion to dismiss Reynolds' counterclaim. Though the point is not argued in the briefs, we may assume the order to be appealable. See *Eisen* v. *Carlisle & Jacquelin,* 370 F. 2d 119 (2d Cir., 1966); *Reader* v. *Magma-Superior Copper Co.,* 108 Ariz. 186, 494 P. 2d 708 (1972); *Miles* v. *N.J. Motors,* 32 Ohio App. 2d 350, 291 N.E. 2d 758 (1972).

Reynolds concedes that the trial court's action in dismissing his counterclaim, insofar as it constituted a class action, must be affirmed unless we overrule our holding in *Tucker* v. *Pulaski Fed. S. & L. Assn.*, 252 Ark. 849, 481 S.W. 2d 725 (1972), which was decided at about the same time the trial court entered the order now before us. In *Tucker* we held that the filing of a class action is not within the scope of the counterclaim statute. Ark. Stat. Ann. § 27-1121 (Repl. 1962).

We adhere to the *Tucker* decision. Reynolds argues that both the counterclaim statute and the class action statute, Section 27-809, were parts of the Civil Code and should be construed together. In 1935, however, the legislature amended the counterclaim statute to provide that a defendant "must" assert his counterclaims, making that assertion mandatory. *Corey* v. *Mercantile Ins. Co. of America,* 207 Ark. 284, 180 S.W. 2d 570 (1944). Obviously the filing of a class action by counterclaim cannot be mandatory, for if it were the other members of the class would be bound by a single defendant's failure to assert the common cause of action by counterclaim.

Reynolds also argues that the *Tucker* decision deprives him of his opportunity to maintain the class action, if he cannot assert it by counterclaim in this case. There are two answers to that contention. First, Reynolds could have filed the class action as plaintiff before the appellee took the initiative by instituting the present suit. Secondly, Reynolds has no inherent or constitutional right to bring a class action, because, apart from his personal cause of action, the recovery would be for the benefit of other persons.

In the briefs both sides agree that the trial court erred in dismissing Reynolds' personal counterclaim. We do not pass upon the merits of that cause of action, for even if we held the pleading to be demurrable, Reynolds would be entitled to amend. We therefore affirm the trial court's action in dismissing the class-action counterclaim, but we set aside the dismissal of Reynolds' personal counterclaim and remand that cause for further proceedings, with Reynolds to recover his appellate costs.

MRS. RALPH KIDD *v.* BILL PAVATT

73-103 500 S.W. 2d 339

Opinion delivered October 22, 1973

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

Gordon, Gordon & Eddy, for appellee.

GEORGE ROSE SMITH, Justice. This is an appeal from a $30,000 personal injury award to the appellee. The appellant's single contention is that the verdict is excessive. That issue depends essentially upon whether there is substantial evidence establishing a causal connection between the plaintiff's injuries and a heart attack which he suffered about three months after the accident in which he was hurt.

On January 14, 1972, Pavatt, age 36, was riding as a passenger in a pick-up truck. While the vehicle was standing on the highway it was struck so violently from the rear by a car driven by the appellant that the bolts anchoring the seat of the truck were snapped. Pavatt was thrown forward against the dashboard, suffering injuries to his neck and back.

Three days later Pavatt consulted his family physician, Dr. Hickey, who found stiffness, soreness, and pain in the patient's back and neck. Inasmuch as Pavatt had an abnormally fast heartbeat, Dr. Hickey put him in the Conway County Hospital, where a number of tests, including electrocardiograms, were made. Dr. Hickey's final diagnosis was "a sprain of the cervical, dorsal, and lumbosacral spine, arteriosclerotic heart disease, coronary sclerosis, and multiple contusions and abrasions." After Pavatt's discharge from the hospital he continued to have pain and soreness in his neck and back and was treated by Dr. Hickey in February and March.

Pavatt again visited Dr. Hickey on April 29. In addition to the earlier complaints Pavatt was then suffering from chest pains. Dr. Hickey made another electrocardiogram, which showed evidence of a heart attack—myocardial infarction. Dr. Hickey again put his patient in the hospital. Dr. Hickey testified at the trial that Pavatt had a 20% permanent disability, of which 5% was related to the neck and back injuries and 15% to the heart condition.

Pavatt admittedly was suffering from arteriosclerotic heart disease at the time of the accident, but it had not been disabling. The question is whether the accident aggravated or activated his condition, within the rule stated in *Owen* v. *Dix,* 210 Ark. 562, 196 S.W. 2d 913 (1946): "The rule appears to be well settled that when a defendant's negligence aggravates, or brings into activity, a dormant or diseased condition or one to which the injured person is predisposed, the defendant is liable to the injured person for the full amount of the damages which ensue, notwithstanding such diseased or weakened condition."

Dr. Hickey testified that in his opinion there was probably a causal relation between Pavatt's myocardial infarction and the neck and back injuries that he sustained in the accident. He explained that pain, nervousness, and tension affect the progress of heart disease and that it is well recognized in medicine that such afflictions can precipitate a heart attack. (A number of

authorities are quoted in Woods, The Heart Attack Case in Workmen's Compensation, 16 Ark. L. Rev. 214 [1962].)

Dr. Hickey is a general practitioner. The appellant's only medical witness was another general practitioner, Dr. Weber, who had studied the medical records on the night before the trial but had not examined Pavatt. Dr. Weber was of the opinion that there was no possible connection between Pavatt's injuries and his heart attack some three months later. It was his view that Pavatt's heart disease had developed over a period of years and could not have been caused or aggravated by the automobile accident.

We can only conclude that the conflicting testimony made a question of fact for the jury. We cannot say that Dr. Hickey's expert opinion is shown to have no reasonable basis. Dr. Hickey explained the reasons for his conclusions. His qualifications are essentially the same as those of Dr. Weber. In our judgment the testimony of each physician amounted to substantial proof supporting the beliefs that he expressed. It was for the jury rather than for the members of this court to determine the factual issue that was presented.

Affirmed.

HAROLD CONRAD *v.* WILLIAM L. CARTER

73-107 500 S.W. 2d 336

Opinion delivered October 22, 1973

Rhine & Rhine and *George Thiel,* for appellant.

Reid, Burge & Prevallet, for appellee.

LYLE BROWN, Justice. Appellant Harold Conrad, engaged in the business of clearing farm lands with heavy equipment, performed work for appellee William L. Carter, landowner. Appellant billed appellee for 67 hours of work at $15.00 per hour, which appellant claimed was the contract price. Appellee refused to pay that amount, claiming it was agreed that the maximum cost would run $150 per acre for bulldozing approximately two acres of land. The chancellor held that the purported contract was indefinite and decided the case under the *quantum meruit* rule, awarding appellant $350 for the work performed. On appeal it is contended that a definite contract was established and that the court erred in resorting to the *quantum meruit* rule.

There are two facets of the oral contract about which the parties disagree; one is the contract price, and the other being the time within which the work was to be performed.

With reference to the price, appellant said the sole agreement was $15.00 per hour. He did concede that they talked in terms of around $100 an acre:

Q. You didn't tell him that you could do it for a little over $100 an acre?

A. I told him if it was sprouts like he told me it was, that I could.

Q. You told him if it was like he told you it was you could do it for a little over $100 an acre?

A. Yes, but I had been in the business long enough, I knew that it wasn't just sprouts.

Q. A lot of people clear land for $100 an acre, don't they?

A. They can do it cheaper than that with a regular cutting blade.

Appellant also conceded that the amount billed "was awful high for this job".

Appellee's testimony differed. He said he asked appellant for an estimate of the total cost, to which appellant replied: "Well, it will run you over $100 an acre, you can count on that".

Q. How many acres were involved?

A. Two acres, and I said, "That's fine, that's good, if it run $150 it wouldn't be bad". Of course during this time I had Mr. Spence [tenant] and I told Mr. Conrad that Mr. Spence would represent me, that I wouldn't be there and wouldn't even know when they went out to do this work. [Mr. Carter, appellee, lived in Oklahoma].

* * * *

Q. Would you have hired Mr. Conrad to do this work for you at $15.00 per hour if he had not estimated the total cost to you per acre?

A. No, sir, I would not.

Witness W. B. Spence was present when the oral contract was made between the parties. He was appellee's tenant. His memory about what was said between the two men was admittedly hazy. He did have some recollection about a conversation concerning contracting the job and that appellant declined to do so. He expressed no opinion as to whether a maximum price per acre was estimated by appellant. The witness said that after appellant completed the job, the witness and his son spent five days with a tractor and a chisel plow, pulling out roots from the cleared ground; he also said they pulled out a tree that was eight inches at the butt and some fifteen feet long, the tree having been pushed into the ground. He said an old house place consisting of approximately one acre, and one acre of trees and saplings, were in the contract for clearance.

We hold that this was not a case for the application of the *quantum meruit* rule. Both parties agree that there was a contract for services and the disputed question was the nature of the contract. "Where there is an express contract for services at a fixed compensation, there can be no recovery *quantum meruit.*" *Christian & Taylor* v. *Fancher,* 151 Ark. 102, 235 S.W. 397 (1921). However, we resolve chancery cases de novo. It is clear to us that the two men talked in terms of $100 an acre; however, they have a different version of the conclusion they arrived at on a maximum. Appellant said he told appellee that the work could be done for $100 an acre "if it was sprouts like he told me it was". Appellee said he agreed that the cost could run as much as $150 per acre, and of course he should be bound by that agreement. The trial court observed that "it is ridiculous to say it would take 67 hours of bulldozer work to clear two and a fraction acres of land". The court also observed that it was evident that the dozer worked several hours "slopping around there on wet ground". There was also evidence that there were 130 trees, counting saplings, and that appellant said it would take fifteen minutes for each large tree. There was also evidence that in the category of large trees there were 21 trees better than 24 inches in circumference. It is our conclusion that the evidence establishes the contract to have been $15.00 per hour with a maximum of $150

per acre. On that basis the chancellor entered judgment for an amount equal to the contract which we find to have been entered into between the parties.

Affirmed.

FOGLEMAN, J., dissents.

JOHN A. FOGLEMAN, Justice. Dissenting. I respectfully dissent because I feel that the evidence in this case is clear that the agreement did not limit Conrad's compensation to $150 per acre. It may well be that appellant claimed credit for more hours than he should have because of attempts to work when the soil conditions, due to weather, were not proper for land clearing or the use of Conrad's equipment. I agree that the case is not one for the application of quantum meruit and that Conrad is probably not entitled to the full amount claimed by him.

CHARLES N. MCKENZIE ET AL *v.*
MYRTLE BURRIS ET AL

73-73 500 S.W. 2d 357

Opinion delivered October 22, 1973

Williams & Gardner, Wright, Lindsey & Jennings, and *Smith, Williams, Friday, Eldredge & Clark,* for petitioners.

Krivcher & Cox and *Mobley & Smith,* by: *Oscar Fendler,* for respondents.

JOHN A. FOGLEMAN, Justice. Petitioners are defendants in a medical malpractice action brought by Myrtle and Billy D. Burris in the Circuit Court of Pope County. They seek by writ of certiorari to quash the order of that court granting the motion of Mobley and Smith, as attorneys for the Burrises, to enter the name of James S. Cox as an attorney of record in this case to assist them, as associate counsel, in all phases of trial of the action. Mobley and Smith is a firm of attorneys licensed to practice in Arkansas and residing in Pope County. It was employed by the Burrises and, pursuant to that employment, filed a complaint. After answer had been filed by petitioners, Mobley and Smith filed the motion in question. Petitioners then moved to strike the order granting the motion of Mobley and Smith, alleging that this case was not one wherein a nonresident attorney was seeking admission for a single or particular case because, they alleged, Cox was practicing law in Arkansas without having been licensed to practice in Arkansas. This motion was denied.

It is admitted that Cox is a resident of Memphis, Tennessee, where he maintains his office for the practice of law and that he has been admitted to practice law in all courts of the state of Tennessee, but has not been licensed in any other state. Cox had previously participated, as associate counsel in one personal injury case, a will contest, and six medical malpractice actions filed in Arkansas. He had also consulted with Arkansas attorneys with respect to two other medical malpractice cases in which no suit has been filed.

It has been suggested that the petitioners, as the adversaries of the plaintiffs who would be represented by Cox, have no standing to question, on certiorari, the right of Cox to participate in the trial, or the right of respondents or their attorneys, Mobley and Smith, to employ Cox as an associate attorney in the case. It has been recognized in this state for 135 years that a party whose interest might be jeopardized by prosecution of a suit against him may require even a regularly licensed attorney, duly admitted to practice in the courts of this state, to show his authority to represent an adversary. *Tally,*

Admr. v. *Reynolds,* 1 Ark. 99. See also, *Cartwell* v. *Menifee,* 2 Ark. 356. This right has subsequently been recognized in *Pekin Stave & Mfg. Co.* v. *Ramey,* 104 Ark. 1, 147 S.W. 83; *Red Bud Realty Co.* v. *South,* 153 Ark. 380, 241 S.W. 21; and *Nunez* v. *O. K. Processors, Inc.,* 238 Ark. 429, 382 S.W. 2d 384. It is widely held in other jurisdictions that proceedings in a suit instituted or conducted by one not entitled to practice are a nullity, and if appropriate steps are timely taken the suit may be dismissed, a judgment in the cause reversed, or the steps of the unauthorized practitioner disregarded. See *Bennie* v. *Triangle Ranch Co.,* 73 Colo. 586, 216 P. 718 (1923); *Niklaus* v. *Abel Construction Co.,* 164 Neb. 842, 83 N.W. 2d 904 (1957); *Landis* v. *Superior Ct.,* 232 Cal. App. 2d 548, 42 Cal. Rptr. 893 (1965); *City of Downey* v. *Johnson,* 69 Cal. Rptr. 830 (263 Cal. App. 2d 775) (1968); *Stevens* v. *Jas. A. Smith Lumber Co.,* 54 S.D. 170, 222 N.W. 665 (1929); *Duysters* v. *Crawford,* 69 N.J.L. 229, 54 A. 823 (1903); *Hazard* v. *Phoenix Woodworking Co.,* 78 N.J. Eq. 568, 80 A. 456 (1911); *Maso Holding Corp.* v. *Einstein,* 17 N.Y.S. 2d 655 (1939); *Goldstein* v. *Marriott,* 14 Pa. D. & C. 635 (1929), followed in *Winters* v. *Sheporwich,* 83 Pa. D. & C. 484 (1952); *Colton* v. *Oshrin,* 155 Misc. 383, 278 N.Y.S. 146 :1934); *Anderson* v. *Coolin,* 27 Idaho 334, 149 P. 286 (1915); *Application of County Collector,* 1 Ill. App. 3d 707, 274 N.E. 2d 164 (1971); *Leonard* v. *Walsh,* 73 Ill. App. 2d 45, 220 N.E. 2d 57 (1966). See 7 C.J.S. 725, Attorney and Client, § 16b. The question was raised in *Goldstein* by a motion by the adverse party to strike the complaint. In *Stevens,* it was raised by the plaintiff's motion to strike an answer signed only by nonresident attorneys. In *Colton,* where the court said that prejudice was to be conclusively presumed, the question was presented by the adverse party's motion for mistrial. In *City of Downey* v. *Johnson* and *Application of County Collector,* the question was raised by the appellate court. In *North Laramie Land Co.* v. *Hoffman,* 27 Wyo. 271, 195 P. 988 (1921), it was held that the adverse party might properly move to strike a petition signed only by nonresident attorneys not admitted to practice in the state. See also *Bradley* v. *Sudler,* 172 Kan. 367, 239 P. 2d 921 (1952), 174 Kan. 293, 255 P. 2d 650 (1953).

On the other hand, it has been held that if and when a nonresident attorney, not licensed to practice in the state where an action is pending, seeks to practice in that action, the matter of his qualification will then be addressed to the discretion of the trial court, *State Bar of Texas* v. *Belli,* 382 S.W. 2d 475 (Texas 1964), and that, unless a party in interest in the particular case presents the question of the disqualification of a nonreisdent attorney to appear as counsel for an adverse party, his entitlement to practice before the court will be presumed and the question of his disqualification waived. *Walker* v. *Walker,* 123 So. 2d 692 (Fla. Ct. App. 1960). See also, *Freeling* v. *Tucker,* 49 Idaho 475, 289 P. 85 (1930). Whichever view we might take of the situation, it only seems logical that an adverse party who could question the authority of the attorney to represent his opponent can also, to the same extent, question the authority of that attorney to practice in the state, or the particular court in which the litigation is pending, insofar as that case is concerned. We have no hesitancy in saying that petitioners' challenge to Cox's participation in the trial was appropriately and timely made in the trial court.

But it is contended by respondents that certiorari is not available as a remedy to review the action of the trial court in this regard, and they have moved to dismiss the petition for that reason, saying that there are other adequate remedies. Among those suggested are appeal from any eventual judgment against petitioners, complaint to the Supreme Court Committee on Professional Conduct, and prosecution for violation of Ark. Stat. Ann. § 25-101 et seq. (Repl. 1962).

It is true that these and other remedies might have been appropriate at the instance of the proper party, if the facts should justify such actions. Petitions seeking judicial action against persons charged with the unauthorized practice of law have been entertained by the courts when filed by a local bar association or one of its committees or when presented on behalf of the state bar or one of its committees. 7 Am. Jur. 2d 103, Attorneys at Law, § 89. See *Arkansas Bar Association* v. *Union National Bank of Little Rock,* 224 Ark. 48, 273 S.W. 2d 408. It seems well

settled that unauthorized practice of law, at least by court appearances, is an unlawful intrusion and usurpation of the function of an officer of the court, and constitutes a contempt of any court in which or under whose authority or sanction the unauthorized person pretends to act. *Bessemer Bar Association* v. *Fitzpatrick,* 239 Ala. 663, 196 So. 733 (1940). See also, *Freeling* v. *Tucker,* 49 Idaho 475, 289 P. 85 (1930); *New Jersey Photo Engraving Co.* v. *Schonert and Sons,* 95 N.J. Eq. 12, 122 A. 307 (1923); *State* v. *Barlow,* 131 Neb. 294, 268 N.W. 95, 132 Neb. 166, 271 N. W. 282 (1936). While the pertinent authorities make it quite clear that contempt proceedings may be instituted by an interested bar association, or one of its committees, it does not seem that the right of an adverse litigant to initiate contempt procedures in such cases is so widely recognized. But there is respectable authority that the courts will not resort to this drastic remedy unless there is no other efficient remedy available and there is an evident need for summary action to protect the public and the jurisdiction of the court. See 7 C.J.S. 726, Attorney and Client, § 16c and cases cited. In any event, this remedy would undoubtedly be inadequate for petitioners, because it seems unlikely that punishment for contempt would be imposed after their motion to strike had been denied by the court in which the case was to be tried.

We have approved the granting of injunctive relief at the suit of the state bar association. See *Arkansas Bar Association* v. *Union National Bank,* supra; *Beach Abstract & Guaranty Co.* v. *Bar Association of Arkansas,* 230 Ark. 494, 326 S.W. 2d 900. This is generally accepted as a proper form of relief, particularly where class actions are involved. See *Conway-Bogue Realty Co.* v. *Denver Bar Assn.,* 135 Colo. 398, 312 P. 2d 998 (1957); *Hexter Title & Abstract Co., Inc.* v. *Grievance Committee, 5th Cong. Dist., State Bar of Texas,* 142 Tex. 506, 179 S.W. 2d 946, 157 A.L.R. 268 (1944); Ann., 90 A.L.R. 2d 63, 14 A.L.R. 359.[1] Here again the suitability

[1]But see, *The State Bar of Texas* v. *Belli,* 382 S.W. 2d 475 (Tex. 1964), where it was held that injunctive relief would not be granted at the suit of the state bar against an individual nonresident attorney who was not then participating or offering to participate in the trial of a case in the forum state.

and adequacy of this relief to an individual litigant to prevent his adversary from utilizing, as an attorney, a person not properly authorized to practice in the court wherein the litigation is pending are not so well recognized and are highly questionable, to say the least. This remedy is, generally speaking, an equitable one lying within the jurisdiction of our chancery courts. *Harrison* v. *Knott,* 219 Ark. 565, 243 S.W. 2d 642, 28 A.L.R. 2d 405; *Kennedy, ex parte,* 11 Ark. 598. The undesirability of one court's interfering with proceedings pending in another of concurrent or coordinate jurisdiction and equal dignity, as a matter of comity, if not of jurisdiction, would seem to foreclose resort by petitioners to this form of remedy, even if it were otherwise available to them. See *Askew* v. *Murdock Acceptance Corp.,* 225 Ark. 68, 279 S.W. 2d 557; *Butt* v. *Southwestern Distilled Products, Inc.,* 199 Ark. 750, 135 S.W. 2d 857; *Wasson* v. *Dodge,* 192 Ark. 728, 94 S.W. 2d 720; *Wright* v. *LeCroy,* 184 Ark. 837, 44 S.W. 2d 355. See also, *Doss* v. *Taylor,* 244 Ark. 252, 424 S.W. 2d 541.

Quo warranto on the relation of the proper authority has been found to be a proper vehicle for inquiry into the right of one who engages in the practice of law in a state, on the bases that this ancient writ is a demand by the state upon that individual to show by what right he exercised that privilege or franchise, and that unauthorized practice is a usurpation of an office or franchise. *State* v. *Perkins,* 138 Kan. 899, 28 P. 2d 765 (1934). We have recognized the writ as appropriate to prevent the unauthorized enjoyment of an office or franchise. *Moody* v. *Lowrimore,* 74 Ark. 421, 86 S.W. 400; *State* v. *Evans,* 3 Ark. 585, 36 Am. Dec. 468. It does not seem, however, that this writ could properly be invoked by petitioners. *State* v. *Jones,* 194 Ark. 445, 108 S.W. 2d 901; *Moody* v. *Lowrimore,* supra. It is intended, in such cases, only to subserve the interest and guard the rights of the whole community, and not private rights. *Caldwell, Admr.* v. *Bell and Graham,* 6 Ark. 227. If it could be invoked by petitioners, it may well have been rendered ineffective in these circumstances by our decision in *Schirmer* v. *Light,* 222 Ark. 693, 262 S.W. 2d 143. Even if available, quo warranto is not

a remedy which excludes resort to other remedies, such as certiorari. *Howell* v. *Howell,* 213 Ark. 298, 208 S.W. 2d 22.

Resort to disciplinary proceedings against attorneys who associated Cox would certainly afford no remedy to petitioners, even if it were indicated. It is at least doubtful that Cox is subject to this action in Arkansas, even if the circumstances warranted it. Disciplinary action, however, is for the purpose of protecting the rights of the public in general and maintaining the public confidence in the bar, rather than protection of private rights or for inflicting punishment for a criminal offense. *In re Silverstein's Case,* 108 N.H. 400, 236 A. 2d 488 (1967). Resort to criminal prosecution would only result in punishment of a violator but would accomplish nothing insofar as the participation of Cox in the trial is concerned, even if he should eventually be found guilty.

Certiorari cannot ordinarily be utilized as a substitute for appeal. No appeal from the present order would seem to be available until a final judgment against petitioners had been entered. *State* v. *Nelson,* 246 Ark. 210, 438 S.W. 2d 33. This does not mean, however, that actions of trial courts during the course of an action are not subject to review, in a proper case, by a court having supervisory jurisdiction, or that, in the exercise of that jurisdiction, resort may not be had to mandamus, prohibition or certiorari where appellate remedy is unavailable or inadequate. *State* v. *Nelson,* supra. Still, neither of these writs may be used to control the discretion of a trial court, correct its erroneous action, review findings of fact, correct an abuse of discretion, or review a finding or an erroneous conclusion drawn from the facts, except in matters going to the jurisdiction of the inferior tribunal, where there is a remedy by appeal. *State* v. *Nelson,* supra; *North Little Rock Transportation Co.* v. *Sangster,* 210 Ark. 294, 195 S.W. 2d 549; *Sharum* v. *Meriwether,* 156 Ark. 331, 246 S.W. 501; *Howell* v. *Howell,* supra; *Fowler* v. *McKennon,* 45 Ark. 94. See also, 14 Am. Jur. 2d 830, 831, Certiorari, §§ 64, 65, 66; 14 Am. Jur. 2d 782, Certiorari, § 5.

The efficacy of the remedy by appeal after Cox had fully particpated in the trial is at least open to doubt. If it is available to petitioners, certiorari, in a court having supervisory jurisdiction, would still lie to quash a judgment which is void on its face, or to control the actions of an inferior tribunal which is proceeding illegally where no other mode of review has been provided. *Reed* v. *Bradford,* 141 Ark. 201, 217 S.W. 11; *State* v. *Nelson,* supra; *McCain* v. *Collins,* 204 Ark. 521, 164 S.W. 2d 448. Petitioners argue that the circuit court was proceeding illegally. It can be argued, with some force, that the court's order was void for want of jurisdiction or was in excess of its jurisdiction. The question is treated as jurisdictional in some states. See, e.g., *Bradley* v. *Sudler,* 172 Kan. 367, 239 P. 2d 921 (1952), 174 Kan. 293, 255 P. 2d 650 (1953). See also, *Ebeling* v. *Continental Illinois National Bank & Trust Co. of Chicago,* 272 Cal. App. 2d 724, 77 Cal. Reptr. 612 (1969); *Herndon* v. *Lee,* 281 Ala. 61, 199 So. 2d 74 (1967); *Leonard* v. *Walsh,* 73 Ill. App. 2d 45, 220 N.E. 2d 57 (1966); *City of Downey* v. *Johnson,* 263 Cal. App. 2d 775, 69 Cal. Rptr. 830 (1968).

In *State* v. *Nelson,* 246 Ark. 210, 438 S.W. 2d 33, we quashed, on certiorari, an order of a chancery court appointing a master on the ground that the court had proceeded illegally in that the appointment was not only premature but too comprehensive in scope. In *Howell* v. *Howell,* supra, we vacated divorce decrees as void, holding that they were rendered by a person who was neither a judge de jure nor de facto, because of the invalidity of an act purporting to create a second division of a chancery circuit. In doing so, we actually treated an appeal as a petition for certiorari. Our language there is rather appropriate to this situation. We said:

> The right of a supervising court to deal with a particular proceeding in a manner consistent with justice and to thereby expeditiously dispose of issues is unquestioned where recourse to the procedure is not prejudicial to one who is not immediately before the appellate court and where there is no statutory or constitutional impediment. If the result arrived at is the only one that in any event could be reached,

> the party indirectly affected is not injured. To this end appeal may be treated as certiorari. The writ may not be used as a substitute for appeal. It is insufficient because only the face of the record and matters of which the appellate court takes judicial notice may be considered. But it does not follow that an appeal cannot be treated as certiorari; and this discretion to convert and to apply practical processes arises in those cases where through inadvertence or a lack of procedural understanding the wrong course has been pursued where the judgment or decree, however just and free from error, cannot stand because it does not in fact have judicial support.

The disposition we make of this case will render it unnecessary for us to actually decide that certiorari is proper in this instance. It is the only remedy invoked here by petitioners, and we will apply its intrinsic limitations on our review. Without actually deciding whether appeal is the proper remedy and treating the matter as if certiorari at this stage of the proceedings would be appropriate, we decide this case, as we did *Stevenson* v. *McDonald,* 77 Ark. 208, 91 S.W. 300, on the basis that petitioners are not entitled to relief by certiorari on the record presented. We find that the circuit court was not, on the face of the record, without jurisdiction to enter the order permitting Cox to proceed in this case and did not act in excess of its jurisdiction or proceed illegally in granting this permission. See *State* v. *Nelson,* supra. In this connection, it should be emphasized that, in denying petitioners' motion to strike, the court only entered Cox's name as attorney of record "to be associated by Mobley and Smith * * * and to assist in all phases of trying the herein cause of action."

The narrow question presented here, then, is whether the Circuit Court of Pope County had authority to permit a nonresident attorney, not licensed to practice in Arkansas, to participate in the trial of this case in that court, representing a litigant in association with an attorney who is a resident licensed to practice, and regularly engaged in the practice of, law in this state,

even though the nonresident attorney has, in similar circumstances, engaged in the trial, or preparation for trial, or settlement negotiations of numerous other cases in Arkansas. We hold that it did.

Limiting our examination to the face of the record in this proceeding does not mean that we inspect only the pleadings and the court's order. The record in a case such as this includes such pertinent matters as the answer of Cox to petitioners' interrogatories, admissions contained in his affidavit filed in the circuit court, the official docket sheet of the circuit court showing enrollment of Cox in the court and his payment of a fee of $1.00 in accordance with Ark. Stat. Ann. §§ 25-108—110 (Repl. 1962). Where the evidence adduced is pertinent to the determination of the lower tribunal's authority to take the action questioned, it is a part of the record. *Stevenson* v. *McDonald,* 77 Ark. 208, 91 S.W. 300; *McCain* v. *Collins,* 204 Ark. 521, 164 S.W. 2d 448.

Petitioners contend that Ark. Stat. Ann. § 25-108, et seq., insofar as applicable here, should be construed to be only a codification of the common law admission pro hac vice, i.e., admission of a nonresident attorney for the purpose of trial of a particular case only. As such, they say, it is applicable only in an isolated instance and cannot be construed to permit such an extensive or systematic practice as Cox has conducted in Arkansas, and this court should find that, because Cox has used the statute as a cloak for an extensive unlicensed practice of law in Arkansas, he should not be permitted to proceed in this case. In the alternative, only if we cannot so find, petitioners ask that we declare Ark. Stat. Ann. § 25-108, et seq., unconstitutional as a legislative invasion of the sphere of the judicial branch and contrary to Amendment 28 of the Arkansas Constitution, as well as a violation of Article II, §§ 3 and 18, of the Arkansas Constitution and the Fourteenth Amendment to the United States Constitution. We find no basis for the relief sought by petitioners, even if we concede that their construction of the statutes is correct, and we find no merit in their attack on the constitutionality of the statutes. In order to approach the matters raised

by petitioners, we find it necessary to treat the statutes, and their status, effectiveness and function without considering each point severally.

Amendment 28 certainly put to rest for all time any possible question about the power of the courts to regulate the practice of law in the state. There can be no doubt that the power of the judicial department, acting through this court, is, in this respect, exclusive and supreme under this amendment, if the power was not already inherent in the courts. This does not mean, however, that adoption of this amendment had the effect of invalidating every act of the General Assembly bearing upon the subject, particularly those passed prior to the effective date of the amendment, if they are not necessarily in irreconcilable conflict with or repugnant to the amendment. An existing statute is superseded by a subsequent constitutional amendment only when there is an irreconcilable conflict or the statute is necessarily repugnant to the new constitutional provision. *Vance* v. *Johnson,* 238 Ark. 1009, 386 S.W. 2d 240; *Priest* v. *Mack,* 194 Ark. 788, 109 S.W. 2d 665; *Polk County* v. *Mena Star Company,* 175 Ark. 76, 298 S.W. 1002; *Kirk* v. *High,* 169 Ark. 152, 273 S.W. 289, 41 A.L.R. 782; *Hodges* v. *Dawdy,* 104 Ark. 583, 149 S.W. 656.[2] See also, *Henley v Goggin,* 241 Ark. 348, 407 S.W. 2d 732; *Lewelling* v. *Board of Directors of Mansfield School District,* 240 Ark. 237, 398 S.W. 2d 665; *Cone* v. *Garner,* 175 Ark. 860, 3 S.W. 2d 1. A basic and fundamental rule applicable in consideration of the effect of both statutes and constitutional amendments

[2]But see, *W. R. Wrape Stave Company* v. *Arkansas State Game and Fish Commission,* 215 Ark. 229, 219 S.W. 2d 948, wherein it was held that since the purpose of Constitutional Amendment 35, making the State Game and Fish Commission an independent constitutional agency of government, seemed to have been to cover the whole subject and to either provide, or leave to the commission, methods for reaching its ends, the amendment superseded all prior legislative acts, whether directive or restrictive in nature. Specific conditions precedent for suits in eminent domain by the commission were the subject of the act there held unconstitutional. Although the amendment provided that the power of eminent domain be exercised in the same manner as provided for exercise of the power of the State Highway Commission, the opinion was not premised on this specific language. Furthermore, there is no mention in the opinion of the sentence: "All laws now in effect shall continue in force until changed by the Commission."

is that repeal by implication is not looked upon with favor and is never allowed by the courts except where there is such an invincible repugnancy between the former and later provisions that both cannot stand together. See *Lybrand* v. *Wafford,* 174 Ark. 298, 296 S.W. 729.

Since this court has not taken any action to regulate the extension of the right of comity to a nonresident attorney, and the pertinent sections of the statute are not necessarily repugnant to Amendment No. 28, we hold that the particular sections of the statute involved are not unconstitutional, insofar as they apply to the facts in this case. Statutes which provide a penalty for unauthorized practice of law by a nonresident of the forum state have been held to be cumulative to the powers of the courts to punish. *Bessemer Bar Association* v. *Fitzpatrick,* 239 Ala. 663, 196 So. 733 (1940). It has also been said that statutes relating to the practice of law are merely in aid of, but do not supersede or detract from the power of the judicial department to define, regulate and control the practice of law, and that the legislative branch may not, in any way, hinder, interfere with, restrict or frustrate the powers of the courts. *Wallace* v. *Wallace,* 255 Ga. 102, 166 S.E. 2d 718 (1969); *State* v. *Perkins,* 138 Kan. 899, 28 P. 2d 765 (1934); *Automobile Club of Missouri* v. *Hoffmeister,* 338 S.W. 2d 348 (Mo. Ct. App. 1960); *Hoffmeister* v. *Tod,* 349 S.W. 2d 5 (Mo. 1961); *Meunier* v. *Bernich,* 170 So. 567 (La. Ct. App. 1936); *State* v. *Barlow,* 131 Neb. 294, 268 N.W. 95 (1936). See also, *Clark* v. *Austin,* 340 Mo. 467, 101 S.W. 2d 977 (1937); 7 Am. Jur. 2d 44, Attorneys at Law, § 2. The Court of Appeals for the Eighth Circuit has appropriately held that the courts may, and frequently do, honor implementing legislation, but are not bound to do so. *Feldman* v. *State Board of Law Examiners,* 438 F. 2d 699 (1971). *See also, Martin* v. *Davis,* 187 Kan. 473, 357 P. 2d 782 (1960); *Meunier* v. *Bernich,* supra.

In subsequent legislation, Act 438 of 1961 [Ark. Stat. Ann. §§ 25-215—217 (Repl. 1962)], the General Assembly has given specific recognition to the principle by declaring that act to be in aid of and subordinate to the

right of this court to regulate and define the practice of law and to prevent and prohibit unauthorized or unlawful practice thereof by appropriate rules, orders and penalties. We seem definitely to have chosen to recognize and apply certain statutes which are not necessarily inconsisent with, or repugnant to, court rules, and do not hinder, interfere with, frustrate, pre-empt or usurp judicial powers, at least when the statutes were, at the time of enactment, clearly within the province of the legislative branch and when the courts have not acted in the particular matter covered by the statute. *Arkansas Bar Assn.* v. *Union National Bank,* 224 Ark. 48, 273 S.W. 2d 408. While the constitutionality of the act now before us was not involved in *Letaw* v. *Smith,* 223 Ark. 638, 268 S.W. 2d 3, this court applied it, as then written, as a valid statute. Upon adoption of "Rules Regulating Professional Conduct of Attorneys at Law," April 24, 1939, soon after the adoption of Amendment 28, this court provided in Rule IX that those rules should not be deemed exclusive of, but as supplemental to, the statutes of the State of Arkansas and the Committee (now Supreme Court Committee on Professional Conduct) may invoke the statutes or proceed under those rules if it should elect to do so. We have, however, held that statutes in conflict with rules adopted by this court under authority given by Amendment 28 were superseded by the rules. *Armitage* v. *Bar Rules Committee,* 223 Ark. 465, 266 S.W. 2d 818. But, we clearly indicated that we would recognize and apply a statute making certain advertising practices unlawful with reference to the practice of law in *Arkansas Bar Assn.* v. *Union National Bank,* supra, saying:

> In many jurisdictions, as in this state, the judiciary has on occasions apparently given approval to certain enactments by the legislative body, but these enactments are considered to be in aid of the judicial prerogative to regulate the practice of law and not to be in derogation thereof.

When viewed in the light of the narrow question presented here, the statute constitutes little more than a recognition of the usual practice of permitting an at-

torney, licensed and in good standing in a sister state, to appear and participate in the trial or argument of a particular case. The granting of such permission, without or even in spite of a statute, seems to be within the inherent power of the courts and is a rather general practice. See *Freeling* v. *Tucker,* 49 Idaho 475, 289 P. 85 (1930); *State* v. *Perkins,* 138 Kan. 899, 28 P. 2d 765 (1934); *Anderson* v. *Coolin,* 27 Idaho 334, 149 P. 286 (1915); 7 C.J.S. 723, Attorney and Client, § 15, 7 Am. Jur. 2d 48, Attorneys at Law. This practice extends comity as a courtesy, not as a right. *Mason* v. *Pelkes,* 57 Idaho 10, 59 P. 2d 1087 (1936). A lawyer who does not confine his practice to the limits of such an admission is subject to appropriate state action for unauthorized practice. *Sanders* v. *Russell,* 401 F. 2d 241 (5th Cir. 1968).

The state has legitimate interests to be weighed in considering pro hac vice admissions in order to maintain a high level of professional ethics, to assure a high quality of representation in the courts and to protect the economic interests of the regularly licensed resident attorneys of the state. In order to properly protect these interests and to expedite the administration of justice, the courts are concerned with the qualifications and conduct of counsel, their availability for service of papers and amenability to disciplinary proceedings. But these interests do not justify an arbitrary numerical limitation on the number of such appearances by an attorney in the state, where the nonresident attorney associated with resident counsel is not involved in a general practice of law, particularly where the nonresident practitioner has developed some degree of expertise in the particular field of litigation in which he is engaged. *Sanders* v. *Russell,* supra. See also, *Meunier* v. *Bernich,* 170 So. 567 (La. Ct. App. 1936); *Freeling* v. *Tucker,* supra; *Hulse* v. *Criger,* 363 Mo. 26, 247 S.W. 2d 855 (1952); 7 C.J.S. 712, Attorney and Client, § 6 a and c.

As we view the matter, § 25-108, at least as it now reads and as applied in the case before us, is not in conflict with Amendment 28 or any rule promulgated by this court. If Cox attempts to participate in other cases

in reliance upon his "enrollment" in connection with this case, quite a different matter will be presented. Insofar as this case is concerned, he has complied with the terms and conditions imposed by the court in which the case is pending, and we need not consider the effect of Ark. Stat. Ann. § 25-111, if indeed it has survived the rules of this court governing admission to the bar and the 1955 amendment to Ark. Stat. Ann. § 25-108.

Not only are we unable to say that Ark. Stat. Ann. § 25-108 is unconstitutional for conflict with Amendment 28, we are also unable to say that it is invalid under either Section 3 or 18 of Article II of the Constitution of Arkansas, or the Fourteenth Amendment to the United States Constitution.

It is true that the right to practice law is a privilege in the nature of a franchise. *Martin* v. *Davis,* 187 Kan. 473, 357 P. 2d 782 (1960); *State* v. *Perkins,* 183 Kan. 899, 28 P. 2d 765 (1934); *Gordon* v. *Clinkscales,* 215 Ga. 813, 114 S.E. 2d 15 (1960); *In re Bailey,* 30 Ariz. 407, 248 P. 29 (1926); *Freeling* v. *Tucker,* supra; *New Jersey Photo Engraving Company* v. *Schonert & Sons,* 95 N.J. Eq. 12, 122 A. 307 (1923); *In re Co-operative Law Company,* 198 N.Y. 479, 92 N.E. 15, 139 A.S.R. 839 (1910). See *Wernimont* v. *State,* 101 Ark. 210, 142 S.W. 194. It is not a matter of grace. *Schware* v. *Board of Bar Examiners,* 353 U.S. 232, 77 S. Ct. 752, 1 L. Ed. 2d 796 (1957); *Raffaelli* v. *Committee,* 7 Cal. 3d 288, 101 Cal. Rptr. 896, 496 P. 2d 1264 (1972). But it is not an absolute, natural or constitutional right. *Wernimount* v. *State,* supra; *Gordon* v. *Clinkscales,* supra; *West Virginia State Bar* v. *Earley,* 144 W. Va. 504, 109 S.E. 2d 420 (1959); *In re Bailey,* supra.

The right to practice in state courts is not a privilege or immunity under the Fourteenth Amendment to the United States Constitution. *In re Lockwood,* 154 U.S.116, 14 S. Ct. 1082, 38 L. Ed. 929 (1894); *Bradwell* v. *Illinois,* 83 U.S. 130, 21 L. Ed. 442 (1872). See also, *Starr* v. *State Board of Law Examiners,* 159 F. 2d 305 (7th Cir. 1947); *Ruckenbrod* v. *Mullins,* 102 Utah 548, 133 P. 2d 325 (1943). It is only when there is no rational

basis for denying the right or privilege to practice in a state or there is arbitrary action or invidious discrimination by state officers excluding one from the practice that the "due process" and "equal protection" clauses of the Fourteenth Amendment come into play. *Schware* v. *Board of Bar Examiners,* supra; *Konigsberg* v. *State Bar of California,* 353 U.S. 252, 1 L. Ed. 2d 810, 77 S. Ct. 722 (1957). See also, *Martin* v. *Davis,* 187 Kan. 473, 357 P. 2d 782 (1960), appeal dism. sub nom *Martin* v. *Walton,* 368 U.S. 25, 82 S. Ct. 1, 7 L. Ed. 2d 5 (1961). But it was recognized in *Konigsberg,* as it had always been, that states are free to determine who may practice in their courts, so long as the power to do so is not exercised in an arbitrary or discriminatory manner. See also, *Feldon Saier* v. *State Bar of Michigan,* 293 F. 2d 756 (6th Cir. 1961); *Starr* v. *State Board of Law Examiners,* 159 F. 2d 305 (7th Cir. 1947). It was acknowledged in *Theard* v. *United States,* 354 U.S. 278, 77 S. Ct. 1274, 1 L. Ed. 2d 1342 (1954), that the limits of review of state action in such matters were set in *Konigsberg* and *Schware,* and that they were narrow. In dismissing an appeal from *Martin* v. *Davis,* supra, wherein rules requiring that a Kansas attorney who regularly practiced in another state must associate local counsel before appearing in the courts of Kansas were held not violative of the equal protection and due process clauses, the Supreme Court of the United States found a want of a substantial federal question. The court found the rules, both on their face and as applied, within the competence of the Supreme Court of Kansas and not beyond the allowable range of state action under the Fourteenth Amendment. The United States Supreme Court said that the fact that the rules may result in "incidental individual inequality" did not make them offensive to the Fourteenth Amendment. *Martin* v. *Walton,* supra. This seems to be a complete answer to petitioners' argument that somehow nonresident attorneys, who presumably have satisfied the courts of their own states as to competence and moral qualifications, are favored in Arkansas. Whatever deficiencies exist under the statute may certainly be remedied by "terms, conditions and requirements prescribed by rules of practice" of the individual courts, and if they are not, the rule-making power of this court may be invoked.

Since the practice of law is a profession licensed as a privilege or franchise and its members officers of the court and a necessary arm of the judicial system, it is not a natural right, the regulation of which is limited by the state constitution. See *Gosnell* v. *State,* 52 Ark. 228, 12 S.W. 392. There is certainly no indication that the statute and the action of the court in this case are in any way discriminatory and that the same rights and privileges accorded Cox thereunder would not have been accorded to all others similarly situated upon the same terms. In denying the motion to strike, the circuit judge found that it had been the custom and practice of that court to allow nonresident attorneys to be admitted for a particular case.

We find no merit in petitioners' arguments on this point and nothing in Ark. Stat. Ann. § 25-108 or the circuit court's action in this case which violates either the state or federal constitution.

The writ is denied.

V. G. PEEK *v.* HOYT MEADORS

73-109 500 S.W. 2d 333

Opinion delivered October 22, 1973

Harold C. Rains Jr., for appellant.

Batchelor & Batchelor, for appellee.

JOHN A. FOGLEMAN, Justice. Appellee has raised a question about the timeliness of the notice of appeal in this case, which we must first consider because it goes to the jurisdiction of this court. *Davis* v. *Ralston Purina Company,* 248 Ark. 14, 449 S.W.2d 709. The jury verdict was rendered on November 29, 1972. Judgment was filed on December 13, 1972. Thereafter, on December 15, 1972, appellant filed a motion for new trial. A response thereto was filed by appellee on December 21, 1972. The motion was taken under advisement by the circuit judge on January 10, 1973, and denied on February 6, 1973. Notice of appeal was filed on February 7, 1973.

Notice of appeal must be filed within 30 days from the date of the judgment. Ark. Stat. Ann. § 27-2106.1 (Repl. 1962). This time may be extended, however, by the timely filing and disposition of a motion for new trial. Ark. Stat. Ann. §§ 27-2106.3 and 2106.4 (Supp. 1971). Motion for new trial must be filed within 15 days after the verdict, unless that time expires after adjournment or expiration of the term, in which event, it must be presented to the trial judge within 30 days after the verdict was rendered. Ark. Stat. Ann. § 27-1904 (Repl. 1962). It is clear that the time runs from the date of the verdict and not the date of the judgment. *Henderson* v. *Skerczak,* 247 Ark. 446, 446 S.W.2d 243.

It can be readily seen that the motion was filed more than 15 days after the verdict and was not presented to the circuit judge until more than 30 days had elapsed. The term of court continued without adjournment until the first Monday in March, 1973. Ark.

Stat. Ann. §§ 22-310, 312 (Repl. 1962). Consequently, presentation of the motion was not required within 30 days after the verdict was returned, if the motion was timely filed. This was not the case unless the taking of the motion under advisement had the effect of extending the time for filing of the motion. We have held that the circuit judge has the authority to extend the time for filing of such a motion. *Peterson* v. *Brown,* 216 Ark. 709, 227 S.W.2d 142; *Metropolitan Life Ins. Co.* v. *Thompson,* 203 Ark. 1103, 160 S.W.2d 852. If the circuit judge considers a tardily filed motion for new trial, we presume, in the absence of a showing to the contrary, that it was filed with permission of the court, and that the considerations for permitting the late filing were legally sufficient, at least when the motion is filed and considered and acted upon within the term of court during which the verdict was rendered. *Hill* v. *Wilson,* 216 Ark. 179, 224 S.W.2d 797; *Marshall Bank* v. *Turney,* 105 Ark. 116, 150 S.W. 693; *Fitzhugh* v. *Norwood,* 153 Ark. 412, 241 S.W. 8; *Fordyce* v. *Hardin,* 54 Ark. 554, 16 S.W. 576. Here the verdict was rendered and the motion filed, considered and overruled during the same term of court. Not only is there a failure to show that the court did not permit the late filing or that there were no legally sufficient grounds for doing so, but appellee filed a response to the motion without any mention of its late filing.

Since we must presume that the motion was timely filed, insofar as the requirements of Ark. Stat. Ann. § 27-1904 are concerned, the provisions of Ark. Stat. Ann. §§ 27-2106.3, 2106.4 and 2106.5 (Supp. 1971) come into play. The motion was filed within two days after the entry of the judgment, so the requirements of Ark. Stat. Ann. § 27-2106.3 were met. The circuit judge took the motion under advisement within 30 days after it was filed, so the requirements of § 27-2106.4 were met. The notice of appeal was filed one day after the motion was denied, so the requirements of § 27-2106.5 were met. Since the notice of appeal was given within the time allowed, we consider the appeal on its merits.

We reverse this judgment in favor of a real estate purchaser and against the seller's real estate agent for

want of substantial evidence, bypassing other points asserted by appellant, because appellee has correctly pointed out that the pleadings, motion to dismiss, motion for a directed verdict and other pleadings and orders are not sufficiently abstracted. Viewing the evidence (which does appear to have been adequately abstracted) in the light most favorable to the judgment, the facts are as follows:

> Peek is a licensed real estate broker. He had a listing from Douglas E. and Marjorie K. McGriff of Hartford, Iowa, for the sale of a tract of land near Mountainburg on which a motel, service station, cafe and other buildings were located. Hoyt Meadors, then a resident of California, observed, while visiting in the community, that the property, of which he had known for many years, was for sale. After his return to California, he authorized his cousin O. D. Meadors to enter into negotiations on his behalf to purchase the property. O. D. Meadors went to view the property with Peek and asked about various items. When they came to a locked garage building on the premises, both looked through cracks in the door and saw various tools. O. D. Meadors then asked Peek if the items he observed were included in the sale and Peek replied that they were, and that everything on the place went. Peek said that for some reason he did not understand he had the keys to all the buildings except this one, but that he would break the lock on it if necessary. O. D. Meadors replied that it was not, and later signed an "offer and acceptance" on a printed form on which the description of the property was filled in as "LAKE-ENTRANCE-CAFE-MOTEL WITH-ALL-EQUIPMENT - IN-BLDGS." On the next day the McGriffs signed an acceptance of this offer. Before the final closing, Hoyt Meadors revealed to Peek that he was the actual purchaser of the property and asked that he be permitted to personally view the property before the sale was completed. Peek and Hoyt Meadors went to the property and inspected it. Upon coming to the locked garage building, Hoyt Meadors asked particularly if they could enter it and see what was in it. Peek did not have a key, so he got

a sledge hammer from his automobile parked nearby, and Hoyt Meadors obtained a claw hammer. Hoyt Meadors broke the lock off the door at the direction of Peek, entered the building and observed a 10-inch table saw, a cement finisher, various hand tools, three gallons of paint and a square of rubber roofing. Hoyt Meadors specifically asked Peek if these items were included in the sale. Peek replied that they were, saying that he did not know where they came from or why they were there, "but they all go, everything you see goes with the deal." Peek never specifically asked the McGriffs whether these items, shown to have a value of about $600, were a part of the property being offered for sale. After the sale was closed, these items were reclaimed by Don Valliquette, who had stored them in the building with approval of McGriff. There is no evidence that Peek had any actual knowledge about the real ownership of the items about which the controversy arose. At the closing of the sale, which took place the day following the visit of the premises by Hoyt Meadors and Peek, no mention was made of the questioned items. Meadors did not ask McGriff about them because he relied on Peek's representations.

Peek testified, over appellee's objection, that he was authorized to sell all the equipment in all the buildings. Although this testimony of appellant could not be taken as uncontradicted, it is corroborated by the inescapable inference that he was so authorized, arising from the written acceptance of the Meadors offer by the sellers, with the express description of the property including "all equipment in buildings."

The principal, and not the agent, is liable upon the contract, where the agent is duly constituted, names his principal, contracts in the principal's name and does not exceed his authority. *Brown* v. *Maryland Casualty Company,* 246 Ark. 1074, 442 S.W.2d 187. As a basis for liability of the agent, appellee relies upon the doctrine of constructive fraud set out in *Lane* v. *Rachel,* 239 Ark. 400, 389 S.W.2d 621, wherein we held, as we have in other cases, that one, not knowing the truth,

who makes a representation which is false, may be liable to one to whom he owes a legal or equitable duty, even though there is a complete absence of any moral wrong or evil intention. The misrepresentation generally involves a mere mistake of fact. *Kersh Lake Drainage District* v. *Johnson,* 203 Ark. 315, 157 S.W.2d 39. Although an agent might well be liable to a third person for legal or constructive fraud, we do not think that the evidence in this case supports such a liability. In *Brooks* v. *Smith,* 215 Ark. 421, 22 S.W.2d 801, we held that an agent was not liable to a third party where his representation to the buyer was only a repetition, in good faith, of a statement authorized by his principal. There is no evidence from which a lack of good faith or the existence of a deceitful intent on Peek's part could be inferred. As we have pointed out, the evidence shows that Peek's authority was to sell all equipment in the buildings on the premises, and he was relying upon that authority in making the statements relied upon by the purchaser. Under these circumstances, the rule stated in *Brown* v. *Maryland Casualty Company,* supra, applies, and the judgment lacks substantial evidentiary support.

Accordingly, the judgment is reversed and the cause remanded.

STATE OF ARKANSAS *v.* JAMES W. GIBBONS

CR 73-101 500 S.W. 2d 341

Opinion delivered October 22, 1973

[redacted]

Jim Guy Tucker, Atty. Gen., by: *O. H. Hargraves,* Deputy Atty. Gen., for appellant.

Howell, Price, Howell & Barron, for appellee.

J. FRED JONES, Justice. James W. Gibbons was indicted by a Pulaski County grand jury for the crime of pandering. At his trial in the Pulaski County Circuit Court certain tape recordings were offered in evidence by the state and refused by the trial court. A mistrial was declared in connection with some matter not in the record before us, and the state brings this appeal assigning three errors in connection with the trial court's refusal to admit the sound recordings in evidence. The appellee Gibbons contends that there is no authority for an appeal by the state from an interlocutory order and we agree.

The appeal in this case was perfected under the provisions of Ark. Stat. Ann. § 43-2720 (Repl. 1964) setting out the method of perfecting an appeal in a felony case where an appeal on behalf of the state is desired. Ark. Stat. Ann. § 43-2733 (Repl. 1964) sets out the procedure for appeals in misdemeanor cases when an appeal by the state is desired. The state apparently relied on Ark. Stat. Ann. § 43-2706 (Repl. 1964) in attempting this appeal from an interlocutory order. This statute was repealed by Act 333 of 1971 but it originally read as follows:

> "An appeal shall only be taken on a final judgment *except on behalf of the State.*" (Emphasis added).

We have held that the state was entitled to appeal from the entry of an interlocutory order *in felony cases* under this statute. See *State* v. *Flynn,* 31 Ark. 35; *State* v. *Robinson,* 55 Ark. 439, 18 S.W. 2d 541.

In *State* v. *Langstaff,* 231 Ark. 736, 332 S.W. 2d 614, we held that the state was not entitled to an appeal from an interlocutory order in a misdemeanor case

and pointed out that § 43-2706 was a part of Title 9, Art. 1, of the Criminal Code which is applicable only to felonies and not to misdemeanors.

Act 333 of the Arkansas Legislature for 1971 was an Act to simplify the procedure for appeals from the circuit court to the Supreme Court in criminal cases. After providing for an absolute right of appeal from misdemeanor as well as felony convictions in the circuit courts, this Act concludes with §§ 13 and 14 as follows:

> "SECTION 13. *Appeal by the Prosecution.* The manner in which the state or other prosecuting party may appeal in a criminal case is not altered by this act.
>
> SECTION 14. *Repeal of Laws.* All laws and parts of laws in conflict herewith, including but not limited to the following, are hereby repealed: Ark. Stat. Ann. §§ 43-2301, 43-2701, 43-2703, 43-2704, 43-2705, 43-2706, 43-2708, 43-2709, 43-2710, 43-2711, 43-2712, 43-2713, 43-2723, 43-2725, 43-2731, 43-2732, 43-2734, 43-2736, 43-2737, 43-2738."

Thus it is seen that § 43-2706, *supra,* was repealed outright but §§ 43-2720 and 43-2733 were not disturbed by Act 333.

The case of *State* v. *Cosentino,* 252 Ark. 68, 477 S.W. 2d 460, was another appeal by the state from an interlocutory order in a misdemeanor case which was considered by this court in March, 1972, after the effective date of Act 333 of 1971. In that case we followed our decision in *State* v. *Langstaff, supra,* and concluded that opinion as follows:

> "Without deciding the point, we call attention to the possibility that the State's privilege of appealing from interlocutory orders in *felony cases,* under Ark. Stat. Ann. § 43-2706 (Repl. 1964), may have been abrogated by §§ 13 and 14 of Act 333 of 1971. See Ark. Stat. Ann. §§ 43-2706 and -2720.1 (Supp. 1971)." (Emphasis added).

As already pointed out, the appeals in *Langstaff* and *Cosentino* were from interlocutory orders in *misdemeanor cases* and our decisions in those cases turned on the fact that the exception in favor of the state found in § 43-2706 simply did not apply to misdemeanor cases. In the case at bar, the accused is charged with a felony and we now hold, as we strongly indicated in *Cosentino,* that Ark. Stat. Ann. § 43-2706 (Repl. 1964) was repealed by Act 333 of 1971, and the state no longer has the right of interlocutory appeal reserved to it by the exception in § 43-2706, *supra.*

The state argues that since the manner in which the state or other prosecuting party may appeal in a criminal case was specifically excluded from the effects of Act 333, the state may still appeal from an interlocutory order in a felony case. We find no merit in this argument. The state may still perfect its appeals by the procedures set out in §§ 43-2720 and 43-2733 which were not repealed or altered by Act 333.

The appeal is dismissed.

CLAUD H. HOLTHOFF AND EVELYN HOLTHOFF
v. EMMETT J. TUCKER, ET AL, INTERVENOR

73-105 500 S.W. 2d 338

Opinion delivered October 22, 1973

B. Kenneth Johnson and *Gill, Clayton & Johnson,* for appellants.

Odell C. Carter, for appellees.

CONLEY BYRD, Justice. Prior to May 19, 1969, Linnie B. Hill, Willie Gene Laster, Emmett Tucker and Allie B. Wilson were tenants in common of the NW¼ NW¼ Sec. 26, T. 85, R 5 W in Lincoln County. On that date Allie B. Wilson executed a quitclaim deed to Emmett Tucker. The deed was properly recorded. Emmett Tucker started trying to sell the property and ran some advertisements in the local paper. Sometime during 1970, Tucker entered into an oral contract with Albert Matthews to sell him the entire 40 acres. June 4, 1970, appellants Claud H. Holthoff and Evelyn Holthoff acquired the undivided one-fourth interest of Linnie B. Hill. On January 20, 1971, appellants acquired a quitclaim deed from Allie B. Wilson paying therefor a consideration of $2,000. In August 1971, the appellants filed a partition suit making appellees Tucker and Willie Gene Laster parties. Thereafter, appellee Matthews intervened. In the trial court appellees denied appellants' claimed ownership of the Allie B. Wilson interest citing the prior 1969 deed to Tucker. Appellants countered with the contention that the 1969 deed was executed fraudulently and without consideration. The chancellor in a written opinion determined that appellants were not the owners of the Allie B. Wilson interest. For reversal it is contended:

> "POINT I. The court incorrectly placed the burden of persuasion as to fraud in the procurement and as to the existence of a constructive trust upon appellants when a confidential relationship was shown to exist.
>
> POINT II. The court erred in holding that the law in Arkansas does not give a third party any right to seek cancellation of a deed valid on its face."

Allie B. Wilson testified that at the time of the conveyance to her brother Emmett J. Tucker she was in

debt to him for some liens he had satisfied on the property. After some equivocation as to her brother's conduct (*i.e.* whether he held it for investment purposes), Allie Wilson stated that she had never complained about the way her brother had handled this transaction and that she was not complaining now.

We do not reach appellants' contention that they, as third parties, have standing to seek cancellation of the deed from Wilson to Tucker, because even if we should assume that they have the requisite standing still they cannot prevail. The deed was of record and according to Ark. Stat. Ann. § 16-114 was constructive notice of the conveyance. Furthermore, under the allegations here made the deed was not void but at most would only be voidable. Under these circumstances the appellants' claim to the title as against Tucker could never exceed those of Allie B. Wilson. The testimony of Allie B. Wilson was certainly sufficient to show by a preponderance that the deed was executed to Tucker for a valid consideration and that she was not now repudiating its validity. Under these circumstances Allie B. Wilson could not set aside the conveyance, *Heskett & Hale* v. *Bryant,* 247 Ark. 790, 447 S.W. 2d 849 (1969). The appellants' claim being no greater than Wilson's is subject to the same limitation.

Affirmed.

MAURY D. DICKS ET AL *v.* FRED NAFF, MAYOR ET AL

73-81 500 S.W. 2d 350

Opinion delivered October 22, 1973

Putman, Davis & Bassett, for appellants.

Ledbetter & Associates Ltd., by: *Thomas D. Ledbetter; Smith, Williams, Friday, Eldridge & Clark,* by: *Herschel H. Friday, James A. Buttry,* and *Hermann Ivester,* for appellee.

FRANK HOLT, Justice. Appellants attack the constitutionality of Ark. Stat. Ann. § 19-4613 et seq. (Suppl. 1971) (Act 185 of 1965 as amended), which is enabling legislation, and also the constitutionality of an implementing ordinance of the City of Eureka Springs. The city ordinance, as permitted by the enabling act, levied a 1% tax upon the gross receipts or proceeds of motels, hotels and restaurants, owned and operated by appellants, for the purpose of advertising and construcing facilities in the promotion of tourism.

Appellants first contend that the chancellor erred in declaring the enabling act and the implementing ordinance constitutional. It is appellants' position that the enabling act is unreasonable and arbitrary and without just distinction creates a separate class for taxation consisting only of hotels, motels and restaurants to bear the brunt of the total cost of promoting tourism. Further, appellants contend that the classification does not rest upon some ground of difference having a fair and substantial relation to the object of the legislation so that all persons similarly situated shall be treated alike. Therefore, it is asserted that the enabling act as well as the implementing ordinance is violative of the due process and equal protection clauses of the Fourteenth Amendment of the Federal Constitution.

We first review the controlling rules of statutory construction with reference to the validity of legislation in the area of taxation. In the early case of *Green, et al,* v. *Frazier,* 253 U. S. 233 (1920), the court said:

> When a state legislature acts within the scope of its authority it is responsible to the people, and their right to change the agents to whom they have entrusted the power is ordinarily deemed a sufficient check upon its abuse. When the constituted authority

> of the State undertakes to exert the taxing power, and the question of the validity of its action is brought before this court, every presumption in its favor is indulged, and only clear and demonstrated usurpation of power will authorize judicial interference with legislative action.

In *Madden* v. *Kentucky,* 309 U.S. 83 (1940), where a state tax set different rates on bank deposits in the state from those out of state, the United States Supreme Court held that the tax was consistent with due process and equal protection. The court said that "in taxation, even more than in other fields, legislatures posses the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes." Again it was emphasized that "[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." Neither is the state "required to resort to close distinctions or to maintain a precise, scientific uniformity with reference to composition, use or value." *Allied Stores* v. *Bowers,* 358 U.S. 522 (1959). Nor is a legislature required to make meticulous adjustments in an attempt to avoid incidental hardships. *Rapid Transit Corp.* v. *New York,* 303 U.S. 573 (1938). However, as appellants assert, "[T]he State must proceed upon a rational basis and may not resort to a classification that is palpably arbitrary." *Allied Stores* v. *Bowers, supra.* The mere fact that a taxation statute is discriminatory in favor of one class is not sufficient to make it arbitrary if that discrimination is based upon a reasonable distinction or if any facts can reasonably be conceived to sustain the act and a difference need not be great. *Tax Commissioners of Indiana* v. *Jackson,* 283 U.S. 527 (1931), and *Allied Stores* v. *Bowers, supra.*

To meet equal protection and due process requirements the legislative classification for the purpose of taxation must rest upon some ground of difference hav-

ing a fair and substantial relation to the object of the legislation so that all persons similarly situated shall be treated alike. *Royster Guano Co.* v. *Virginia,* 253 U.S. 412 (1920), and *Larey, Comm'r* v. *Cont. Southern Lines,* 243 Ark. 278, 419 S.W. 2d 610 (1967). A classification is permissible if the differences in the inpact of the act are reasonably related to the purpose of the law. *Jacks* v. *State,* 219 Ark. 392, 242 S.W. 2d 704 (1951). With respect to the extent of the great freedom of the legislature in exercising its broad and discretionary powers in the area of taxation, it was said in *Carmichael* v. *Southern Coal Co.,* 301 U.S. 495 (1937):

> A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it.

In *Carmichael* the Alabama Unemployment Compensation Act established a tax scheme levied on employers of eight or more persons for twenty or more weeks in the year. Addressing the numerical requirements, the court said:

> Yet this is the type of distinction which the law is often called upon to make. It is only a difference in numbers which marks the moment when day ends and night begins, when the disabilities of infancy terminate and the status of legal competency is assumed. It separates large incomes which are taxed from the smaller ones which are exempt, as it marks here the difference between the proprietors of larger businesses who are taxed and the proprietors of smaller businesses who are not.

To the same effect is *Potts* v. *McCastlain, Comm'r,* 240 Ark. 654, 401 S.W. 2d 220 (1966), where we recognized that the mere fact that a classification made by the state is unfair and unequal is not sufficient for invalidating the statute inasmuch as any system of taxation results in many inequalities and perhaps unfairness to particular classes. "This arises more often, not out of the law it-

self, but out of the peculiar conditions under which classes, or individuals, may find themselves in their manner of doing business or location, rather than out of the classification." *U-Drive-Em Corporation* v. *Wiseman,* 189 Ark. 1163. 76 S.W. 2d 960 (1934).

In *Madden* v. *Ky., supra,* it was said "[t]his court fifty years ago concluded that 'the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation' and the passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a Legislature in formulating sound tax policies."

Thus, the foregoing authority permits the state legislatures to classify certain groups for taxation purposes if a rational basis exists and if a difference is reasonably related to the purpose of the law. A presumption of validity attends such legislation with all doubts being resolved in its favor. The appellants must shoulder the heavy burden of demonstrating that this type legislation can conceivably have no rational basis. In our view the legislature, by its democratic process of conducting public hearings before committees and the free and open discussions by its members in that forum could very well have determined that the greatest income from the toursit dollar would be to the advantage of the members of this particular class. It is common knowledge from time immemorial that the traveler or tourist primarily must first have lodging and food in the area in which he sojourns.

Therefore, in the case at bar we hold, and appellants cite no cases to the contrary in the factual situation, that the enabling act has a rational basis and appellants' classification has a fair and substantial relation to its objective.

The appellants, as prevously indicated, next assert the unconstitutionality of the implementing ordinance on the same basis they attacked the enabling act; i.e., that it has no rational basis and the difference in the effect of the ordinance on other persons similarly situated is not reasonably related to the purpose of the law. It was stipulated that hotels and motels derive 97.5%

of their income from tourist trade and that 90% is derived by restaurants and other eating establishments. In arriving at these percentage figures, it was agreed that seventeen motels and hotels, five restaurants, cafes and cafeterias were considered. This constituted appellants' classification. It was further stipulated that other businesses which were untaxed derived the following percentage of their gross receipts from the tourist trade: campgrounds (1) 100%, gas stations (8) 66%, gift shops (12) 86%, art galleries (3) 88%, liquor stores (3) 53%, grocery stores (2) 50%, toy stores (1) 75%, antique shops (3) 90%, museums (1) 90%, cheese shops (1) 70%. There was evidence adduced, however, that there was actually a total of twenty-five restaurants, thirty-two motels and two campgrounds. It was agreed that the stipulated percentages do not take into account any differences in the amount of gross receipts derived by the various business establishments from tourism. Certainly this is a distinction.

Very quickly we observe that it could reasonably be inferred by the legislative authorities that the gross receipts of those businesses constituting the classification could be greatly in excess of the gross receipts of those untaxed businesses which also benefit from the tourist trade. It is, further, observed that the stipulated percentages of gross receipts derived from tourism are not weighted in terms of the number of businesses in each sub-class.

The two campgrounds are obviously different from hotels and motels inasmuch as the traveler or tourist using them must have with him and furnish most of the necessary facilities for lodging. As to the other untaxed businesses, there also exist differences in "organization, management, and type of business transacted." See *Tax Commissioners of Indiana* v. *Jackson, supra.*

In the case at bar, the ordinance earmarked the funds for expenditure in advertising and providing facilities to promote the tourist industry in that locality. In *New York Rapid Transit Corp.* v. *City of New York, supra,* a tax was placed upon a classification of indus-

tries and earmarked the revenues to relieve unemployment. Even though the funds were earmarked to be spent for that purpose, it was said that the purpose or object of the tax law was to raise revenue. The court said:

> We conclude, therefore, that the provisions of the legislation earmarking the funds collected are not of importance in determining whether or not the classification of the challenged acts is discriminatory.

There it was further said that it is not constitutionally required that a classification for a tax be earmarked or related to the appropriation of the proceeds. *New York Rapid Transit Corp.* v. *City of New York, supra.*

In other words, it was there stated the controlling "object" or purpose "is the revenue to be raised by the acts." We hold that whether the object or purpose of the act and implementing ordinance was merely for raising revenue or its object or purpose was to spend revenue to promote tourism as earmarked by the act, in either event, the appellants have not discharged the heavy burden of proof which they must shoulder to demonstrate the enabling act and implementing ordinance have no rational basis and are not reasonably related to the purposes of the legislation. As previously observed, the legislature could logically and practically envision that appellants, as a classification, would be the beneficiary of not only as great or greater percentage of the tourist dollar (as stipulated) - they also would benefit from much greater gross receipts and profits than the untaxed businesses which also derive a benefit from the sojourner or tourist.

Appellants next contend that the provision in the enabling act providing for a referendum upon the petition of 500 electors is not severable and, further, it is unconstitutional in that it arbitrarily and capriciously discriminates against the smaller cities of the first class (1,500). Eureka Springs is a city of approximately 1,600 population and about 1,233 are qualified electors. At the last general election, a total of 833 voted for a mayor. We hold that the provision requiring 500 petitioners

is severable inasmuch as the enabling act is not dependent upon this provision nor are we of the view that the legislature would have refused to enact the legislation without this number. In fact the legislature, in plain and explicit language in a severability clause, provided that any portion of the act was severable to insure its validity. Furthermore, we do not consider that the appellants are in a position to attack this proviso inasmuch as they did not avail themselves of Amendment 7, §1, of our constitution which permits them to refer any city ordinance to a general election upon the petition of 15% of the local voters of that city. That would have only required approximately 125 petitioners to refer this ordinance to the voters for approval. In oral argument appellees agreed this was a permissible procedure. In the event the petitioners of a city of the first class desire to utilize Amendment 7 as an alternative, that is permissible.

Finally, the appellants, assert the chancellor erred in admitting the testimony of Dr. Charles E. Venus, an expert witness, as to the results of his statewide and local surveys with respect to tourism. A sufficient answer is that, although the chancellor permitted the witness to testify, he specifically found in the decree that appellants' objection to the testimony was sustained and consideration of the testimony was excluded by him in the determination of the issues.

Affirmed.

SOUTHLAND MOBILE HOME CORPORATION *v.* ROBERT L. CHYRCHEL AND GLORIA A. CHYRCHEL

73-102 500 S.W. 2d 778

Opinion delivered October 29, 1973

Paul Jackson, for appellant.

Lewis E. Epley Jr., for appellees.

CARLETON HARRIS, Chief Justice. Appellant, Southland Mobile Home Corporation, operated, through O.E. Barham,[1] a mobile home sales lot near Springdale. In January, 1970, appellee, Gloria Chyrchel,[2] visited the

[1]This employment, according to Barham, was terminated in September, 1970. Bob Wallace, General Manager and Vice President of Southland, testified that Barham was employed until September, 1971, but this appears to be a mistake.

[2]While Mr. Chyrchel is also an appellee, he does not appear actively in the case and appellees will be referred to throughout this opinion in the singular.

Southland Mobile Home lot in Springdale and talked to Mrs. O. E. Barham, wife of Barham, relative to purchasing trailers. At the lot, appellee looked at two mobile homes, known as a "Detroiter", and a "Nashua", which she subsequently purchased, but she also expressed a desire to purchase a mobile home which had an end bedroom. According to appellee, Mrs. Barham said there was not one on the lot but she knew where one of this type was located, and they drove to the location and looked at it. Mrs. Chyrchel was pleased with the trailer (an LTD) shown her, and when it was agreed that a new gas range would be placed in it, she said she would purchase same. All three trailers were purchased by appellee, a down payment in a lump sum of $2,000 being made ($500.00 of which was a deposit on the LTD) and the balance being made by three different checks before the occurrence of the fire, hereinafter discussed.[3] After the purchases had been made, the service crew, employed by Southland, made the installations. Though employed by Southland, they were hired by Barham and worked directly under him. The LTD trailer was placed in position, the sewer and gas were hooked up, and the pilot light on the range lighted, but the service crew was unable to complete installation because they were not knowledgeable on how to hook up the furnace, and they did not hook up the electricity. While they were engaged in their work, Mrs. Chyrchel told them that she smelled gas, suggested that there was possibly a leak, and asked them to check it. She was advised that they had already checked for leaks, but to satisfy her, would check again. This partial installation occurred on Tuesday, April 7. On Friday, the 10th, they connected the water heater but still did not complete the other connections. On this same day, Mrs. Chyrchel thought she could still smell gas but, noticing a piece of pipe on the living room floor, assumed that there was a residue. She opened the windows to "air" the trailer, returned Sunday morning because it appeared that there would be a rain, closed the windows, and left. Not long thereafter, there was a report that the LTD was on fire.

[3]The Nashua, a used trailer, was purchased for the use of Mrs. Chyrchel, who lived in another state, but planned on moving to Carroll County to live with her husband, after retirement; the LTD was purchased for the use of her mother; and the Detroiter, a new trailer, was purchased on behalf of friends who were going to live in it.

There had been an explosion[4], and the trailer was damaged extensively and made uninhabitable as a result of the fire. When Mrs. Chyrchel was unsuccessful in getting her money refunded or obtaining a replacement for the LTD, she instituted suit against Southland and Barham, alleging negligence, and subsequently amending the complaint to allege breach of contract and breach of warranty. Southland defended on the basis that the trailer was sold to appellee by Mr. Barham, on his own, and that Southland had no interest in the trailer, and did not make the sale; further, that the title to the LTD, at the time of the fire, was in appellee, and it was not liable. On trial, the court held that there had been a breach of contract and a breach of warranty by Southland and Barham, jointly and severally, and rendered judgment in favor of appellee in the sum of $4,595, together with interest at the rate of 6% per annum. From this judgment, appellant brings this appeal.

For reversal, three points are relied upon, first that Southland did not own the LTD, and therefore could make no sale (and accordingly no warranty); second, that the sale was complete, and the risk of loss passed to the buyer at the time of the fire. Finally, it is asserted that the Barhams were not the agents of Southland at the time of the sale of the LTD, and the company is not bound by their actions. For convenience, these points will be discussed in reverse order.

The trial court pointed out some rather pertinent facts in rendering its opinion as follows:

> "But now, as far as the cause of action on the breach of warranty or breach of contract, I think the case right now shows that a prima facie case[5] on a cause of action on a breach of warranty in this sense, that the trailer was purchased by Mrs. Chyrchel from the Barham's who were held out to be the agents in charge

[4]According to Barham's testimony, the fire apparently started around the gas stove.

[5] This portion of the opinion was rendered in response to appellant's motion for directed verdict, such motion being denied. Thereafter, only Wallace testified, and the court, after further brief comments, in accord with those quoted, rendered judgment.

of the lot, or Mr. Barham was the agent in charge of the Southland Mobile Home Corporation lot at Springdale. *** It is also true that when the trailer was delivered, it was delivered by Southland Mobile Home truck, by Southland Mobile Home service personnel, and they proceeded to make the installation. I don't think it's seriously argued that when she went to see about buying the trailer, she went to the Southland Mobile Home office and she was taken by Mrs. Barham to the Southland Mobile Home lot where they kept their trailers and everything involved in this transaction is calculated to indicate that Mr. Barham was the agent of the Southland Mobile Home Corporation and that he was doing those things which were normal and within the scope of his authority as such, and he at least had ostensible authority to sell the trailers to her on behalf of Southland Mobile Homes. Now as far as whether Southland Mobile Homes actually owned the trailer or not, I think the evidence shows they probably did not, but it also shows that at the time Mrs. Chyrchel bought the trailer that she was not told that it was owned by anybody other than Southland and that she was told that it was on a different lot and that Mr. Barham would have to get it to her, and that is what he apparently did. Now I think she was entitled to consider that she was dealing with Mr. Barham as the agent of Southland Mobile Homes, because the whole transaction appeared to be that way, and on that basis I think up to this point Southland is in the position of a seller and as such is chargeable like any other seller with the matter of implied warranties of a sale and warranty of merchantability for the purpose indicated, and the testimony by Mrs. Chyrchel is she told Mr. Barham she wanted it for a home for her mother, and this is what it was to be used for."

Bob Wallace, General Manager of Southland, admitted that Barham was an employee of the company, in charge of the Springdale lot, and was, of course, authorized to make sales. Wallace testified that Barham was the only salesman to whom the company paid any commissions, and that other salesmen were paid by Barham. In other

words, commissions paid for sales made there were all sent to Barham who, if others had made a sale, paid them from the check sent him. Wallace said it was left up to Barham whether he wanted one salesman or fifty. The witness stated that Barham had no authority to purchase trailers.

Appellant depends in large measure upon the fact that, in paying for these trailers, appellee, in purchasing the Detroiter and Nashua, made the checks payable to Southland, but in purchasing the LTD, made the check payable to Barham. It is accordingly argued that she knew that Southland did not own the LTD. We do not think this fact deserves the significance attached to it by appellant, for Mrs. Chyrchel testified that she was told to make the check payable to Barham instead of Southland because this particular trailer was not on the Southland lot at the time it was purchased.

As pointed out by the trial court, the setting up of all trailers and installation of services were performed by Southland employees. The trailers were taken to Mrs. Chyrchel's premises by appellant's crew and appellee testified that the Southland name was on the towing vehicle. Though the trailers were shown to Mrs. Chyrchel by Mrs. Barham, there is no question but that Barham himself participated in the sale. He was "in and out" of the office while the papers were being prepared, and was thoroughly familiar with the transaction, including the fact that he told Mrs. Chyrchel to make out one of the checks to him.

Barham testified that all service personnel were employed by Southland, though he, as manager, hired them. According to the witness, he had the responsibility of hiring and firing for Southland, and these employees worked under his direction. The delivery equipment was owned by Southland, and he said that it was this equipment that delivered the trailers that Mrs. Chyrchel had purchased. Barham testified that his wife worked for him in sales and was working as his assistant at the time. Other pertinent facts worthy of mention are that the contracts for the purchase of all three mobile homes were prepared at the same time by Mrs. Barham in the office of

appellant, using forms furnished by appellant. As previously stated, the kitchen range in the LTD was to be replaced and Mr. Barham testified that the new range came from the inventory of appellant and was installed by its service personnel at his direction. There is no dispute in the evidence but that Mrs. Chyrchel was not told that the mobile home was owned by someone other than Southland. In *General Motors Acceptance Corporation* v. *Salter,* 172 Ark. 691, 290 S.W. 584, this court, quoting 2 C.J. 573, said:

> " 'Apparent authority in an agent is such authority as the principal knowingly permits the agent to assume, or which he holds the agent out as possessing; such authority as he appears to have by reason of the actual authority which he has; such authority as a reasonably prudent man, using diligence and discretion, in view of the principal's conduct, would naturally suppose the agent to possess.' "

We have also said that when the evidence as to the nature and extent of an agent's authority is in conflict, it is a question of fact for the jury. See *American Metal Window Company* v. *Watson,* 238 Ark. 418, 382 S.W. 2d 576.

In *Mark* v. *Maberry,* 222 Ark. 357, 260 S.W. 2d 455, this court stated that while an agent's declarations, standing alone, are not admissible to prove agency, nevertheless an agency can be established by circumstances, and any evidence tending to establish agency is admissible, including the testimony of the agent. We hold that there was substantial evidence to support the trial court's finding, sitting as a jury, that Mr. Barham possessed apparent authority to sell the LTD as the agent of appellant company.

Nor do we agree that the sale was complete before the fire and the risk of the loss had passed to the buyer. Mrs. Chyrchel testified that the price included installation of facilities and that everything was to be ready for use of the trailer by her mother before acceptance. In fact, she said that her son had signed the acceptance agreement for the other two trailers, but that this particular

trailer was never accepted nor was any check list ever presented to her for acceptance. Barham testified that, "We would try our best to get the trailer ready, yes," and he explained that by "ready", he meant water, lights, and gas connected so that the trailer could be lived in. Admittedly, this was not done, and the trailer was not ready for occupancy at the time it burned. Appellant relies on Ark. Stat. Ann. § 85-2-509 (3) (Add. 1961), which it contends placed the risk of loss on appellee once the trailer was delivered. It would appear that there is a quick answer to this contention. Sub-section (4) provides that the provisions of this section are subject to a contrary agreement of the parties and to the provisions of the article on effect of breach on risk of loss as stated in § 85-2-510. We have already pointed out that in addition to moving the trailer to the Chyrchel lot, there was an agreement to hook up the facilities and thus prepare the trailer for occupancy by Mrs. Chyrchel's mother. This required more from appellant than mere placement of the trailer and can be construed as a contrary agreement which left the risk of loss on the seller/appellant until the installation was completed. Also, § 85-2-510 provides that where delivery of goods so fails to conform to the contract as to give the right of rejection, the risk of loss remains on the seller until cure or acceptance. This section was construed in the case of *William F. Wilke, Inc.* v. *Cummins Diesel Engines, Inc.*, 252 Md. 611, 250 A. 2d 886, where a seller delivered a generator to the job site in a field, but did not perform required field tests called for under the agreement between the buyer and seller. Subsequently, the generator froze, and the question at issue was which party suffered the loss. The court held that "In the absence of a delivery of conforming goods, the risk of damage remained with Cummins, notwithstanding the delivery of the generator to the job site, the receipt of payment from Wilke, and some eight months' delay in start-up." It also stated, "U.C.C. § 2-106 (2) provides that 'Goods or conduct including any part of a performance are "conforming" or conform to the contract when they are in accordance with the obligations under the contract.' Non-conformity cannot be viewed as a question of the quantity and quality of goods alone, but of the performance of the totality of

the seller's contractual undertaking. *Campbell* v. *Pollack,* 101 R.I. 223, 221 A. 2d 615 (1966)." The court then said:

> "Under the facts of this case, we have no difficulty in holding that the delivery of the generator to the job site, while identifying the goods to the contract, did not amount to a delivery of goods or the performance of obligations conforming to the contract. It could not constitute such a delivery and performance until the generator had been installed, started up, and field tests completed to the satisfaction of the government. Until then, risk of loss remained with Cummins regardless of where title may have stood."

Previous discussion has included Southland's contention that it did not own the LTD and therefore could make no sale, this contention having been found to be without merit.

We are of the view that the evidence, heretofore set out, is of a substantial nature, and in *American Metal Window Company* v. *Watson, supra,* we commented that it is well settled law in this state that the finding of the trial court, as a trier of the facts, has the verity and binding effect of a jury verdict and will be sustained if there is any substantial evidence to support it.

Affirmed.

ARTHUR RATZLAFF ET AL *v.* FRANZ FOODS OF ARKANSAS

73-152—73-158 500 S.W. 2d 379

Opinion delivered October 29, 1973

Putman, Davis & Bassett, and *John O. Maberry,* for appellants.

Crouch, Blair, Cypert & Waters, by: *H. Franklin Waters,* for appellee.

GEORGE ROSE SMITH, Justice. These seven appeals have been consolidated here. The controlling question is whether a plaintiff, by taking a voluntary nonsuit with respect to two counts in his complaint, can thereby convert an adverse partial summary judgment with respect to a third count into an appealable order.

Six landowners filed three suits against Franz Foods, alleging that Franz had, by discharging prohibited wastes into the sewer system of the city of Green Forest, polluted a stream running through the plaintiffs' property. The trial court sustained demurrers to the complaints, but on appeal we held that the complaints, by charging Franz with breaches of a contract with the city, stated a cause of action. *Ratzlaff* v. *Franz Foods of Arkansas,* 250 Ark. 1003, 468 S.W. 2d 239 (1971).

After that decision four more suits were filed. Eventually all seven complaints alleged not only the ground for recovery which we had sustained but also a second ground, that Franz had wrongfully discharged wastes directly into the stream, and a third ground, that Franz's discharge of certain wastes into the municipal sewer system violated a city ordinance. On Franz's motion the trial court entered partial summary judgments striking the third count of the complaints. The plaintiffs at once took voluntary nonsuits with respect to the two counts which the trial court had found to be valid and appealed from the partial summary judgments.

We sustain Franz's motion to dismiss the appeals for want of a final appealable order, which the statute re-

quires. Ark. Stat. Ann. § 27-2101 (Supp. 1971). In interpreting the statute we have steadfastly refused to allow piecemeal appeals. See our most recent case on the point, *Independent Ins. Consultants* v. *First State Bank of Springdale,* 253 Ark. 779, 489 S.W. 2d 757 (1973). Here the appellants seek to circumvent the policy of the statute by holding two counts of their complaints in abeyance while they seek our opinion upon the validity of a third count. If that procedure is permissible, litigants may appeal from various interlocutory orders by taking a nonsuit with respect to the rest of the case.

We are not persuaded by the appellants' argument that the situation is essentially the same as it would have been if they had first asserted only one cause of action and then, after a successful appeal from an adverse summary judgment, had added the other two causes of action by amendment after the case had been remanded to the trial court. The controlling distinction is that in the case at bar we know that a piecemeal appeal is presented and that we would violate the policy of the statute by entertaining it. In the suggested alternative situation no violation of the statute would exist or be discernible upon the appeal.

The case at bar falls squarely within the spirit of a statement that was first made in *Woodruff* v. *State,* 7 Ark. 333 (1846), and was later commented upon in *Yell* v. *Outlaw,* 14 Ark. 621 (1854): "It is not in the power of a party to single out a single issue, even by the most solemn contract of record, and submit it to the consideration of the supreme court, so as to elicit the opinion of the supreme court upon the law or the fact of that particular issue. Such a judgment would not be final, as not embracing all the issues in the case, and consequently it could not become the subject of an appeal or writ of error. The real object of the parties was to take the opinion of the supreme court upon the questions of law arising upon the demurrer to the second plea, but in order to receive the benefit of that decision it became absolutely necessary that the circuit court should pass upon all the issues joined."

Appeals dismissed.

HAROLD SULLIVAN *v.* STATE OF ARKANSAS

CR 73-125 500 S.W. 2d 380

Opinion delivered October 29, 1973

James M. Simpson, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Philip M. Wilson,* Asst. Atty. Gen., for appellee.

LYLE BROWN, Justice. Appellant's Rule I petition was denied and he appeals on the grounds that he had inadequate assistance of counsel, and that he did not make an intelligent waiver of his right to a jury trial.

In 1968 appellant entered a plea of guilty to having carnal knowledge of his step-daughter, age eleven years. He was sentenced to a period of not less than ten nor more than thirty years. On August 26, 1968 the court appointed attorney Marion Gill to represent the defendant and on the same day the plea of guilty was entered. Appellant testified at the Rule I hearing that the attorney conferred with him for about ten minutes; that he was told by the attorney he would get a life sentence if he did not plead guilty; that he had a fourth grade education; that no constitutional rights were ever explained to him; and that he was not told he had a right to trial by jury.

Deputy Sheriff Atkinson testified that he assisted Sheriff Robert Moore (now deceased) in the arrest of appellant and that while the three men were sitting in a car he heard Sheriff Moore read the rights form to appellant. He said the sheriff particularly explained to appellant that he had a right to a lawyer but appellant at that time did not ask for one.

Attorney Marion Gill testified on behalf of the State. He could not recall how long he interviewed the appellant, but it was his opinion that it was much longer than ten minutes. The attorney said he explained the applicable law to appellant, explained his rights, and obtained from appellant the information needed to properly advise him. The attorney could not recall specifically whether appellant related that he was guilty but said: "I have never in any criminal case allowed the person to enter a plea of guilty if they told me they were innocent." Mr. Gill said he also interviewed Sheriff Moore, one of the investigating officers. Also, the prosecuting witness happened to be in the courtroom and it was his recollection that he talked with her. He said there was nothing about the interview that indicated mental incompetency on her part. The attorney said he entered into plea bargaining negotiations either with the prosecuting attorney, the sheriff, or both, and related the results thereof to appellant. He said it was appellant's decision "to accept the terms that were offered and to enter a plea of guilty". The attorney was emphatic in his recollection that he told appellant he was entitled to a jury trial if he entered a plea of not guilty. Also, he was certain, he said, that the decision to enter a plea of guilty was the decision solely of appellant. Mr. Gill said he did not talk to the examining physician because, based on what appellant told him, he did not consider it necessary.

We think the evidence is sufficient to sustain the trial court's conclusion that appellant had adequate assistance of counsel. That is especially true in light of our rule that there is a presumption of competence which of course appellant must overcome. *Clark* v. *State,* 255 Ark. 13, 498 S.W. 2d 657.

Since it is our conclusion that appellant voluntarily entered a plea of guilty, there is no need to discuss his other point, namely, that he did not waive a trial by jury. *Medley* v. *Stephens,* 242 Ark. 215, 412 S.W. 2d 823 (1967) is authority for the proposition that a voluntary plea of guilty effects a waiver of trial by jury.

Affirmed.

WILLIE PERRY *v.* STATE OF ARKANSAS

CR 73-109 500 S.W. 2d 387

Opinion delivered October 29, 1973

Joe W. McCoy and *Edward E. Scrimshire,* for appellant.

Jim Guy Tucker, Atty. Gen., by: *Alston Jennings Jr.,* Asst. Atty. Gen., for appellee.

JOHN A. FOGLEMAN, Justice. Appellant Perry, charged with the first degree murder of Pat Brumett, was found guilty of voluntary manslaughter by a jury which fixed his punishment at six years' imprisonment. He alleges that the trial court erred in admitting two photographs of the body of Brumett into evidence and in allowing the prosecuting attorney to exceed the bounds of propriety in closing argument. We find no reversible error.

Appellant asserted that the killing was done in self-defense. Brumett died from wounds inflicted on him by Perry with a knife. A physician, acting as State Medical Examiner, testified that in his opinion death resulted from a knife wound on the neck, but that one under the arm might have been the cause. There had been previous difficulties between the two and some argument between them on June 18, 1972, the day of the fatal encounter. The killing took place in a small cabin consisting of one room, a kitchen area and a bathroom. It occurred after a dice game there in which Lewis Sutton, Neal Jester, Brumett and Perry had all participated at one time or another during a period of three hours or more. All par-

ticipants had been drinking beer or whiskey. The argument between Perry and Brumett took place while this game was in progress.

Just prior to the encounter, Brumett had been sitting at the end of a bed near the door to the cabin. None of the others present saw what took place between Perry and Brumett as Perry started to leave, or heard any statements made by either to the other. Each professed to have had his attention attracted by a commotion, as if persons were scuffling near the door, and to have then seen Brumett bleeding badly and Perry and Brumett standing and facing one another. Immediately after the witnesses saw this, Perry bolted out the door. None of the witnesses saw any weapon in the possession of either Perry or Brumett or heard any threat made by Brumett to Perry.

Perry first contends that the photographs were introduced without a proper foundation having been laid, i.e., that it was not shown that the pictures were accurately taken or that they were correct representations of the subject matter. They were identified by C. B. Crownover, a deputy sheriff who investigated the incident. Crownover went to the hospital and observed Brumett's body after he had made an inspection in and about the cabin and obtained such information as he could. He testified that the two photographs admitted, along with others excluded, were made in his presence by the physician who acted as medical examiner, after Brumett's clothing had been removed. Crownover said that the pictures showed Brumett's appearance after the clothing had been removed. We cannot say the foundation thus laid for the introduction of these pictures was inadequate. We note the physician later testified that he made the photographs and that the two, one a front view and the other a rear view of Brumett's body, portrayed all the "cuts" on it. He referred to these photographs in explaining his examination and findings.

Appellant also contends the photographs should have been excluded because of their tendency to inflame the minds of the jury, and that they were introduced solely for that purpose.

Brumett was described as a man over six feet tall, weighing over 200 pounds. Perry was said to have weighed 140 to 150 pounds. Perry testified that as he started to leave, Brumett jumped up from the bed and started striking and choking him, and that he ran his hand in his pocket, withdrew a knife and cut Brumett with it until Brumett slackened his hold enough that he (Perry) could get loose and fall out the door. Perry stated that he did not know how many times he struck Brumett with the knife, but that he thought each time that Brumett would feel a "sting" and release him. Perry denied having his hand or arm around Brumett's neck while cutting him with the knife.

An in camera hearing was held before the circuit judge admitted the photographs into evidence. It is significant to us that he rejected five others. We agree with appellant that these admitted should have been rejected if their sole effect was to inflame the passions of the jurors against him. See *Garrett* v. *State,* 171 Ark. 297, 284 S.W. 734. Otherwise, the admission and relevancy of photographs are matters resting largely in the discretion of the trial judge. *Lee* v. *State,* 229 Ark. 354, 315 S.W. 2d 916. An objection that photographs tend to inflame or prejudice the jury is not valid, if they are otherwise properly admissible. *Milam* v. *State,* 253 Ark. 651, 488 S.W. 2d 16; *Williams* v. *State,* 239 Ark. 1109, 396 S.W. 2d 834; *Oliver* v. *State,* 225 Ark. 809, 286 S.W. 2d 17. However inflammatory they may be, they are admissible in the discretion of the trial judge, if they tend to shed light on any issue or are useful to enable a witness to better describe the objects portrayed or the jury to better understand the testimony, or to corroborate testimony. *Davis* v. *State,* 246 Ark. 838, 440 S.W. 2d 244; *Stewart* v. *State,* 233 Ark. 458, 345 S.W. 2d 427; *Oliver* v. *State,* supra. Photographs are also admissible as primary evidence upon the same grounds and for the same purposes as diagrams, maps and plats. *Sellers* v. *State,* 91 Ark. 175, 120 S.W. 840. These principles have been applied in sustaining the admission of photographs depicting conditions resulting from bodily injuries. *Reed* v. *McGibboney,* 243 Ark. 789, 422 S.W. 2d 115. We there pointed out that an oral description of such conditions by a witness who was

unusually eloquent might be as inflammatory as a photograph showing the same conditions.

The photographs admitted showed a front and a rear view of Brumett's body. The one taken from the rear showed two long gaping wounds on Brumett's back, both on the left side—one just below the shoulder blade, and one near the bottom of the rib cage—and another across the back of his neck. The one taken from the front showed one severe wound on the throat and another below the armpit, both on Brumett's left side.

We have in many cases upheld the admission of photographs of the body of the victim in a homicide case when they showed the nature and location of wounds, even though the photographs were gruesome. See, e.g., *Lillard* v. *State,* 236 Ark. 74, 365 S.W. 2d 144; *Oliver* v. *State,* supra; *Perkins* v. *State,* 217 Ark. 252, 230 S.W. 2d 1; *Lee* v. *State,* 229 Ark. 354, 315 S.W. 2d 916; *Smith* v. *State,* 216 Ark. 1, 223 S.W. 2d 1011, cert. denied, 339 U.S. 916, 70 S. Ct. 562, 94 L. Ed. 1341; *Black* v. *State,* 215 Ark. 618, 222 S.W. 2d 816, cert. denied, 338 U.S. 956, 70 S. Ct. 490, 94 L. Ed. 590; *Higdon* v. *State,* 213 Ark. 881, 213 S.W. 2d 621; *Nicholas* v. *State,* 182 Ark. 309, 31 S.W. 2d 527; *Sellers* v. *State,* supra.

Perry's defense raised questions, among others, as to which of the two was the aggressor, whether Perry in good faith endeavored to avoid the danger which appeared to him and to avert the necessity of killing Brumett and to decline further contest before the mortal wound was inflicted, whether Perry honestly believed he was in danger of losing his own life or suffering great bodily injury, whether the circumstances were sufficient to excite the fears of a reasonable person, whether Perry acted hastily or in a spirit of revenge and whether he acted with due caution and circumspection. Ark. Stat. Ann. §§ 41-2209, 41-2235, 41-2236 (Repl. 1964). *Bruder* v. *State,* 110 Ark. 402, 161 S.W. 1067; *Deatherage* v. *State,* 194 Ark. 513, 108 S.W. 2d 904; *Peters* v. *State,* 245 Ark. 9, 430 S.W. 2d 856; *Duncan* v. *State,* 49 Ark. 543, 6 S.W. 164.

The nature and location of the wounds were material in this case to several of the issues. In considering these

issues, the jury was at liberty to consider the nature and location of the wounds, the probable manner of their infliction and the extent to which they were contradictory to appellant's contentions. See *Bartley* v. *State,* 210 Ark. 1061, 199 S.W. 2d 965; *Black* v. *State,* supra. The number and severity of the wounds were relevant to the questions whether Perry acted in a spirit of revenge, and whether he acted with due caution and circumspection. In addition, these facts had some probative force tending to show malice. *Davis* v. *State,* 246 Ark. 838, 440 S.W. 2d 244; *Government of Virgin Islands* v. *Lake,* 362 F. 2d 770 (3rd Cir. 1966); *Carson* v. *State,* 217 Ark. 658, 232 S.W. 2d 835; *Tatum* v. *State,* 172 Ark. 244, 288 S.W. 904. See also, *Stanley* v. *State,* 248 Ark. 787, 454 S.W. 2d 72; *Stockton* v. *State,* 239 Ark. 228, 388 S.W. 2d 382; *Bly* v. *State,* 213 Ark. 859, 214 S.W. 2d 77; *Wooten* v. *State,* 220 Ark. 750, 249 S.W. 2d 964. They were also to be considered in determining whether the intent to kill should be inferred. *Craig* v. *State,* 205 Ark. 1100, 172 S.W. 2d 256. From an examination of these wounds, it appears that it was possible for all or some of them to have been inflicted by one who was behind Brumett. If so, that fact was quite material to the question of whether deceased or appellant was the aggressor. See *Bartley* v. *State,* 210 Ark. 1061, 199 S.W. 2d 965.

In *Nicholas* v. *State,* 182 Ark. 309, 31 S.W. 2d 527, where a picture was nothing more than a description of fatal wounds of the deceased at the hands of the accused, it was argued that, because of the gruesomeness of the wound shown, the picture prevented a fair and impartial trial because it tended to arouse the passions of the jury. Our language there is pertinent here. We said:

> The character of the wound inflicted upon deceased by one charged with his murder is always admissible in evidence, and we know of no rule limiting the description thereof to word of mouth. * * * We do not think the most accurate method of reflecting a truth should be eliminated, but, just to the contrary, such a method should be approved and accepted.

We can say with assurance that there was no abuse of the circuit judge's discretion in admitting these photo-

graphs, and his rejection of five others tends to indicate that his discretion was soundly exercised. Since appellant was charged with first degree murder and convicted of only voluntary manslaughter, we have considerable doubt that the admission of the photographs could have inflamed the passions of the jury. See *Perkins* v. *State,* 217 Ark. 252, 230 S.W. 2d 1; *Garrett* v. *State,* 171 Ark. 297, 284 S.W. 734.

Appellant complains that the prosecuting attorney failed to produce a forensic pathologist to testify about the direction from which the cuts were inflicted or the position of the person who inflicted them, as he stated that he would at the hearing in camera. In view of what we have said, this failure is immaterial. He also complains of the statement by the circuit judge at that hearing that the photographs admitted would have "some weight to the jury for them to know there was a hog skinning out there." If that statement had been made in the presence of the jury, we would have cause for concern. Since it was made out of the hearing of the jury, appellant could not have been prejudiced by the folksy language used by the judge in stating the reasons for his ruling.

Appellant also complains that the circuit judge gave the jury no instruction stating the purpose for which the photographs might be considered and admonishing the jurors against permitting these pictures to inflame their minds, as was done in *Lee* v. *State,* 229 Ark. 354, 315 S.W. 2d 916. There was no request by appellant for such an admonition. The failure to give an admonitory or cautionary instruction, or one limiting the effect of testimony or the purpose for which it may be considered, is not prejudicial error, in the absence of a request therefor. *Petron* v. *State,* 252 Ark. 945, 481 S.W. 2d 722; *Steel* v. *State,* 246 Ark. 75, 436 S.W. 2d 800; *Clark* v. *State,* 246 Ark. 1151, 442 S.W. 2d 225. *Fielder* v. *State,* 206 Ark. 511, 176 S.W. 2d 233; *Kyles* v. *State,* 143 Ark. 419, 220 S.W. 458.

The fact that appellant's counsel admitted that the victim was cut numerous times did not render these photographs inadmissible. In the first place, the location and severity of the cuts were not admitted and admission

could hardly have portrayed the actual nature of the wounds or given any indication as to the direction from which they may have been inflicted. Furthermore, the fact that the evidence is cumulative or unnecessary because of an admission by defendant of facts disclosed by photographs does not, in and of itself, render them inadmissible. *Smith* v. *State,* 216 Ark. 1, 223 S.W. 2d 1011, cert. denied, 339 U.S. 916, 70 S. Ct. 562, 94 L. Ed. 1431; *Rivers* v. *United States,* 270 F. 2d 435 (9th Cir. 1959); *State* v. *Upton,* 60 N.M. 205, 290 P. 2d 440 (1955). See also, *Stanley* v. *State,* 248 Ark. 787, 454 S.W. 2d 72; *State* v. *Greene,* 74 R.I. 437, 60 A. 2d 711 (1948); *State* v. *Lantzer,* 55 Wyo. 230, 99 P. 2d 73 (1940).

Appellant's contentions about the prosecuting attorney's arguments to the jury are threefold. The arguments were not reported verbatim, but the record purports to state the gist of the statements to which appellant objected and of his objections thereto. We do not consider the statement in appellant's brief that the prosecuting attorney was waving a knife in front of the jury, because the record does not disclose that this was done, or, if it was, that any objection was made.

The first objection was made to a statement by the prosecuting attorney that he had wanted Perry to open a pocket knife in court, but that appellant's attorney wouldn't let him because he (the attorney) didn't think he could open it with one hand. After a general objection was made, the court admonished the jury to consider remarks of counsel as statements of their opinions and to base its verdict on the evidence and the law given by the court. Thereafter, appellant's attorney only requested that the judge ask the prosecuting attorney to stay in the record. We do not consider there was any reversible error here. Perry had testified that while Brumett was striking and choking him, he got one hand into his right pocket, removed his pocket knife, stuck his finger in the "nail thing," put it against his leg and opened it. The circuit judge had sustained appellant's attorney's objection to the prosecuting attorney's request that Perry demonstrate how he opened the knife with a knife tendered by the prosecuting attorney. Perry later denied that the knife

was open in his pocket before the encounter. Appellant did not request any further admonition, object to that given, or move for a mistrial. In view of the court's admonition, we cannot say that there was any prejudicial error in this instance. See *Camp* v. *State,* 249 Ark. 1075, 467 S.W. 2d 707.

The second objection was made to the statement that Pat Brumett was a fellow that liked to shoot craps, drink and fight, and that the defendant must have liked to also. It is sufficient to say that there was no error because it was not unreasonable for one to draw from the evidence the inference that the prosecuting attorney stated. See *Patrick* v. *State,* 245 Ark. 923, 436 S.W. 2d 276; *Gibson* v. *State,* 252 Ark. 988, 482 S.W. 2d 98.

The third instance is reported thus:

MR. LOVELL: He jumped on the man's back and cut him all to pieces.

MR. McCOY: I object. I want him to argue the evidence.

THE COURT: I have repeatedly told the jury where their verdict will be based on and the right of attorneys to express their opinions.

MR. McCOY: Would you insist he stay in the record.

THE COURT: He has a right to express his opinion, Mr. McCoy.

MR. McCOY: Save my exceptions.

Here again, appellant's attorney did not move for a mistrial and made no request for any further admonition except that the prosecuting attorney be required to stay in the record. Appellant argues that there is no evidence that appellant jumped on Brumett's back and that the only evidence on the subject was the testimony of two witnesses that the two were locked face to face. It is true that the witnesses said that the two were standing face

to face when they looked toward appellant and the deceased. It is also true that they had both previously heard a commotion and when they saw Brumett and Perry, the wounds must have already been inflicted, because Brumett was bleeding badly at the time and neither professed to have seen any of the combat. As we have previously indicated, an inference that the wounds were inflicted by someone to Brumett's rear would not be totally unfounded. Consequently, there does not appear to have been any impropriety in the argument, and the court's admonition to the jury to the effect that statements of counsel were to be considered as opinions only would seem to be sufficient. *See Ulmer* v. *State,* 253 Ark. 106, 484 S.W. 2d 691; *Gibson* v. *State,* supra; *Camp* v. *State,* supra; *Patrick* v. *State,* supra.

The trial court has a wide latitude of discr in controlling, supervising and determining the prop of the arguments of counsel, and its exercise will not be reversed in the absence of manifest gross abuse. *Stanley* v. *State,* 248 Ark. 787, 454 S.W. 2d 72; *McGill* v. *State,* 253 Ark. 1045, 490 S.W. 2d 449; *Hill* v. *State,* 253 Ark. 512, 487 S.W. 2d 623; *Blanton* v. *State,* 249 Ark. 181, 458 S.W. 2d 373. We find no abuse of that discretion here.

The judgment is affirmed.

D. R. HOLLINGSWORTH AND ROCKWOOD INSURANCE COMPANY *v.* JIMMY RAY EVANS AND MARY LEE EVANS

73-112 500 S.W. 2d 382

Opinion delivered October 29, 1973

Shackleford & Shackleford, by: *Norwood Phillips,* for appellants.

Paul K. Roberts, for appellees.

J. FRED JONES, Justice. This is an appeal by D. R. Hollingsworth and Rockwood Insurance Company, the employer and compensation insurance carrier respectively, from a circuit court judgment reversing the Arkansas Workmen's Compensation Commission's dismissal of claims filed by Jimmy Ray Evans and Mary Lee Evans against Hollingsworth. The appellants contend on this appeal that the decision of the Workmen's Compensation Commission is supported by substantial evidence and the circuit court erred in reversing the Commission.

The facts appear as follows: Hollingsworth had a contract with the Georgia Pacific Corporation whereby Hollingsworth purchased pulpwood in Bradley County and shipped it to Georgia Pacific. When the contract was entered into, Hollingsworth was required to submit proof to Georgia Pacific that Hollingsworth had procured a policy of workmen's compensation insurance. Before Georgia Pacific would pay Hollingsworth for the pulpwood he shipped, Hollingsworth was required to attach to each bill of lading a statement that he had complied with state law pertaining to workmen's compensation insurance coverage. Hollingsworth carried workmen's compensation insurance under a policy issued by Rockwood Insurance Company and was charged a premium of 47 cents per cord of pulpwood he shipped to Georgia Pacific. Mr. Hollingsworth maintained a pulpwood yard in Warren, Arkansas, where pulpwood was delivered by truck and loaded onto railroad cars for shipment to Georgia Pacific.

Hollingsworth purchased pulpwood from various individuals including Jimmy Ray Evans. Mr. Evans owned a pulpwood truck and was engaged in the business of purchasing timber, cutting it into pulpwood and selling it to Mr. Hollingsworth. At Mr. Evans' request, Hollingsworth withheld from the amount due Evans for pulpwood sold to Hollingsworth, the amounts Evans had agreed to pay the owner of the timber he purchased and Hollingsworth would pay that amount direct to the timber owner and the balance to Evans.

Mr. Evans had purchased some saw log tree tops on land owned by a Miss Hardy and on November 1, 1971, Evans and his wife were cutting the tree tops into pulpwood to be delivered to Hollingsworth when a bolt in their chainsaw broke. Mr. and Mrs. Evans started in their pickup truck to Warren to have the chain saw repaired when they were involved in a collision with another vehicle in route and both of them were injured. They filed a claim for workmen's compensation benefits and following a hearing before a Referee, their claims were denied by the Referee and the Commission.

On appeal to the circuit court, the court found there was no substantial evidence to warrant the Commission in denying the claims. The court found that Hollingsworth was required by Georgia Pacific to provide workmen's compensation insurance for the *workers who produced the pulpwood* Hollingsworth shipped to Georgia Pacific. The court further found that the claimants paid a consideration to Hollingsworth for each cord of wood claimants produced, or had a consideration withheld by Hollingsworth from each cord produced, and for these reasons the claimants were covered by the policy of insurance issued to Hollingsworth by the respondent, Rockwood Insurance Company. The court further found that the respondents were estopped to deny that claimants were covered by the policy because they had already paid similar claims. The court reversed the decision of the Commission and remanded the case with directions to award benefits to Mr. and Mrs. Evans. We must agree with the appellants that the decision of the Workmen's Compensation Commission is supported by substantial evidence and the circuit court erred in reversing the Commission.

Mr. Evans testified that he had been cutting and hauling pulpwood to Hollingsworth for about four years with the exception of perhaps one week when he hauled his pulpwood to another buyer. He said that he was receiving $15 per cord for pine and $12 per cord for oak for the pulpwood delivered to Hollingsworth's yard. He said he purchased his timber from various individuals and at the time of his and his wife's injuries, he was hauling from downed tree top timber he had purchased from Miss Hardy. He said Miss Hardy's woods foreman directed him to the tract from which he was to cut and that by mutual agreement, Mr. Hollingsworth paid directly to the Hardy interest the amount per cord he agreed to pay for the timber tops he was cutting, and that Hollingsworth paid the balance directly to him. He was asked and answered the following questions:

> "Q. Was anything taken out of your wages or the money that you got for insurance?
>
> A. I really don't know how that insurance is set up.
>
> Q. You don't know how that is set up?
>
> A. It is so much a cord. I don't know whether that is held out of our check or just how that works. I really don't know."

Mr. Evans testified that he carried no insurance of his own and at one time, prior to his injury, he had a conversation with Hollingsworth concerning insurance. When asked about the conversation, he testified in part as follows:

> "A. Well, it was brought up a time or two, but I never did question it. Donnie just said that we were covered out there in the woods if we got hurt or anything, that we had the insurance.
>
> Q. When did Mr. Hollingsworth tell you that?
>
> A. I don't remember exactly. It's been—well I believe that was before I even went to hauling to him. I'm not sure."

Mr. Evans said Hollingsworth's statement concerning insurance was made when he, Evans, was in partners with his uncle. He said he had a helper about that time who was injured and his claim was accepted by Hollingsworth's compensation carrier. He said he is quite sure he was hauling for Hollingsworth at that time. He then said:

> "I don't remember the date. I do remember we was talking about that insurance. I remember this much about it, it was ever who we hauled the last wood to, if we had an accident before we got in with the next load, the one that we hauled the last load to, whether I hauled it to Martindale or down to Hermitage, their insurance was the one obligated to pay it. I do remember hearing—I do remember that about the insurance."

Mr. Evans testified that he had no employees except himself and his wife when he was injured; that he owned his own equipment including his pulpwood truck, loader and saws; that he purchased his own timber and furnished his own fuel. He said that Hollingsworth did not direct any of his activities in connection with the pulpwood cutting and hauling except that he designated the length of pulpwood acceptable. He said that he carried on his operation without any interference or assistance from Hollingsworth and that he worked when he wanted to. On cross-examination he testified that cost of stumpage was forwarded directly to the owner of the stumpage and that he received the amount left over for the pulpwood he delivered to Hollingsworth.

> "Q. So there was nothing withheld out of your check except the amount of the cost of the stumpage?
>
> A. To the best of my knowing, that's all."

On redirect examination Mr. Evans testified that after he dissolved the partnership with his uncle, he continued to haul pulpwood to Hollingsworth, but that nothing else was ever said about insurance until after his accident and injury. He said that after the injuries he and his wife sustained, he asked Mr. Hollingsworth about insurance coverage.

> ". . . [M]e and Donnie were just talking, and I asked him about did he think that I ought to be covered or was I covered, and he said, 'Well, I can't tell you that you are and I can't tell you that you ain't, but my opinion you should be covered. . . ."

Lawrence H. Derby, Jr., the insurance agent from whom Hollingsworth obtained the policy issued by Rockwood, testified that he did not recall Rockwood paying a claim on a man named E. L. Davis. At this point the appellant's attorney, after conferring with Hollingsworth, volunteered the information that there was a "medical only" claim filed for $4 or $5 which was paid. The insurance policy issued to Hollingsworth was a standard workmen's compensation insurance policy agreeing "to pay, promptly when due, all compensation and other benefits required of the insured by the workmen's compensation law."

Mr. Hollingsworth testified that he had workmen's compensation insurance coverage at the time Mr. and Mrs. Evans were injured, and that he was paying 47 cents per cord in premiums for the insurance and that the premium was paid on the basis of check stubs he received from Georgia Pacific for the pulpwood he shipped to them. He said he would take, or mail, his check stubs to his agent Derby, and that Derby would then mail back to him a premium statement based on the total number of cords of pulpwood he had shipped to Georgia Pacific during the month. He said he shipped all his pulpwood to Georgia Pacific and that his insurance premium would vary with the number of cords of pulpwood he shipped. He said when he purchased the insurance, agent Derby told him his subcontractors would be covered under the policy, but that he did not withhold anything for insurance premiums from the amounts due the haulers. He testified that he had no "direct" employees. He said that he had no employees from whom he was withholding Social Security or income tax, and that he turned in no quarterly reports pertaining to same.

Mr. Hollingsworth was not asked to explain his meaning of *direct* employees as distinguished from em-

ployees that were not direct. In attempting to explain the insurance coverage he purchased from Derby, he testified as follows:

> "Mr. Derby and I talked about this when I began business. My father had this business prior to the time that I took it from him. At the time he was paying an extra ten cents a cord to cover a sub-contractor. At the time I took the policy, I had only sub-contractors and I felt like it would be only reasonable that I should pay only the ten cents a cord and not the basic policy fee. At that time we discussed it. It's been many years ago and I could not say, word for word, what was said at that time. I don't think Mr. Derby could. There was no written agreement but the only reason I had the policy was to protect me against liability and to protect my employees as such, as sub-contractors."

Mr. Hollingsworth then testified that he entered into his contract with Georgia Pacific about 1968 and Georgia Pacific required him to furnish proof that he had workmen's compensation insurance coverage. He said:

> "I bought it because it was required by law and because I had to have protection for myself at the time I bought it. I was under the impression that my subcontractors were covered. That's the best answer I can give you on it. . . . "

Mr. Hollingsworth said he had been selling wood to Georgia Pacific and buying it from people such as Mr. Evans and others similarily situated for approximately three years. He said he usually had between three and ten different haulers who delivered pulpwood to him on the same basis as Mr. Evans; that "they come and go." He said the contract between him and Georgia Pacific was subject to cancellation at any time by either party notifying the other; that he was required to attach to the bill of lading on each car of pulpwood he shipped to Georgia Pacific a form saying he had complied with all laws and statutes of Arkansas, but that he was not required to present a receipt showing he had purchased

workmen's compensation insurance except the one time when he entered into the original contract with Georgia Pacific.

Ark. Stat. Ann. § 81-1306 (Repl. 1960) provides that when a subcontractor fails to secure compensation required by the Act, the prime contractor shall be liable for compensation of the employees of the subcontractor. Mr. Hollingsworth refers repeatedly to his obtaining insurance for the protection of his "subcontractors." The *prime* contract is not in evidence and there is no evidence one way or the other relating to the duties of subcontractors as distinguished from haulers or producers such as Mr. Evans, from whom Mr. Hollingsworth purchased pulpwood. It is entirely possible that Mr. Hollingsworth considers the haulers, such as Mr. Evans, as "subcontractors." He said, however, that when he took the business over from his father, that his father had *one* subcontractor. Mr. Hollingsworth did say he had no "direct employees" but he did not say who loads the pulpwood from his woodyard to the railroad cars, and he did not say whether anyone else is involved in his operation except himself and the haulers from whom he purchases pulpwood delivered to his yard.

There is, of course, a considerable difference between a subcontractor and an independent contractor. In Black's Law Dictionary, Rev. 4th Ed., a subcontractor is defined as:

> "One who takes portion of a contract from principal contractor or another subcontractor. * * * One who has entered into a contract, express or implied, for the performance of an act with the person who has already contracted for its performance."

In *Gaydos* v. *Packanack Woods Dev. Co.,* 166 A. 2d 181, at page 184, the New Jersey Court defines a subcontractor in a workmen's compensation case as follows:

> "A subcontractor is one who enters into a contract with a person for the performance of work which such person has already contracted to perform. In other

words, subcontracting is merely 'farming out' to others all or part of work contracted to be performed by the original contractor."

As already stated, the prime contract between Hollingsworth and Georgia Pacific is not before us so it is entirely possible that in addition to purchasing pulpwood from haulers or producers such as Mr. Evans, Hollingsworth did have subcontractors performing part or all of his contract with Georgia Pacific and these employees, as well as Georgia Pacific, would have been protected as a matter of law by Hollingsworth's compensation coverage.

The employees of a subcontractor are covered by workmen's compensation benefits under the prime contractor's coverage in the event the subcontractor does not have separate coverage for his employees, but the employees of an independent contractor who is not a subcontractor are not covered as are the employees of a subcontractor under § 81-1306. This statute does not provide coverage, as a matter of law, for the subcontractor himself but only applies to his employees. The record is not clear whether Mr. Hollingsworth himself was a subcontractor under Georgia Pacific or was simply an independent contractor who purchased and sold pulpwood to Georgia Pacific. It is apparent, however, from Mr. Hollingsworth's testimony, he believed he was required to carry a workmen's compensation policy by the laws of Arkansas, but there is no evidence in the record that he was so required.

The trial court apparently based its decision on such cases as *Stillman* v. *Jim Walter Corp.*, 236 Ark. 808, 368 S.W. 2d 270, and *Hale* v. *Mansfield Lbr. Co.*, 237 Ark. 854, 376 S.W. 2d 670. In the *Stillman* case the contract between the parties was in evidence in which Jim Walter was designated "contractor" and Roy Stillman was designated as "subcontractor." The Jim Walter Corporation engaged Stillman to build houses for a specified consideration depending upon the type of house constructed. Stillman was to furnish only the labor. The contract in that case provided that the subcontractor was to furnish the contractor with a certificate of workmen's compensa-

tion coverage on *subcontractors and on employees* of the subcontractor. In the absence of such certificate, all payments due the subcontractor were subject to a three per cent deduction and the contractor would furnish such workmen's compensation coverage. Stillman was injured on the job and filed a claim for compensation benefits. The claim was defended on the ground that Stillman was an independent contractor and not an employee. In that case we pointed out that the Jim Walter Corporation had agreed, for a consideration of three per cent of the contract price payable to Stillman, to furnish workmen's compensation coverage *for Stillman as well as his employees.* With Stillman's consent the three per cent was deducted and the coverage furnished. In that case we held that regardless of whether Stillman was in fact, an independent contractor or employee, under the facts in that case, the Jim Walter Corporation was estopped to say that Stillman was not entitled to workmen's comepnsation. The decision in that case turned on the written contract supported by valuable consideration. Such is not the fact supported by any substantial evidence in the case at bar.

In *Hale* v. *Mansfield Lbr. Co., supra,* Hale was to receive $7.50 per 1,000 board feet *plus payment of the insurance premum* for skidding logs out of the woods and loading them on trucks. Hale owned and used his own team in the operation and no other insurance premiums were involved except workmen's compensation insurance premiums. The primary distinction in *Hale* and the case at bar, however, was that Mansfield Lumber Company was removing timber from government land under a contract with the government, and in that case we said:

> "Even if it can be said that Hale was an independent contractor, he was an independent subcontractor, and Mansfield would be liable to his employees under the workmen's compensation law."

Hale had no employees of his own and was simply one of the workmen getting out the timber in the performance of Mansfield's contract with the government. Mansfield paid a premium for workmen's compensation insurance in the amount of $11.36 on every $100 of remuneration

paid to Hale and we held that it could be fairly inferred that the insurance was to cover Hale as well as the other workers. The insurance policy in that case specifically covered logging and that was what Hale was doing. Had Hale been the one who entered into a contract with the government for the purchase and removal of timber from government land, and if he in turn had cut the timber and sold the logs to the Mansfield Lumber Company, the *Hale* case would have been more in point with the case at bar and also in point with the cases of *West* v. *Lake Lawrence Pulpwood Co.,* 233 Ark. 629, 346 S.W. 2d 460, and *Pearson* v. *Lake Lawrence Pulpwood Co.,* 247 Ark. 776, 447 S.W. 2d 661.

The facts in *West, supra,* as set out on page 631 of the Arkansas Report are almost identical to the facts set out in the case at bar and in *West* this court on appeal, sustained the Commission in denying compensation. As pointed out in the dissenting opinion in *West,* both West and Lake Lawrence thought West was covered by Lake Lawrence's workmen's compensation policy and Lake Lawrence deducted a fixed sum per cord of wood cut for workmen's compensation insurance. The dissenting members of the court in *West* would have applied the rule of estoppel but the majority of the court did not agree.

In the *Pearson* case, *supra,* the facts were very similar to those in the case at bar and we there held there was substantial evidence to support the Commission's denial of compensation on the basis that the decedent was not an employee of the appellee pulpwood company. We wound up our decision in *Pearson* by quoting from *Herman Wilson Lbr. Co.* v. *Hughes,* 245 Ark. 168, 431 S.W. 2d 487, as follows:

> " '* * * 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.' "

We found in that case that there was substantial evidence to support the Commission.

We are in sympathy with Mr. Hollingsworth's alleged statement to Evans that he thought Evans *should* be covered by Hollingsworth's compensation insurance policy, but we are forced to the conclusion that he was not.

The judgment of the circuit court is reversed.

EARL EUGENE MURPHY *v.* STATE OF ARKANSAS

CR 73-104 500 S.W. 2d 394

Opinion delivered October 29, 1973

James H. Pilkinton, for appellant.

Jim Guy Tucker, Atty. Gen., by *James W. Atkins,* Asst. Atty. Gen., for appellee.

CONLEY BYRD, Justice. In April, 1971, Earl Eugene Murphy, the appellant herein, entered a plea of guilty to a charge of robbery and was sentenced to 18 years. At the time of this sentence a charge of assault with intent to kill was pending against appellant. Following his incarceration for robbery, appellant's motion for a speedy trial on the assault with intent to kill charge was granted. Appellant was tried before a jury and found guilty of this charge which grew out of the appellant's shooting of the

operator of the service station which he had robbed. The jury set appellant's punishment at 21 years, and the court entered judgment ordering this latter sentence to run consecutively with the previous one.

No appeal was taken from this conviction, but appellant petitioned for post conviction relief under our Rule One procedures and was granted a hearing. The trial court denied all relief on the Rule One.

For reversal appellant contends that he should be granted a trial on the robbery charge to which he pleaded guilty. Appellant bases this contention on the allegation that he was under the influence of drugs at the time of the hearing at which he changed his plea from not guilty to guilty. Therefore, appellant argues, his plea was involuntary and should not have been accepted by the trial court.

Appellant testified at the Rule One hearing that he had concealed several capsules of "RJS", a drug that "lifts your spirits", on his body at the time of his arrest by taping them under his arm pit. He testified that he took the last one of these capsules the night before he went to court and changed his plea to guilty. He further testified that, as a result of the effects of this drug, at the time of entering his plea of guilty he did not know what he was doing and was not himself. Appellant in his brief argues that there is no showing that his plea of guilty was freely and understandingly entered, and it therefore must be taken to have been involuntarily made.

We find no merit in this contention. The record of the Rule One hearing indicates that appellant recalled that the judge before whom the plea was entered had asked him if he was under the influence of alcohol or drugs, and appellant's response was that he was not. Appellant was represented by court appointed counsel at the time of the plea. Counsel testified at the Rule One hearing that he had thoroughly discussed the nature and consequences of a plea of guilty with appellant prior to the entry of the plea, and that on the day of the plea appellant appeared normal and never indicated in any manner that he was under the influence of drugs.

It should be noted that there is nothing in the record which tends to inpugn the voluntariness of the guilty plea other than appellant's own testimony at the Rule One hearing. See *Parker* v. *State,* 254 Ark. 878, 496 S.W. 2d 430 (1973). The balance of the record relative to this point indicates that the plea was voluntarily and understandingly entered, and that the judge before whom the plea was entered made thorough inquiries as to the voluntariness of the change in plea.

Appellant's other point for reversal concerns the voluntariness of a confession introduced at the trial of the assault with intent to kill charge. Appellant argues that the trial court made no specific finding that the confession was voluntary. We find no merit in this contention. In the first place the record does not reveal any request by the appellant that the trial court make a specific finding on the voluntariness of the confession. *Ballew* v. *State,* 249 Ark. 480, 459 S.W. 2d 577 (1973). Furthermore, appellant did not raise the issue in his Rule One Hearing from which this appeal was taken. *Bailey* v. *State,* 254 Ark. 628, 495 S.W. 2d 150 (1973).

In any event the record reveals that an in-chambers hearing was held prior to the introduction of evidence of the confession. This hearing was held after the jury was sworn and prior to any testimony being taken, and the record shows that its purpose was to determine whether appellant had been advised of his rights prior to making statements to the sheriff and the deputy prosecutor subsequent to his arrest. At this in-chambers hearing the deputy prosecuting attorney and the sheriff testified that prior to making any incriminating statements the appellant had been advised of his right to have an attorney of his choice present or to have an attorney appointed for him. At the end of this hearing the trial judge said:

> "The court holds that the defendant was appraised of his rights, that he understood them—that he intelligently understood them—and that he waived them."

Even if the appellant had properly raised the issue of the voluntariness of the confession in his Rule One

petition, the in-chambers hearing conducted by the trial court was sufficient to satisfy the requirements of Ark. Stat. Ann. § 43-2105 (Supp. 1971), which provides for procedures to insure compliance with the constitutional requirement of a *Denno* hearing. Furthermore, the witnesses called by appellant at his trial testified to confessions he had made without objection.

Affirmed.

WELLS R. McCALL, JR. *v.* SOUTHERN FARM BUREAU CASUALTY INSURANCE COMPANY

73-108 501 S.W. 2d 223

Opinion delivered October 29, 1973
[Rehearing denied December 10, 1973.]

Jeff Duty, for appellant.

Putman, Davis & Bassett, for appellee.

FRANK HOLT, Justice. A jury awarded $15,000 damages to appellant's guest passenger for injuries sustained in an automobile accident and we affirmed. *McCall* v. *Liberty,* 248 Ark. 618, 453 S.W. 2d 24 (1970). Appellant,

having liability insurance coverage of only $10,000, paid the $5,000 balance, plus interest and costs. He then brought the present action to recover from appellee, his insurance carrier, that excess of the coverage. Appellant asserted that appellee was negligent in refusing negotiations and settlement within the policy limits. On appeal we first consider the appellant's contention that the court erred in directing a verdict against the appellant.

It is true that an insurer is liable to its insured for any excess judgment of the insured's policy limits if the failure to settle the claim by the insurer is due to fraud, bad faith or negligence. *Tri-State Ins. Co.* v. *Busby,* 251 Ark. 568, 473 S.W. 2d 893 (1971). In the case at bar, only negligence is asserted and, of course, the burden to establish this issue was upon appellant. When we view the evidence, as we must do on appeal, most favorably to appellant against whom the verdict was directed, we are of the view the court correctly held there was no substantial evidence adduced to constitute a factual issue that the appellee was negligent in failing to settle the case within the policy limits.

The factual background surrounding the accident is sufficiently detailed in *McCall* v. *Liberty, supra,* for purposes of this opinion. At that trial for recovery of damages, the insured's guest was represented by two attorneys. In the case at bar only one of those attorneys testified. He wrote a letter to appellee's attorney preceding the trial stating that his client would settle the case "within the policy limits at this time." The letter was made an exhibit to his testimony. He further testified that his only effort to settle "money-wise" on behalf of his client was to write this letter to appellee's attorney to advise him he had the authority to "settle within the limits, whatever those limits might be." In previous correspondence liability was acknowledged as a close question.

The appellant, the insured, testified that at one time, on mistaken information, he had told his insurer's (appellee) attorney he would pay $2,500 out of his own pocket just "to get it over with." The appellee's attorney advised him not to do so as he felt there was no liability.

Appellant was also individually represented by an attorney of his own choice in the original lawsuit. Appellant further testified although he was willing to pay his injured friend $2,500 out of his own pocket, he, as well as his own lawyer, agreed with appellee's attorney there was no liability based upon the allegation of willful and wanton misconduct. His wife was of the same view. It does not appear that appellant's personal attorney ever made a demand for settlement in the case. Appellant acknowledged that he was "willing to go to trial," knowing he would have to pay a judgment in excess of $10,000, because "I really thought we would win it."

In preparation of the trial, the appellee had the benefit of statements from the attending physician, as well as hospital and medical reports. Appellant was interrogated by appellee's investigator and gave him his version of the accident. Furthermore, it was stipulated that a copy of the state police officer's investigation was acquired by the appellee during its investigation. The appellant, the insured, himself expressed the view that he did not know of anything the appellee or his attorney "did wrong" in preparation of the defense to the case and was "well pleased" with the services of his personal attorney as well as appellee's attorneys.

In summary, after investigation of the claim which was made by appellant's guest against him, the appellee (insurer) was of the view that the appellant, its insured, was not guilty of willful and wanton misconduct which is required to make a host liable to his guest passenger. The injured party's attorney, in a letter to appellee's attorney, expressed, *inter alia,* that "the liability is the close question in this matter." The appellant and his personal counsel appear to have agreed with appellee's attorney that the asserted liability, based upon willful and wanton misconduct, was a very close question and a favorable jury verdict would result. In retrospect, appellant expressed no complaint about the preparation and defense of the case. In fact, appellant adduced no evidence from any witness that failure to evaluate and settle the lawsuit constituted negligence. Therefore, we hold, as previously indicated, appellant did not establish evidence legally

sufficient to constitute a factual issue that appellee negligently failed to evaluate and settle the case.

Appellant relies upon *Members Mutual Ins. Co.* v. *Blissett,* 254 Ark. 211, 492 S.W. 2d 429 (1973). We do not consider this case applicable and it is distinguishable. Among the distinctions are that appellee's (insurer) attorney, in the case at bar, never recommended that appellee pay any sum in settlement of the case. In *Blissett* the contrary occurred and, in fact, the insurer's attorney recommended a larger settlement than was offered. There appears to be no conflict in the testimony as to how the accident occurred in the case at bar and there was in *Blissett.* There was only a formal demand here for settlement "within the policy limits," whatever the limits might be, made by the injured party's attorney and at the same time acknowledging it was a close case as to liability. Appellant's personal attorney never made demand for settlement. In *Blissett,* a mistrial had occurred which clearly indicated the possibility of a recovery by the injured guest.

Appellant contends the court erred in excluding the proffered testimony of the state policeman who investigated the accident. The court sustained appellee's objection to the officer's estimated speed of the vehicle, based upon physical facts, at the time of the accident. It was agreed appellee had a copy of the officer's report and the results of his investigation. It appears that the report was not offered in evidence by either party. Even if we should hold that his estimate of speed was admissible, we find it does not bolster appellant's contention that appellee was negligent in handling the case in view of what we have previously said.

Affirmed.

GLORIA DAVIS, CLIFTON PHILLIPS AND ROBERT EARL YOUNG *v.* STATE OF ARKANSAS

CR 73-115 500 S.W. 2d 775

Opinion delivered November 5, 1973

Billy Satterfield, for appellants.

Jim Guy Tucker, Atty. Gen. by: *O. H. Hargraves,* Deputy Atty. Gen., for appellee.

CARLETON HARRIS, Chief Justice. Appellants, Gloria Davis, Clifton Phillips, and Robert Earl Young, were convicted by the Pulaski County Circuit Court, sitting as a jury, of possessing stolen property with the intent to deprive the true owners thereof, knowing that the property was stolen. Appellants were sentenced to five years imprisonment each, with four years of such sentences suspended. From the judgment so entered, appellants bring this appeal. For reversal, it is first urged that the court erred in overruling appellants' motion to suppress State's Exhibits 1, 2, and 3, and second, it is argued that the evidence was not sufficient to support the conviction. We proceed to a discussion of each point.

Exhibit 1 is a Palm Beach men's suit owned by Dillard Department Stores, which operates Pfeifer-Blass Companies in Arkansas; Exhibit 2 is a ladies' suit owned by Dillard, and Exhibit 3 is a men's navy blue leather jacket owned by David's of Arkansas. Officer Johnny Maack of the Little Rock Police Department made the arrest of the appellants while they were travelling in their automobile, and discovered the aforementioned property in the car; he testified that he turned the property over to Detective Lieutenant George M. Knestrict. Detective Knestrict testified that he stored this property in the Service Division in care of Officer Crump, signing signature cards at the time. He checked the items out from Crump when a hearing was held in municipal court and then checked them back in. He testified that he checked them out again from Officer Crump on the day of the trial, all three being wired together with a tag, and the records reflecting that they had been kept in Crump's custody; in the courtroom, he gave Exhibit 3 to Mr. Overman, employed by David's of Arkansas, who identified the coat from the witness stand. The officer stated that he turned the other two items over to Thomas Dupriest in the courtroom, this man being employed by Dillard. Dupriest identified both the men's and ladies' suits as property of Dillard. It is appellants' contention that turning the property over to the named individuals before it was identified and introduced into evidence represented a break in the chain of evidence, it being asserted that these individuals were not proper custodians. We do not agree that there is merit in this argument. Both store employees testified that they had received the exhibits from Detective Knestrict in the courtroom that same day and they positively identified them as the properties which had been taken. We find no break in the chain; to the contrary, the possession of the items, and the transmission from one person to another is clearly shown. To paraphrase what we said in *Fight* v. *State,* 254 Ark. 928, 497 S.W. 2d 262, there is no word of testimony that these items were different from the articles that were taken from the store, and the court did not err in permitting their introduction.

As to the second point, it is first asserted that the State failed to prove that the items were in fact stolen,

or that appellants knew they were stolen. We disagree. The testimony by Mr. Dupriest and Mr. Overman details that these items were not sold and were missing from the store; it was pointed out by Dupriest that the stubs on the men's suit were still in place when the suit was recovered. The ladies' suit was identified by a different type stub made in the Little Rock warehouse which requires a special tool to insert. Mr. Overman testified that he observed the leather jacket in the store at David's about an hour and a half before two of the appellants entered the store; that it was a size 42, and the only one of that size in the store, and he identified it as belonging to that concern. Gary Griffin, an employee of the Dillard store, testified that two of the appellants, Gloria Davis and Clifton Phillips, were occupants of a red Chevrolet Impala with light stripes down the sides, and they pulled up and parked in front of the store just across the street; that he observed the two (subsequently identified) as they got out of the car and came into the store. He said that his attention was attracted because the driver of the automobile, the third appellant, put money in the parking meter, got back in the car, and appeared to be very nervous. The witness stated that the man and woman subsequently came back out of the store and he observed the woman remove some merchandise from under her dress; that the driver put something on the floorboard and the two first mentioned went back into the store, subsequently returned to the car and as it drove away, he observed the woman take something from underneath her dress. She was wearing a purple dress.[1]

Barbara Mueller, likewise an employee of Dillard, also observed the woman and man go into the store and go back to the car, and she said that she saw the woman take something from under her dress, and then return to the store. Subsequently, after getting off from work, she saw these people, together with another man, in their car being questioned by police officers. The officers asked if she could identify a coat, and, as she testified, "It's from David's, because I knew what their tickets looked like." Officer Maack testified that he had

[1]There is no dispute but that appellants Davis and Phillips were in both stores that afternoon.

received a call that a theft had occurred at the Dillard store and had been given a description of the car and subjects; that he stopped the car occupied by appellants because it conformed to the description and he observed four articles of clothing in the automobile, three of them being State's Exhibits 1, 2, and 3.[2]

It is also asserted that the State failed to prove that appellants were in possession of the items, and failed to show an intent by appellants to deprive the true owners of possession. We cannot agree that there is merit in this assertion. In *Daniels* v. *State,* 168 Ark. 1082, 272 S.W. 833, it was pointed out that the rule has long been maintained by this court that unexplained possession of property recently stolen constitutes sufficient evidence to warrant a conviction and in *Boyette* v. *State,* 254 Ark. 320, 493 S.W. 2d 428, we observed that when the defendant was found in possession of stolen merchandise, the court was not required to accept or believe his explanation. See also *Bond* v. *State,* 230 Ark. 962, 328 S.W. 2d 369.

All three of the appellants testified, Gloria Davis and Clifton Phillips testifying that they paid Robert Young to take them to town; they admitted being in both stores, but denied taking any clothing. Each said that the items were in the car, but they knew nothing about them. Young testified that when the other two went into Pfeifer-Blass, he got out of the car and talked to a friend, Wesley Johnson; that he had worked with Wesley at Pine Bluff. From the record:

> "Well, I get in my car, but when I was standing out there talking to Wesley, well, he had this bag. He said, 'Say, man, I had to take that from Pine Bluff.' We got to talking. Me and him work together. *** And then he said, 'Take this bag. I am going up here to get me some shoes in Phillips.' He said, 'You come up there and pick me up, man.' He said, 'Make sure you get me in the morning on time,' he said, 'so I can talk to Mrs. Isabell.'"

[2]The fourth piece of clothing was a ladies' coat with fur around the collar, but the owner had not been determined at the time of trial.

When asked as to the whereabouts of Wesley Johnson, appellant Young replied that he had subsequently been killed.

We think it is apparent from the outline of the State's testimony herein set out, that there was ample and substantial evidence to support the conviction, and we so find.

Affirmed.

HOME INSURANCE COMPANY *v.* JANICE COVINGTON ET AL

73-123 501 S.W. 2d 219

Opinion delivered November 5, 1973
[Rehearing denied December 10, 1973.]

Davis, Plegge & Lowe and *Boyett & Morgan,* for appellant.

Lightle, Teddler & Hannah, Leroy Froman and *John C. Ward,* for appellees.

GEORGE ROSE SMITH, Justice. This is a personal injury suit. Two of the appellees, Janice Covington and her mother-in-law, Beatrice Covington, were injured in a traffic collision in the city of Searcy while they were riding in an ambulance owned by J. & J. Ambulance Service, Inc. The ambulance company did not have liability insurance upon its vehicle. The injured plaintiffs therefore brought suit against their own insurance company, the appellant, under an uninsured motorist clause, and against the other appellee, Evelyn M. Lewis, who was driving the car that collided with the ambulance. The jury, attributing all the negligence to the driver of the ambulance, made awards of $750 to Janice Covington and $5,000 to Beatrice Covington. For reversal the appellant relies upon three asserted errors in the court's instructions to the jury.

The most serious contention is that the trial court was wrong in ruling as a matter of law that Beatrice Covington was not a guest of the ambulance company. The pertinent facts are that the two women were together upon a street in Searcy when the younger woman, who was pregnant, fainted. Someone called for an ambulance, which arrived promptly. The driver, Charles Steward, had no assistant. A bystander helped him place the patient on a cot in the back of the ambulance. Steward asked if there was anybody with the younger Mrs. Covington. Beatrice Covington said, "I am," and got in the vehicle. She sat in the back of the ambulance and bathed her daughter-in-law's face with a wet cloth. On the way to the hospital Steward, driving above the speed limit, ran a stop sign and collided with Mrs. Lewis's car. The ambulance company's fee of $25.00 was paid by Beatrice Covington's husband.

The trial court was right in holding that the elder Mrs. Covington was not a guest. In *Simms* v. *Tingle,* 232 Ark. 239, 335 S.W. 2d 449 (1960), we defined a guest, with reference to the guest statute, in this language:

> The general rule for determing the status of a passenger in an automobile is that if the transportation or carriage in its direct operation confers a benefit only on the person to whom the ride is given and no benefits other than such as are incidental to hospitality, companionship, or the like, upon the person extending the invitation, the passenger is a guest within the statutes . . . , but if the carriage tends to the promotion of the mutual interests of both the passenger and the driver for their common benefit, or if the carriage is primarily for the attainment of some objective or purpose of the operator, the passenger is not a guest.

We have also noted that the guest statute was passed to remedy the evil of collusive suits where the real defendant is an insurance company, with both the host and the guest interested in establishing liability. *Ward* v. *George,* 195 Ark. 216, 112 S.W. 2d 30 (1937). In the case at hand there was no reason for Mrs. Covington and Steward to establish by collusion a fictitious liability on the part of the ambulance company.

No relationship of hospitality or companionship existed between Mrs. Covington and Steward. To the contrary, the transportation was a business trip involving (as we shall see) a common carrier and its passengers. It was a single transaction. We find in the proof no fact that would warrant the jury in dividing the transaction into two parts, one being compensated and the other being gratuitous.

Upon similar facts the Supreme Court of Texas reasoned that a person in Mrs. Covington's position might be regarded as a guest of the patient but not as a guest of the ambulance company. *Cedziwoda* v. *Crane-Longley Funeral Chapel,* 155 Tex. 99, 283 S.W. 2d 217 (1955). We agree with that court's conclusion: "Under the facts of this case, a sick person who hires an ambulance for transportation certainly has a right to have someone ride with her in the ambulance. The purpose of Article 6701b is to prevent fraudulent collusion between an insured and a guest. The situation at bar does not fall within the purpose of the statute."

It is next contended that the trial court erred in placing upon the ambulance company the high standard of care that a common carrier owes to its passengers. See AMI 1701 and 1702. According to the ambulance company's own testimony it was engaged in the business of carrying passengers for hire. Upon the proof the trial court was justified in concluding that the ambulance company was a common carrier within our statutes and cases. Ark. Stat. Ann. § 73-1758 (a) (7) (Repl. 1957); *Merchants' Transfer & Whse. Co.* v. *Gates,* 180 Ark. 96, 21 S.W. 2d 406 (1929); *Arkadelphia Milling Co.* v. *Smoker Mdse. Co.,* 100 Ark. 37, 139 S.W. 680 (1911).

Finally, the appellant contends that the trial court should have given AMI 912, imposing upon Mrs. Lewis the duty of driving her car over to the curb and stopping when she heard the ambulance's siren. In making this argument the appellant concedes that the ambulance was not in fact an emergency vehicle within the purview of AMI 912. *Walden* v. *Hart,* 243 Ark. 650, 420 S.W. 2d 968 (1967). Nevertheless, the appellant insists that the instruction should have been given, because Mrs. Lewis could not see the ambulance when she first heard its siren and was therefore under a duty to act upon the assumption that the siren was that of an authorized emergency vehicle, such as a police car or fire engine.

That reasoning is unsound. Needless to say, if the siren had proved to have been that of an authorized emergency vehicle, Mrs. Lewis would have acted at her peril in not doing what the law required her to do in the situation. But the ambulance was not an authorized emergency vehicle; so Mrs. Lewis's duty was merely that of exercising ordinary care. For the court to have given the requested AMI instruction would have clothed the ambulance company with a protected status to which it was not entitled by law.

Affirmed.

FOGLEMAN, J., dissents.

JOHN A. FOGLEMAN, Justice, dissenting. I would reverse the judgment in this case because I think that there

was a question of fact as to whether Mrs. Beatrice Covington was a guest.

Ordinarily the issue of whether one is a guest is a question of fact, and this court, in many situations where the evidence seems no less conclusive than it is here, has refused to hold that a plaintiff was or was not a guest. See *Austin* v. *Stricklin,* 240 Ark. 555, 400 S.W. 2d 671; *Buffington* v. *Wright,* 239 Ark. 138, 388 S.W. 2d 100; *Simms* v. *Tingle,* 232 Ark. 239, 335 S.W. 2d 449; *Brand* v. *Rorke,* 225 Ark. 309, 280 S.W. 2d 906; *Corruthers* v. *Mason,* 224 Ark. 929, 277 S.W. 2d 60. See also, *Dieter* v. *Byrd,* 235 Ark. 435, 360 S.W. 2d 495. It is only where fair-minded men could not draw different conclusions from the evidence that we will say that a jury question is not presented. *Buffington* v. *Wright,* supra.

In *Corruthers* v. *Mason,* supra, in which we held that a jury question was presented on the very issue now before us, we relied upon and applied the following language from Blashfield "Cyclopedia of Automobile Law and Practice," (Vol. 4, p. 326):

> Where a dispute exists as to what were the respective purposes or conditions for or upon which the transportation was undertaken, relative to the nature and existence, if any, of the benefits conferred upon the respective parties, it is ordinarily a question of fact whether or not the invitee was a guest within the meaning of the statutes.

It seems to me that the language quoted governs here and requires us to say that there was a question of fact. But there is also appropriate language in *Simms* v. *Tingle,* 232 Ark. 239, 335 S.W. 2d 449, cited in the majority opinion, which seems to dictate a holding that there is a question of fact in this case. We said:

> We have repeatedly held that when the status of an occupant of a car is questioned and conclusions must be drawn from the evidence, then the issue is one for the jury. Corruthers v. Mason, 224 Ark. 929, 227 S.W. 2d 60; Whittecar v. Cheatham, 226 Ark. 31,

287 S.W. 2d 578; Rogers v. Lawrence, 227 Ark. 117, 296 S.W. 2d 899.

While the testimony is undisputed, I submit that fair-minded men could reach different conclusions as to whether any objective, purpose or interest of the ambulance owner or driver was served by Mrs. Covington's riding in the ambulance.

Because of the authorities cited above, I find no necessity for resort to decisions from other jurisdictions. If it is necessary, I would reject the Texas authority for two reasons. First, it seems to be a minority rule, but, more significantly, it is less harmonious with our own decisions than those following the contrary rule. Incidentally, it should be noted that this decision was by a divided court, one judge concurring and three dissenting.

In *Vogreg* v. *Shepard Ambulance Service,* 44 Wash. 2d 528, 268 P. 2d 642 (1954), the Supreme Court of Washington, en banc, without dissent, the wife of the patient rode in the ambulance, having engaged it and having been assisted into it and shown where to sit by the driver and an attendant. No separate charge was made for transporting her. The wife said that she contracted to pay the bill. There the trial court had held that the wife was a guest as a matter of law, and directed a verdict at the close of her case as plaintiff. The Washington court said:

> In the instant case, nothing determinative was said on this question (if the jury believed appellant's testimony) when the implied contract was made. A jury might well conclude that appellant's carriage was as much a part of that contract as her husband's. All reasonable minds would not reach the opposite conclusion.
>
> The court erred in taking the question from the jury.

Although Louisiana did not have a guest statute, there are two cases from that jurisdiction which should be considered, because the status of the ambulance pas-

senger determined the extent of the duty of the ambulance driver to the passenger. It appears from those cases, that if the passenger was a licensee or guest, the driver owed the duty of ordinary care and not to wilfully injure him; on the other hand, if the passenger was not a guest, the ambulance operator is charged with the highest practicable degree of care. *Morales* v. *Employers Liability Assur. Co.,* 7 So. 2d 660 (La. App. 1942); *Rushing* v. *Mulhearn Funeral Home,* 200 So. 52 (La. App. 1941). In both cases, the passenger was held to be a "guest" or "licensee" as a matter of law.

For the reasons stated, I respectfully dissent on this point only.

HELEN STURDIVANT, ADM'X *v.* CITY OF FARMINGTON, ARK.

73-137 500 S.W. 2d 769

Opinion delivered November 5, 1973

Jones & Segers, for appellant.

James E. Evans Sr., for appellee.

LYLE BROWN, Justice. This suit in tort was brought by appellant against appellee, City of Farmington. It arose out of a fatal collision between the city marshal of Farmington and appellant's intestate, a minor. The city's demurrer to the complaint was sustained on the ground that municipalities are immune from tort action. Act 165, 1969; Ark. Stat. Ann. § 12-2901 (Supp. 1971). On appeal it is asserted that the recited act makes it mandatory that the State's political subdivisions carry liability insurance and that failure to do so makes the city amenable to a tort action.

In *Parish* v. *Pitts,* 244 Ark. 1239, 429 S.W. 2d 45 (1968), we set aside the rule of law established by precedent which granted immunity to municipalities from tort liability. The first session of the General Assembly thereafter, referring specifically to *Parish* v. *Pitts,* enacted Act 165 (Ark. Stat. Ann. § 12-2901—03) (Supp. 1971):

> Sec. 1. It is hereby declared to be the public policy of the State of Arkansas that all counties, municipal corporations, school districts, special improvement districts, and all other political subdivisions of the State shall be immune from liability for damages, and no tort action shall lie against any such political subdivision, on account of the acts of their agents and employees.
>
> Sec. 2. Each county, municipal corporation, school district, special improvement district, or other political subdivisions of the State is hereby authorized to provide for hearing and settling tort claims against it.
>
> Sec. 3. All political subdivisions shall carry liability insurance on all their motor vehicles in the minimum amounts prescribed in the Motor Vehicle Safety Responsibility Act (Ark. Stat., § 75-1402 et seq.; Act 347 of 1953, as amended).

> Sec. 4. It is hereby found and determined by the General Assembly that because of the decision of the Arkansas Supreme Court in *Parish* v. *Pitts,* 244 Ark. 1239, municipalities and all units of local government are in imminent danger of bankruptcy because of tort lawsuits and vital public services are in danger of being discontinued. Therefore, an emergency is hereby declared to exist and this Act being immediately necessary to protect the public peace, health and safety, shall take effect immediately on its passage and approval.

We have had at least three cases in which we have discussed Act 165. *Sullivan* v. *Pulaski County,* 247 Ark. 259, 445 S.W. 2d 94 (1969); *Chandler* v. *Pulaski County,* 247 Ark. 262, 445 S.W. 2d 96 (1969); *Williams* v. *Jefferson Hospital Ass'n.,* 246 Ark. 1231, 442 S.W. 2d 243 (1969). In those cases we did not discuss the precise question now before us, namely, that the failure to carry liability insurance makes the political subdivision amenable to a tort action.

The preamble to Act 165 states one of the purposes of the act to be "to require all political subdivisions to carry liability insurance on their motor vehicles". Then Section 3 says "they *shall* carry liability insurance on all their motor vehicles". We think it was the intent of the General Assembly to require such liability insurance.

Two of the fundamental purposes of Act 165 are (1) to set aside *Parish* v. *Pitts,* supra, and (2) to make it possible for persons injured by municipally owned vehicles to have redress for negligence. If we hold that the city of Farmington is entitled to the immunity afforded it under Act 165 and at the same time hold that it is not mandatory that it comply with the liability insurance provision thereof, then we have destroyed the second purpose of the act above enumerated. The mandatory provision for carrying liability insurance is so strongly and clearly stated that we cannot agree to such emasculation. We think, and so hold, that any city which fails to conform to the insurance requirement places itself in the posture of being responsible, as would a self-insurer, in case it is found to be liable, in an amount not to exceed

the minimum amount prescribed in the Motor Vehicle Safety Responsibility Act. See Ark. Stat. Ann. § 75-1466 (Supp. 1971). We think it reasonable to conclude that the legislature intended that the public be protected to the extent of the recited limits. That may be done in only one of two ways, namely, insurance or self-insurance. Our interpretation avoids opportunities to evade the act. An interpretation which defeats evasion is favored in the law. 50 Am. Jur., Statutes, § 361. Then in *Woodruff* v. *State,* 3 Ark. 285 (1840), it was said: "And such construction ought to be put upon it, [the act] as will not suffer it to be eluded". And in Sutherland, Statutory Construction (4th Ed.) Vol. 2A, § 57.01 we find this significant statement: "No statutory provisions are intended by the legislature to be disregarded; but where the consequences of not obeying them in every particular are not prescribed, the courts must judicially determine them. In doing so they must necessarily consider the importance of the literal and punctilious observance of the provision in question to the object the legislation is calculated to serve."

Reversed and Remanded.

FOGLEMAN, J., dissents.

JOHN A. FOGLEMAN, Justice, dissenting. I cannot agree with the court's construction of the act, and I would affirm the judgment. Had the legislature said, or indicated any intent whatever to say, what the court says today I would be bound to agree. I feel the court has again acted legislatively in the municipal immunity field. I need not dwell on my differences with the majority in *Parish* v. *Pitts,* 244 Ark. 1239, 429 S.W. 2d 45, however, because my position in that case leads directly to a construction of the statute, which is the same approach as that taken by the majority.

Previous decisions mentioning Act 165 of 1969, the General Assembly's reaction to *Parish* v. *Pitts,* are not directly in point, because the decision in *Parish* v. *Pitts* had no direct bearing upon tort liability of either counties or charitable institutions. The court's remarks about the act are pertinent, however.

In *Sullivan* v. *Pulaski County,* 247 Ark. 259, 445 S.W. 2d 94, we deemed the action of the General Assembly sufficient reason why a suitor in tort against the county could not prevail, calling attention to Act 165. There we said:

> This statement of public policy is plain and unambiguous, and leaves no room for doubt.

In *Chandler* v. *Pulaski County,* 247 Ark. 262, 445 S.W. 2d 96, decided the same day, we said that the reasoning in *Sullivan* applied. Then we recited the reasoning:

> There, we point out that the General Assembly of 1969 enacted legislation which became Act 165, the legislation declaring the public policy of the State of Arkansas to be "that all counties, municipal corporations, school districts, and all other political subdivisions of the State shall be immune from liability for damages, and no tort action shall lie against any such political subdivision, on account of the acts of their agents and employees."

To the same effect, see *Reeme and Rhodes* v. *Natural Gas. Imp. Dist.,* 247 Ark. 983, 448 S.W. 2d 647. In *Williams* v. *Jefferson Hospital Association,* 246 Ark. 1231, 442 S.W. 2d 243, in rejecting a plea that we abandon the doctrine of charitable immunity, we said:

> There is another reason why the *Parish* case is not controlling. The Legislature acted within less than one year after Parish v. Pitts. By Act 165 of 1969 that holding was overturned. That Act declares the public policy to be that all political subdivisions of the State be immune from tort liability. The Act does require all such subdivisions to acquire public liability insurance on their vehicles. It is further provided that such governmental units may hear and settle tort claims against them. It can well be argued that this expression of legislative intent to retain governmental immunity would bring forward a similar expression in the field of charitable immunity if this court abrogated the latter rule.

True it is, we were dealing with immunities of agencies other than municipalities. It is also true that the requirement of automobile liability insurance had no application in any of these cases. It is significant that in none did we find any qualifying "ifs," "ands" or "buts" in the statute. This is attributable to the fact that there are none, or were not until the court imported them today. It is also significant to me that the language quoted from *Williams* is consistent with my construction of the act. That language indicates the appropriate procedure in tort claims against municipal corporations.

The language of Section 1 of the act says without qualification that "no tort action shall lie against any such political subdivision, on account of the acts of their agents and employees." This is a positive and unequivocal statement and there is no language qualifying or restricting this language anywhere in the act, even if we could consider the act itself ambiguous, and look to the title and emergency clause. Section 3 definitely does not limit, qualify or restrict this positive prohibition. We have said that this statement of public policy is unambiguous. If so, no resort to the title or the emergency clause is proper. But if it is ambiguous enough to permit this, certainly nothing can be found to mandate the construction given the act by the majority in either. The emergency clause is in the majority opinion. The title reads:

> AN ACT to Declare It to Be the Public Policy of the State of Arkansas That the State and Its Political Subdivisions Shall Not Be Liable for Tort Under the Laws of the State of Arkansas and to Provide That No Action Shall Be Maintained Therefor; to Require All Political Subdivisions to Carry Liability Insurance On Their Motor Vehicles; to Declare An Emergency; and for Other Purposes.

The patent effect of the majority opinion is to create a cause of action, otherwise nonexistent, by reason of the nonfeasance of municipal officers, something heretofore unheard of in Arkansas. It was clearly and unequivocally held in *City of Little Rock* v. *Holland,* 184 Ark. 381,

42 S.W. 2d 383 (aside from and independent of the holding that a municipality is not liable for the negligence of its officers and agents in the performance of its governmental functions), that it is well settled that a municipality is not liable for the nonfeasance of its officers and agents. We quoted extensively from *Collier* v. *Ft. Smith,* 73 Ark. 447, 84 S.W. 480, 68 L.R.A. 237, as follows:

> There is no necessary conflict between the earlier case holding the city liable for misfeasance of its officers and servants, and the two later cases, holding that cities and towns are not liable for nonfeasance. This distinction is not without reason, for, in the absence of a statute expressly imposing liability to individuals for nonperformance of a duty to the public, none will be implied, though liability might be implied from the commission of a positive wrong, whereby an individual might suffer injury. Nor is this distinction without high authority to support it * * *.

Resort to 18 McQuillin (Third Edition Revised) reveals the following rules:

> A municipality can be compelled through its officers to comply with the law, but because of failure or refusal in this respect no obligation or penalty not provided by law is thereby imposed upon the municipal corporation. (p. 128, § 53.08)

> The act of entering into an insurance contract on the part of the municipality is a governmental act, for neglect of which a city is not liable in tort. (p. 190, § 53.28)

In construing Act 46 of 1947, which permitted, but did not require, municipal corporations to carry liability insurance, and in holding that the insurer could not assert the municipality's immunity from suit as a defense in a direct action on the policy, we relied upon the comments of that eminent Arkansas legal scholar, Dr. Robert A. Leflar, 1 Ark. L. Rev. 215. See *Aetna Casualty & Surety Co. of Hartford, Conn.* v. *Brashears,* 226 Ark. 1017, 297 S.W. 2d 662. Among other things, Dr. Leflar said:

> It has generally been agreed that the State can by statute permit its lesser agencies to be sued either in tort or contract, though such permission has not generally been given in Arkansas. Act 46 may be deemed a sort of indirect permission, whereby the agency is allowed to contract for such suits to be brought, not against itself, but against its contractual representative who is indemnified by premiums paid to the representative by the agency. As to contracts hereafter made, it is possible that this device may be held to be effectual to give a cause of action to injured persons.

I submit that Section 3 of Act 165 of 1969, by which the carrying of automobile liability insurance by municipalities was made mandatory rather than optional, had exactly the same effect and none other, i.e., it directed the insured city to contract for such suits to be brought against the city's insurer who is indemnified by the payment of premiums. The mere change from a permission to carry insurance to a direction to do so certainly should not be construed to create an exception from a clearly and positively declared immunity from suit. The result reached by the majority actually reads into the statute either an exception to the immunity stated or granted (depending upon one's point of view) or an implied limited waiver of immunity from suit by the failure of municipal officers to acquire the required policies.[1] I insist that there is no indication that the legislature so intended, or that it intended that a liability be imposed by nonfeasance of municipal officials.

This situation is not unprecedented. In *Knauer* v. *Ventnor City,* 13 N.J. Misc. 864, 181 A. 895 (1935), an effort was made to recover on behalf of a policeman the amount of a judgment against him on a cause of action arising out of his negligent operation of a police car while in pursuit of his duties. Liability was based upon a statutory provision similar to that before us. It provided that "[e]very political subdivision in this State shall cause to be insured the drivers of its motor cars * * * against liability for damages resulting in personal injury or

[1]Municipal officers cannot waive or relinquish the rights of the municipality in the absence of express authority. 3 McQuillin, Municipal Corporations (Third Edition Revised) 524, § 12.126.

death or damage to property caused by reason of the operation and use of such motor cars * * * . Said insurance may be issued in the name of the political subdivision, but it shall insure the authorized drivers * * * against liability for damages to property, in any one accident, to an extent of not less than one thousand dollars and against liability for injuries or death of one person in any one accident to an extent of five thousand dollars, and against liability for injury or death of more than one person, in any one accident, of not less than ten thousand dollars."

The New Jersey court said:

> The Legislature manifestly deemed it expedient to establish in the governmental affairs of such municipalities an administrative policy which would afford the drivers of municipally-owned vehicles the designated protection by insurance against the stated liability. The adoption of such a policy was not intended solely for the benefit of the certain individuals who were to be protected by the insurance. It was undoubtedly determined that the adoption of such a policy would be in the public interest. Recognizing, for example, that the drivers of the fire and police department vehicles were rendering a public service and in the performance of such service might incur liability for injuries to others, it was undoubtedly considered to be in the public interest to afford not only protection to such drivers against liability, but also to provide a means by which such liability might be discharged. The Legislature committed the accomplishment of this protective measure to the governing bodies of the municipalities, but did not prescribe any penalty for the failure of the municipal officials to comply with the directions of the statute, and did not impose any liability on a municipality in the event that any such driver suffered loss in consequence of the failure of the municipal officials to comply with the terms of the statute. Assuming that the duty of the governing body of the city to insure the drivers of its vehicles was mandatory, it was nevertheless a duty of a governmental character. The neglect or failure of the governing officials to

> obey the mandate of the statute does not of itself create a cause of action maintainable against the municipality in behalf of one who was detrimentally circumstanced by the dereliction of the governing officials.
>
> In this action the alleged liability of the city is predicated solely upon the failure and neglect of the city council to perform a governmental duty. No such action is maintainable unless afforded by statute. It is appropriately the function of the Legislature to authorize the prosecution of a civil action against a municipality by an individual who has suffered injury in consequence of the neglect of the municipal officials to perform a public and governmental duty, if the creation of such a cause of action is deemed proper and expedient. The obligation of the municipality to perform the governmental duty may be imposed by statute, but the doctrine still prevails that the neglect of a municipal corporation to perform, or its negligence in the performance of, a public duty imposed on it by law, is a public wrong and cannot constitute the basis of a civil action by an individual who has suffered particular damage by reason of such neglect.

In a later case, *Osback* v. *Lyndhurst Tp.*, 7 N.J. 371, 81 A. 2d 721 (1951), the New Jersey Supreme Court rejected a similar claim in which it was urged that a liability should be imposed upon the city because the lower court decision on the basis of *Knauer* effectively took away the benefit of the statute from the two classes of people upon whom it was intended to be conferred. The court, relying upon the well-established rule that an action will not lie in behalf of an individual who has sustained a special damage by reason of the neglect of a public corporation, or its agents, to perform a public duty, said:

> The statute, however, while stating the requirement of public liability insurance in mandatory language, does not provide a remedy for those who may suffer through a failure to comply with its terms. If it had done so, the right to recover would be clear.

The underlying principle followed in these cases has been recognized in Arkansas. In *Gregg* v. *Hatcher,* 94 Ark. 54, 125 S.W. 1007, 27 L.R.A. (n.s.) 138, we quoted, with approval, from 20 American and English Encyclopedia of Law (Second Edition), pp. 1193 and 1194. That quotation included the following language:

> So far as municipal corporations exercise powers conferred on them for purposes essentially public, they stand as does sovereignty whose agents they are, and are not liable to be sued for any act or omission occurring while in the exercise of such powers, unless by some statute the right of action is given; and where, the particular enterprise is purely a matter of public service for the general and common good, it makes no difference whether it is mandatory, or whether only permitted and voluntarily undertaken.

Without further elaboration, I feel the result reached is inappropriate only because of the means and agency through which it is reached. Not only would I have no quarrel with that result had it been reached by the General Assembly, I would agree that it was desirable. If the General Assembly had intended that result it could have said so in a few simple words. We must presume that the legislature knew that nonfeasance of municipal officers does not give rise to a cause of action against the municipality. If the effect of this decision were limited to this particular act, perhaps I should not protest so strongly. As a precedent it can be very far-reaching, and can be the vehicle for many quasi-legislative actions by this court under the guise of statutory construction.

I must add that there is an additional reason why I would affirm the action of the trial court. Failure of the municipal officers to procure the required liability insurance does not mean that Section 2 of the act may not be invoked. Section 2 is clearly applicable to all tort claims, even those arising out of operation of motor vehicles and particularly those which might be for an excess over the limits of automobile liability insurance. There is nothing in the complaint to indicate that appellant had sought to invoke procedures under that section or that the city had not established them.

JOSEPH HORNER *v.* STATE OF ARKANSAS

CR 73-117 501 S.W. 2d 217

Opinion delivered November 5, 1973
[Rehearing denied December 10, 1973.]

Jeff Duty, for appellant.

Jim Guy Tucker, Atty. Gen. by: *O. H. Hargraves,* Deputy Atty. Gen., for appellee.

LYLE BROWN, Justice. Appellant was convicted of burglary and of robbery, growing out of the same incident, and was sentenced to five years on each charge. A second person similarly charged entered a plea of guilty. For reversal it is contended that the court erred in admitting statements made by appellant to the sheriff and another to the prosecuting attorney.

Appellant made an incriminating oral statement to the sheriff on the day of his arrest. It is appellant's contention the State did not establish that appellant was given the *Miranda* warnings. The sheriff testified he first advised appellant of his constitutional rights but

did not elaborate, that is, he did not specify the particular rights of which appellant was advised. Counsel for appellant did not on cross-examination ask the sheriff to list the particular rights given. Appellant offered no testimony on the point. We know of no case authority which requires an officer to particularize the constitutional rights given unless he is asked to do so on cross-examination, or, if deemed necessary, on rebuttal.

With respect to a written statement given the prosecuting attorney it is again asserted that the State did not establish that adequate warnings under *Miranda* were given. A few days after appellant's interview with the sheriff, appellant was taken before the prosecuting attorney. A criminal investigator from the sheriff's office accompanied appellant to the prosecutor's office. That officer testified that appellant was there advised of his constitutional rights. There was no cross-examination on the point and no evidence was offered to refute the testimony of the officer.

The other objection here made to the introduction of the statement taken by the prosecuting attorney is based on Ark. Stat. Ann. § 43-915 (Repl. 1964):

> In all cases where two (2) or more persons are jointly or otherwise concerned in the commission of any crime or misdemeanor, either of such persons may be sworn as a witness in relation to such crime or misdemeanor, but the testimony given by such witness shall in no instance be used against him in any criminal prosecution for the same offense.

The contention is without merit because we have held that the recited statute "applies only to proceedings before a grand jury." *Rhea* v. *State,* 226 Ark. 581, 291 S.W. 2d 505 (1956). In *Rhea* we also said:

> The statute was enacted as § 67 of Chapter 45 of the Revised Statutes of 1838. This chapter relates to criminal procedure and, as may be readily seen from the table of contents which follows its title, is subdivided to conform to the various steps involved in a criminal proceeding. Sections 59 through 77

define the procedure to be observed by grand juries. When § 67 is read together with the sections that immediately precede and follow it there can be no doubt that it pertains only to testimony taken in the course of a grand jury investigation.

Affirmed.

DONALD LOUIS CURTIS *v.* STATE OF ARKANSAS

CR 73-121 500 S.W. 2d 767

Opinion delivered November 5, 1973

Eugene Hunt, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Alston Jennings Jr.,* Asst. Atty. Gen. for appellee.

JOHN A. FOGLEMAN, Justice. Donald Louis Curtis, then 13 years of age, was charged on October 1, 1970, with three counts of burglary, two counts of grand larceny and one count of rape. After advice by Jack Holt, Jr., an attorney employed by his parents, appellant entered a plea of guilty and was sentenced to serve 30 years in the Arkansas Department of Corrections. His petition for postconviction relief under Criminal Procedure Rule 1 was denied on March 7, 1973. In that petition he admitted guilt of two counts of burglary, but denied guilt of all other charges. He asserts two alleged errors as a basis for reversal. We find no merit in either assertion.

Appellant first asserts that the circuit judge erred by admitting his alleged confession into evidence during the hearing on his petition for postconviction relief. Even if we should agree with him that the alleged confession was involuntary, the error was harmless. One who enters a plea of guilty after he has had advice of counsel may not thereafter raise claims relating to deprivation of constitutional rights prior to his plea, except by showing that the plea was not voluntarily and intelligently entered because the advice he received from counsel was not within the range of competence demanded in criminal cases. *Clark* v. *State,* 255 Ark. 13, 498 S.W. 2d 657. Appellant, now represented by another attorney, has not even made this contention, much less the required showing.

Since appellant was so young at the time, we have considered other factors in addition to his failure to argue that his attorney's advice was not in accord with required standards. We cannot say there is no evidentiary support for the trial court's findings, among others, that: appellant's plea of guilty was entered freely and voluntarily; both he and his mother fully understood the consequences of the plea; the plea and sentence had been arrived at through plea negotiations between his attorney and the prosecuting attorney; he was fully, completely and adequately represented by his retained counsel, both

prior to, and at the time of, the plea of guilty. We note that these findings were made by a judge other than the one who accepted the plea of guilty.

Furthermore, the record discloses that appellant's attorney had filed a motion challenging the validity and voluntariness of the confession, a motion for continuance and a motion for trial setting. Appellant testified that he advised his attorney of all the circumstances surrounding the giving of his statement to the officers. There was testimony by Mr. Fletcher Long, deputy prosecuting attorney in St. Francis County, showing that negotiations extending over a period of several months had been initiated by Holt. After Holt had filed motions for a continuance, for a bill of particulars, for disclosure of documents, and for severance of trial, Long said that he permitted Holt to examine everything in the prosecuting attorney's files. He stated that, after discussions about the voluntariness of the youth's statements to the officers and an investigation by Holt, this attorney conceded that he could not discredit the testimony of the officers on this subject. Long also testified that, because of Curtis' age, he took the precaution of assuring himself of the voluntariness of the statement by interviewing young Curtis, after having advised the youth of his constitutional rights. It is not unreasonable to assume that there was an appropriate basis for appellant's failure to challenge the competence of his attorney's advice.

Appellant's other contention is that the state failed to establish his capacity, at age 13, to commit the crimes with which he was charged. His guilty plea was itself a conviction, and, after it was entered, nothing remained except to enter judgment and fix punishment. *Kercheval* v. *United States,* 274 U.S. 220, 47 S. Ct. 582, 71 L. Ed. 1009 (1927). It was, in itself, an admission of all the elements of the charges. *McCarthy* v. *United States,* 394 U.S. 459, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969). It also constituted a waiver of any defense that might have been raised at the trial of the charges. *Cox* v. *State,* 255 Ark. 204, 499 S.W. 2d 630. The state was not required to prove

any element of the crime, since the plea of guilty was sustained. Here again, because of appellant's youth, we sought to find anything to indicate that appellant's attorney was not fully aware of this possible defense and of appellant's mental capacity. We have been unsuccessful. It is significant that appellant was committed to the Arkansas State Hospital for psychiatric examination and observation prior to Holt's employment. We have no reason to believe that the results of this evaluation were not available to counsel and given appropriate consideration by him.

Even with the more extended review accorded appellant because of his youth, we cannot say that his plea of guilty is vulnerable on collateral attack. No doubt the age of the offender has been, and will be, given consideration by the Department of Corrections.

The judgment is affirmed.

HOLT, J., not participating.

HOERNER WALDORF CORPORATION AND INSURANCY COMPANY OF NORTH AMERICA *v.* CARL LEE ALFORD

73-99 500 S.W. 2d 758

Opinion delivered November 5, 1973

Smith, Williams, Friday, Eldredge & Clark, by: *George Pike Jr.,* for appellants.

McMath, Leatherman & Woods, for appellee.

J. FRED JONES, Justice. This is a workmen's compensation case and the question on appeal is whether there is any substantial evidence to sustain the Commission's finding that the claimant-appellee's heart attack and resulting disability grew out of, and occurred within the course of, his employment as a truck driver.

Carl Lee Alford was 58 years of age when on September 13, 1971, he suffered a severe heart attack while driving a truck-trailer rig on a return trip to Little Rock from Rossville, Tennessee, where he had delivered a truckload of corrugated paper boxes bound up in 500 pound bales. Mr. Alford had worked for the appellant-employer, Hoerner Waldorf Corporation, for approximately 20 years, the first five years as a "slitter operator,"[1] and the last 15 years as a truck driver. He had been hospitalized and treated for a hiatal hernia but that condition is of no importance in this case except as it relates to Mr. Alford's complaints as hereinafter set out. The heart attack suffered by Mr. Alford on September 13 was diagnosed as a myocardial infarction and the correctness of that diagnosis is not questioned.

It was Mr. Alford's contention before the Commission that the stress and strain of the work he performed as a truck driver brought about his heart attack on the

[1]The duties of a slitter operator were described as feeding paper cardboard through a machine which trimmed it to proper size for making cardboard boxes.

day in question and aggravated his pre-existing coronary atherosclerosis to the point of a myocardial infarction and permanent disability. The appellant-employer and its compensation insurance carrier contended that Mr. Alford's heart attack on September 13 was a natural result of his progressive degenerative heart disease and was unrelated to his occupation as a truck driver. The Commission found in favor of Alford and awarded compensation for a 70% permanent partial disability in addition to medical benefits that normally follow an award in favor of the claimant. The award of the Commission was affirmed by the circuit court so the employer and insurance carrier contend on this appeal that the "claimant failed to sustain his burden of proving by substantial evidence that there was any causal relationship between his driving the truck and his heart attack."

Mr. Alford testified by deposition as well as in person before the Referee. He said that September 13 was on a Monday and he did not work on the 11th or 12th. He said he just sat around the house on Saturday and Sunday and did not recall having any chest pains on Saturday or Sunday. He said on Sunday afternoon he became drowsy and felt tired and worn-out. He said he started to call his employer to get someone else to work in his place on Monday but thought he might get to feeling better so he decided to go ahead and go to work Monday. He said that he got up about 1:30 or 2:00 o'clock on Monday morning and reported to work; that his trailer was already loaded and he attached the tractor to the trailer and left on his assigned trip for the delivery of merchandise to Rossville, Tennessee. He said he stopped in Palestine, Arkansas, for breakfast and delivered his cargo in Rossville at 7 a.m. He said that prior to stopping in Palestine, he had "a kind of heavy feeling" in his chest but thought it would pass and didn't say anything to anyone about it. He said his cargo consisted of cardboard boxes bound up in bales weighing approximately 500 pounds; that when he arrived in Rossville, the bundles were unloaded with a forklift and he assisted the forklift operator in pulling over about 10 of the bundles so that the forklift could get under them. He said the heaviness he felt in his chest between Palestine and Rossville had lightened up on his return trip to Little Rock but that

after he came through Memphis, Tennessee, and West Memphis, pain in his chest started getting worse and that between Palestine and Wheatley, Arkansas, about two hours after he left Rossville, he had to pull to the side of the highway and stop. He then testified as follows:

> "Q. What kind of problem were you having at that time?
>
> A. Well, I turned deathly sick and felt like I was going to vomit, and that's the reason I jerked the tractor trailer over off the road as soon as I could, and it just felt like something just popped me in the chest right hard, and I slumped over my steering wheel, I suppose, so according to the time that I left Rossville and the time that these boys come along and all I was probably there maybe thirty or forty-five minutes. I don't know just how long it was."

Mr. Alford said two other truck drivers employed by the same company stopped and offered to bring him on in to Little Rock but he managed to bring his own truck to Little Rock. He said that after delivering his truck back to his place of employment, he went home and a day or so later was hospitalized under the treatment of Dr. William B. Bishop.

At the hearing before the Referee, Mr. Alford described his attack in more detail. He said that when he pulled his truck to the shoulder of the highway and stopped, he first laid over on his steering wheel and then got so sick he had to get out of his truck and vomit. He said that for a short time after he stopped he felt dizzy and did not know what he was doing. He said this condition soon cleared up but the pain in his chest never did cease or get any better. He described the attack as starting with sharp pain in his chest under his breast bone. He said it just kept getting worse and worse and he then testified as follows:

> "When it did hit me it was a solid jolt. It just felt like someone stomped me in the chest . . . I had been hit in my chest with a bale of hay and it kind of felt

like that . . . then I knew there was something wrong with me. I had never had that to happen to me before.

Q. Now you had never had this particular type of pain before?

A. I never had.

Q. Now had you ever had any pains in your stomach or in your chest area before?

A. Yes, sir.

Q. Were they anything like this?

A. Never was, no, sir."

He said he had previously experienced pain in his stomach and chest on several occasions when he was in the hospital with a hiatal hernia. He said when his chest pains first started on the 13th, he thought perhaps it was the same thing, but it didn't start hurting in his stomach as it usually did. He said the pain started in his chest on the 13th; that it was of a different nature than he had previously experienced and when it grew worse, he knew it was not from his stomach or hernia. He said after he left Rossville on his return trip to Little Rock, the pain in his chest really started hurting bad and then kept getting worse.

Mr. Robert Cearley, production manager for the appellant-employer, testified that Mr. Alford was an excellent employee. He said Alford worked about five years as a slitter operator in the plant before being assigned to driving a truck.

Both the truck drivers who came upon Mr. Alford while he was stopped at the side of the highway on his return to Little Rock, testified that he was deathly sick, complaining of pain and said that nothing like that had ever happened before.

Orville Jenson, another truck driver for the appellant-employer, testified that a driver of a truck-trailer rig

is under constant pressure in keeping a lookout to prevent accidents and that there is a lot of heavy physical exertion involved in such work.

Dr. William B. Bishop did not testify but his letter-report dated January 26, 1972, directed to Mr. Alford's attorney, was introduced into evidence without objection. Dr. Bishop stated that Mr. Alford had been under his treatment since September 16, 1971, and in his opinion Mr. Alford had advanced arteriosclerotic heart disease with angina on exertion. Dr. Bishop stated that Mr. Alford most likely had an intramural myocardial infarction which precipitated his hospitalization from September 16 through October 11, 1971. He said that in addition, Mr. Alford had symptoms of vertebral basilar artery insufficiency. It was his opinion that Mr. Alford would be unable to resume any occupation which would require any type of physical activity "including pulling, hauling, lifting, standing or walking over a protracted period of time." Dr. Bishop concluded his report with a statement as follows:

> "In that Mr. Alford's initial symptoms occurred while he was driving a truck during the course of his occupation, I would have to presume that his pre-existing condition was aggravated by his driving the truck."

At the request of the compensation insurance carrier, Mr. Alford was examined by Dr. Alfred Kahn, Jr. who reported the results of his examination and also testified by deposition. Dr. Kahn expressed the opinion that there was no causal connection between Mr. Alford's work and his heart attack on September 13. The Commission, however, was entitled to consider and weigh *all* of Dr. Kahn's testimony together with all the other evidence in arriving at its decision as to where the preponderance lies. Dr. Kahn's examination was so thorough, and his testimony so important to the question before us, we feel justified in quoting his testimony at some length. Dr. Kahn's report reads in part as follows:

> "It is my opinion based on Mr. Alford's history, physical examination, laboratory work performed

elsewhere and performed here that Mr. Alford probably had an acute myocardial infarction while he was driving his truck as described in the present illness. * * * A myocardial infarction means death of heart muscle which in turn is the result of an inadequate blood flow through the coronary arteries. This inadequacy of blood flow through the coronary arteries is the result of a progressive degenerative disease seen in American males and known as coronary arteriosclerosis. This progressive degenerative disorder is accelerated by hypertensive disease, hypercholesterolemia, certain endocrine disorders as thyroid disease, sedentary living, hereditary traits, etc.; the reverse holds true. As a result of this patient's coronary artery disease, he not alone had the myocardial infarction but the inadequacy of blood flow through the coronary vessels is still symptomatic and this patient is having what is known as angina pectoris. Angina pectoris is a syndrome of chest pain caused by temporary inadequacy of blood flow through the coronary vessels; this does not produce lasting damage to the heart, but could be looked on as a warning signal that there was a temporary inadequacy of blood flow. At this time I am unable to state that this patient has failure of his heart as a pump; he does not have any notable cardiac arrhythmia.

All of this brings up the question as to whether or not this patient's work was related to his heart attack. The basic underlying cause of the patient's heart attack or myocardial infarction as it is called is coronary atherosclerosis which as I have stated above is a progressive degenerative disease of the coronary vessels. A myocardial infarction may be precipitated in the presence of coronary arteriosclerosis if the patient undergoes excessive or unusual exertion. This unusual exertion has to have a good time relationship with the onset of the symptoms or there cannot be a cause and effect relationship. In the case of Mr. Alford, I do not believe that there is any causal relationship between this man's work as a truck driver and his myocardial infarction."

Dr. Kahn then reported that he made a careful search for any other disease suffered by Mr. Alford which might simulate coronary artery disease. He said that Mr. Alford does have a hiatal hernia and he was of the opinion that some of the pain described by Mr. Alford could have come from the hernia. He found that Mr. Alford did have hypertensive cardio-vascular disease; this could definitely accelerate coronary artery degeneration. He reported that Mr. Alford did not have an elevated blood cholesterol. Dr. Kahn then concluded his report as follows:

> "In summary it is my belief that Mr. Alford has had a myocardial infarction. It was due to progressive arteriosclerosis. I think he is now probably suffering from angina pectoris. I think his principal problems are totally unrelated to his work.
>
> Currently because of the cardiac disease, I think Mr. Alford is totally incapacitated for driving a truck. At the most, Mr. Alford might have some type of sedentary job where he sat or stood for short periods of time; he should not do any heavy lifting. He should not be exposed to any extremes of fatigue or climate."

In Dr. Kahn's deposition he testified on direct examination in part as follows:

> "I think the thing that occurred to Mr. Alford was this; that he had a chronic degenerative disease of the blood vessels, which involved his heart, among other places. This disease, as I stated, is progressive, and eventually the blood supply to the heart muscle is inadequate. This inadequacy might take two forms. One, the inadequacy might precipitate what is known as coronary artery insufficiency, and this is a condition in which there is an inadequate flow of blood to the heart, and as a result there is temporary pain when the individual exercises or exerts. The other disorder is known as myocardial infarction, and it's a more severe disorder, and this is characterized by a much greater impairment of blood supply, and in fact such that the individual has muscle death afterwards. It's my opinion that Mr. Alford's diagnosis is a myocardial infarction, and

that it is a severe form of loss of blood supply through the coronary vessels. This used to be called coronary artery occlusion, but we know that these individuals who have myocardial infarction may have a partially patent blood vessel and the muscle still dies. My belief is that Mr. Alford suffered a myocardial infarction while he was driving his truck. I don't think of this as being violent exertion, and I feel that the progression of the disease was the most important thing in producing his myocardial infarction."

Dr. Kahn then testified that there had been studies made to determine the effect and relationship between exertion and myocardial infarction. He said these statistics showed that 95% of myocardial infarctions occurred while the individuals were either being quiet or at least relatively sedentary. He said that in only about 5% of the cases was there found to be a relationship between the infarction and exertion. Dr. Kahn testified that he agreed with these surveys and, before he would relate a myocardial infarction to exertion, it should be clearly shown that the exertion was quite severe for the particular individual and there would have to be a good time relationship between the exertion and the onset of the symptoms. He said that from the history given him by Mr. Alford, he felt that the exertion, or activity he was engaged in while driving his truck, was not sufficient to relate his activity to his myocardial infarction. Dr. Kahn then continued on direct examination as follows:

"Q. . . . had you known, the extent of his condition before he had this attack, let's say the day before, what would have been your restriction on his activity?

A. Well, I think had I known he had had coronary artery disease sufficient to have caused a myocardial infarction, I would have told him not to take the trip. I would have taken him off this type of work.

Q. You would take him off this type of work, you mean truck driving?

A. Yes, I would. I would have put him on what I would have termed light work.

Q. And what are you putting him on now after he's had the attack; what is the nature of that. . .

A. . . . well, the same, light work.

Q. For example, could he handle a job now or after he reaches his complete healing, as a shipping clerk, for example, where he is to receive and send out materials, provided he did not have to do any lifting and provided he was given an opportunity to sit down periodically in the course of his work?

A. I think he could, provided he weren't exposed to extremes of temperature either. I think sitting and standing, no extremes of temperature, no extremes of exertion, probably a five pound limit on lifting weights and that not very repetitively."

Dr. Kahn then testified that he thought Mr. Alford might be able to carry on the job of slitting machine operator if he was not required to lift anything more than the pieces of cardboard he would feed through a machine. Dr. Kahn said that following death of heart muscle which occurs in a myocardial infarction, the dead muscle tissue is replaced by scar tissue and it is thought that this scarring process continues for around six weeks before complete healing occurs. He said that in such healing process the small blood vessels tend to open up and carry the blood in place of the large vessel which had been occluded or almost occluded.

On cross-examination Dr. Kahn made his prognosis for Mr. Alford as not good. He said any person who has had a myocardial infarction is subject to more coronary disease and that in his opinion this condition is permanent. Dr. Kahn then outlined a regular course of treatment he would suggest under the direction of Mr. Alford's attending physician, Dr. Bishop, who Dr. Kahn said "is an excellent man." Dr. Kahn then testified on cross-examination as follows:

"Q. Is it true, Doctor, that physical or chemical trauma, or a sudden exertion on the body as a whole would require an increased amount of blood?

A. Yes, certainly exertion would. I don't know that trauma would.

Q. And if the body requires an increased amount of blood, I suppose that requires the heart to work harder?

A. Yes.

Q. Where there's exertion and a patient has this narrowing of the coronary artery due to this disease, might there be an inadequate supply of blood to the heart muscle that would cause damage?

A. With exertion?

Q. Yes.

A. Yes, it's conceivable.

Q. And where you have this inadequate supply of blood to the heart muscle or the heart, may this result in pain?

A. Yes.

* * *

Q. I believe you indicated that a deficiency of blood supply to the heart or heart muscle could cause a myocardial infarction?

A. Yes, it could.

Q. Is there any similarity in symptoms from a hiatal hernia and a heart condition?

A. Yes, they are quite similar at times.

Q. Would they be confusing to a patient unless they knew exactly what was wrong with them?

A. Very."

Dr. Kahn testified that whether or not emotional strain would cause damage to a diseased heart with insufficient blood supply is a very difficult question. He said that a sudden emotional shock could place additional strain on the heart but that whether or not emotional stress does lasting damage to a heart is a matter of debate. He said that he felt it could precipitate angina pectoris. He said that emotional stress could increase the heart beat and increase blood pressure.

> "Q. And if the heart is already damaged it could aggravate the condition?
>
> A. Yes, it could aggravate it, temporarily, anyway."

Dr. Kahn testified that it would not be advisable for Mr. Alford to engage in any physical labor of any magnitude and that he should limit his activities in lifting weights to not over five pounds. He said that if Mr. Alford strained very vigorously, it could cause his heart to require more oxygen; that Mr. Alford should not attempt to move a crate weighing 500 pounds, and that he should be limited to light duty in the future. He then concluded his testimony on cross-examination as follows:

> "Q. Mr. Pike asked you if Mr. Alford had come to see you for advice and counsel and treatment on the 13th of September, 1971, before he started out on this trip, what restrictions you would have then placed on his job activities, and I believe you have indicated that you would have placed the same restrictions as you are now placing on him?
>
> A. Yes, I would."

The appellants argue that Dr. Kahn was very definite in his opinion, whereas Alford's medical evidence amounts only to a bare conclusion expressed by his attending physician and is without supporting evidence. They argue that Dr. Bishop does not mention significant history in Mr. Alford's case. As already pointed out, Dr. Bishop did not testify. His deposition was not taken nor was he called as a witness by either party. Mr. Alford, however,

had been under the care and treatment of Dr. Bishop from the date of his attack and it would appear just as logical, if not more so, that Dr. Bishop did take into consideration a history given him by Mr. Alford as it would be that he did not.

The appellants cite many of our decisions in which we have reversed the Commission under the substantial evidence rule. *Ocoma Foods* v. *Grogan,* 253 Ark. 1111, 491 S.W. 2d 65, was a protruding disc case in which the condition developed over a considerable period of time and the claimant's employment consisted of sitting down and lifting nothing heavier than chicken parts.

In *Southland Corp.* v. *Hester,* 253 Ark. 959, 490 S.W. 2d 132, cited by the appellants, we reversed a Commission award in favor of the widow of a man who died of a gunshot wound. The deceased employee was found slumped at his desk with his own .22 rifle (he apparently had brought from home) propped with its butt against an electrical outlet on the floor and its muzzle against his shirt near his heart. The cause of death was a bullet wound through the heart, and there was powder burn on the shirt and if the death was accidental, there was no substantial evidence it grew out of the employment.

Another case cited by the appellants in which we reversed the Commission is the case of *International Paper Co.* v. *Langley,* 251 Ark. 859, 475 S.W. 2d 686. The primary distinction in that case was that Mr. Langley was simply handling empty paper bags seven feet long and two feet wide.[2] Langley had just returned from lunch and picked up one of the paper bags when he experienced one of his many heart attacks. The appellants also cite numerous cases in which we have sustained the Commission under the substantial evidence rule, but each case turns on its own peculiar facts and we only search the record to determine if there is any substantial evidence that will support the decision reached by the Commission.

Heart cases are within the most difficult area of workmen's compensation law, primarily because it is

[2]Approximately the same type of light work Alford did as a "slitter Operator" and which the doctors say he might still be able to do.

common knowledge that disabling heart attacks do occur in many instances without apparent reason as to time and activity. It has become a matter of common knowledge that excessive exertion or strain on a weak or diseased heart is likely to result in a disabling or fatal heart attack and the amount of exertion required may vary with the individual. *Bettendorf* v. *Kelly,* 229 Ark. 672, 317 S.W. 2d 708. It is unfortunate, therefore, that the precise and exact cause and extent of a disabling heart condition are difficult to determine short of heroic exploration or autopsy.

Ever since our decision in *Bryant Stave & Heading Co.* v. *White,* 227 Ark. 147, 296 S.W. 2d 436, there has been no requirement that a heart attack, to be compensable, must be caused, or brought on, by some unusual exertion rather than by the employee's regular work. *Rebsamen West* v. *Bailey,* 239 Ark. 1100, 396 S.W. 2d 822. See also *Reynolds Metals Co.* v. *Cash,* 239 Ark. 489, 390 S.W. 2d 100; *W. Shanhouse & Sons, Inc.* v. *Simms,* 224 Ark. 86, 272 S.W. 2d 68.

In *Reynolds Metals Co.* v. *Cain,* 243 Ark. 483, 420 S.W. 2d 872, we said:

> "It is appellant's contention that appellee's attack was due to pre-existing arteriosclerotic disease, and his work had nothing to do with precipitating the attack. It is true that Cain was suffering from arteriosclerosis, and there is no dispute in the medical testimony on that point. The test, however, is whether the work that appellee was doing aggravated the pre-existing condition to the extent that it (the work) was a factor in bringing on the attack. *Reynolds Metals Company* v. *Robbins,* 231 Ark. 158, 328 S.W. 2d 489. Numerous cases hold in like manner."

In the case of *Asphalt Materials Co.* v. *Coleman,* 243 Ark. 646, 420 S.W. 2d 921, the question was whether or not there was any substantial evidence of a causal connection between the claimant's work and a heart attack, and in that case we said:

"In resolving the issue before us, we are mindful of those cardinal principles so well established as to need no citation of authority: (1) the compensation act is to be construed liberally in favor of the workman; (2) the burden is on the claimant to show causal connection between his heart attack and his employment; and (3) we give the evidence its strongest probative force in favor of the commission's findings because those conclusions carry the weight of a jury verdict."

In *Latimer* v. *Sevier County Farmer's Coop., Inc.*, 233 Ark. 762, 346 S.W. 2d 673, we said:

"In *U.S.F. & G. Co.* v. *Dorman,* 232 Ark. 749, 317 S.W. 2d 708, this court quoted from *Bettendorf* v. *Kelly,* 229 Ark. 672, 317 S.W. 2d 708, as follows: '. . . an accidental injury arises out of the employment when the required exertion producing the injury is too great for the person undertaking the work, whatever the degree of exertion or the condition of his health, provided the exertion is either the sole or a contributing cause of the injury. In short, an injury is accidental when either the cause or result is unexpected or accidental, although the work being done is usual or ordinary.' "

And in *Hall* v. *Pittman Construction Co.,* 235 Ark. 104, 357 S.W. 2d 263, we said:

"Under the substantial evidence rule that prevails in a case of this kind the appellant shoulders a heavy burden in seeking a reversal of the commission's decision upon an issue of fact. In order to succeed the appellant must show that the proof is so nearly undisputed that fair-minded men could not reach the conclusion arrived at by the commission. After studying the record we are unable to say that the appellant is entitled to a reversal; that is, that there is no substantial evidence to support the commission's findings."

There is no question from the medical evidence in this case, that Mr. Alford had an arteriosclerotic heart

condition for at least some period of time prior to his attack on September 13, 1971. Prior to that date, however, there is no evidence that his condition interfered with his regular duties as a truck driver and there is no evidence that he even knew he had the condition. There is little direct evidence as to the amount of stress and physical exertion involved in driving a truck-tractor trailer such as Mr. Alford was driving. It is clear from Dr. Kahn's testimony that the *basic underlying cause* of Mr. Alford's myocardial infarction was the inadequacy of blood supply to the heart muscles through arteries which were occluded, or nearly so, by nonoccupational arteriosclerosis, and this principal problem was unrelated to Mr. Alford's work. It is reasonable to assume that if Mr. Alford had been free of this basic underlying principal problem, his acute infarction would never have occurred and he would still be able to follow his occupation as a truck driver or engage in any other physical activity on an unlimited basis.

Turning now from the *"basic underlying cause"* and Mr. Alford's *"principal problem"* Dr. Kahn explains that a slight or temporary inadequacy of blood supply to the heart may result in warning chest pains known as angina pectoris when the individual exercises or exerts. He explains that a much greater inadequacy of blood supply may result in a myocardial infarction with permanent damage and he said that is what Mr. Alford had. "Inadequacy" is a relative term and Dr. Kahn readily agrees to the common sense proposition that physical exercise and exertion places a greater demand on the heart for its blood supply and while Dr. Kahn expressed the opinion that Mr. Alford's truck driving did not precipitate his heart attack or aggravate his heart condition, he limited Alford's activities to lifting not over five pounds in weight and said that had he had occasion to examine Mr. Alford prior to September 13, 1971, he would have placed him on lighter work than that of truck driving, and would have limited his activities to the same extent he did following the heart attack on September 13.

We are of the opinion that the Commission was justified in interpreting Dr. Bishop's letter-report as dif-

fering in opinion with Dr. Kahn as to whether or not the truck driving aggravated Mr. Alford's heart condition. Dr. Bishop's qualifications are not questioned in this case and he placed practically the same limitations on Mr. Alford's activities as did Dr. Kahn. Apparently both doctors would have recommended lighter work for Mr. Alford than that of truck driving had they had an opportunity to do so prior to September 13.

There is no evidence in the record as to how much either of the doctors knew about the exertion necessary in driving a truck-tractor rig through cities and on the highway, so it is reasonable to assume that Dr. Bishop knew as much about truck driving as did Dr. Kahn. Certainly Dr. Kahn, and apparently Dr. Bishop, would have recommended against attempting to drive the truck on September 13 had they had an opportunity to examine Mr. Alford before he made the trip. Dr. Bishop did not merely say that he presumed the truck driving aggravated Mr. Alford's condition, he said he *would have to* presume that the pre-existing condition was aggravated by driving the truck. Perhaps Dr. Bishop recognized, as Dr. Kahn apparently did, that Mr. Alford was in immediate danger of a myocardial infarction if and when additional demand was made on his diseased arteries and they only differ in the amount of exertion that would create such demand.

It is true that Dr. Bishop did not go into detail as to how he arrived at his opinion as did Dr. Kahn, but he was not asked to do so. Dr. Kahn does not say whether a myocardial infarction occurs over an extended period of time or suddenly. He does say that in his opinion Mr. Alford suffered an *acute* myocardial infarction. He explains that a myocardial infarction occurs for lack of blood supply through diseased arteries and the substance of his testimony is to the effect that anything, including exercise, which would increase the demand on the heart and arteries for blood supply, would likely result in insufficient blood oxygen to the heart muscles and result in a myocardial infarction.

From the overall evidence in this case, under the above rules we have announced in previous cases, we

are of the opinion that there is substantial evidence to support the Commission's finding in this case, and that the judgment of the trial court affirming the Commission must be affirmed.

Judgment affirmed.

FOGLEMAN, J., concurs.

THE DOW CHEMICAL COMPANY AND THE CITY OF RUSSELLVILLE, ARKANSAS *v.* BRUCE-ROGERS COMPANY ET AL

73-118 501 S.W. 2d 235

Opinion delivered November 5, 1973

Ike Allen Laws Jr., P.A., for appellants.

Williams & Gardner, James A. McLarty, Jon Sanford and *W. H. Schulze,* for appellees.

J. FRED JONES, Justice. This is an appeal by Dow Chemical Company and the City of Russellville, Arkansas, from a chancery court decree enforcing statutory materialmen's liens filed by the appellees against the leasehold interest of Dow Chemical in land and improvements owned by the City of Russellville.

Most of the facts were agreed to by stipulation and they appear as follows: The City of Russellville sold industrial development bonds under the municipality and county development revenue bond law [Act 9 of 1960 (ex. session)] [Ark. Stat. Ann. §§ 13-1601—13-1614 (Repl. 1968)] and with the proceeds from said sale purchased land adjacent to Russellville in Pope County and leased the land to Dow Chemical Company over a period of years with option to purchase. The lease rentals to be paid by Dow Chemical were pledged to service the bonds. Upon retirement of the bonds, under Dow Chemical's option to purchase, it had a right to purchase the property including the improvements thereon for the sum of $100. Dow Chemical went into possession of the property under its lease and employed Russco Corporation and Russco Builders, Inc. in the building of two manufacturing plants on the property. These apparent two separate corporate entities will hereafter be referred to in the singular, simply as "Russco."

In the early part of 1972 Russco became unable to meet obligations and numerous liens for labor and materials were filed against the property, and numerous garnishments after judgments were filed against Dow Chemical and the City of Russellville. Russco had completed its work under its contract when the liens were filed and the judgments were obtained against it, but Dow Chemical and the City of Russellville were still indebted to Russco in the amount of $7,740. This amount still owed to Russco was far less than the amounts of the claims filed and judgments obtained against it.

As a result of the liens and garnishments, Dow Chemical and the City of Russellville filed a bill of interpleader and deposited the amount still owed to Russco into the registry of the court.

A trial on the issues resulted in a decree adjudicating the amounts of the liens as valid claims against Russco but holding that the land and improvements were public property and beyond the reach of the statutory liens. The chancellor held, however, that the leasehold interest of Dow Chemical was subject to the claims of the lien claimants. The chancellor entered judgments for the lien claimants against Russco and decreed liens in favor of the lien claimants in the amounts of their respective judgments against the leasehold interest of Dow Chemical Company. The decree provided that if the judgments be not paid within 10 days that the leasehold interest of Dow Chemical be sold at public auction, with the proceeds from the sale to be used, after the payment of all costs and expenses of the sale, to satisfy the lien claimants pro rata with the excess, if any, to be remitted to Dow Chemical Company. The decree provided for a stay bond pending appeal to this court, and such bond was filed by Dow Chemical. The appellants contend on this appeal that the chancellor erred in holding that the liens attached to the leasehold interest of Dow Chemical.

Ark. Stat. Ann. § 51-601 (Repl. 1971) provides that:

> "Every . . . workman . . . or other person who shall do or perform any work to or upon, or furnish any material, . . . for any building, erection, improvement to or upon land, . . . under or by virtue of any contract with the owner or . . . his . . . contractor or subcontractor, upon complying with the provisions of this act . . . shall have for his work or labor done, or materials, . . . furnished a lien upon such building, erection or improvement, and upon the land belonging to such owner or proprietor on which the same is situated. . . ."

By statute as well as case law in Arkansas, leasehold interests are subject to liens for materials and labor.

Ark. Stat. Ann. § 51-606 (Repl. 1971); *Meek* v. *Parker,* 63 Ark. 367, 38 S.W. 900. Public policy, however, forbids the attachment of liens on public buildings and land for labor and materials furnished by contractors in the construction of public facilities. *Plummer* v. *School Dist. No. 1 of Marianna,* 90 Ark. 236, 118 S.W. 1011; *Holcomb* v. *American Surety Co.,* 184 Ark. 449, 42 S.W. 2d 765. The parties in the case at bar seem to recognize the municipal immunity to liens on the fee title in this case. So, the question actually boils down to whether this municipal immunity extends to the leasehold interest owned by Dow Chemical Company.

The appellants argue that the leasehold interest of Dow Chemical is pledged toward the retirement of the $20 million bond issue and the enforcement of materialmen's liens against this interest would amount to enforcing liens against public property held by the City of Russellville. The appellees argue that Dow Chemical contracted with the City of Russellville that it would not permit liens to attach to the subject property, and that appellees stand as third party beneficiaries of that contractual obligation. They also argue that appellants are estopped from claiming immunity by virtue of their failing to comply with Ark. Stat. Ann. § 51-632 (Repl. 1971) which provides as follows:

> "No contract in any sum exceeding $3,000 providing for the repair, alteration, or erection of any public building, public structure or public improvement shall be entered into by the State of Arkansas, or any subdivision thereof, any county, municipality, school district, other local taxing unit, or by any agency of any of the foregoing, unless the contractor shall furnish to the party letting the contract a bond in a sum equal to the amount of the contract."

Under the contract entered into between the City of Russellville as lessor, and Dow Chemical Company as lessee, it was provided that the lessor would obtain all necessary approvals from any and all governmental agencies requisite to the constructing and equipping of the project "and the project shall be constructed and

equipped in compliance with all state and local laws applicable thereto." The contract further provided that the lesseee shall, after occupancy of the premises under permits, approvals and authorities obtained by lessor, promptly comply with all valid statutes, laws, ordinances, orders, judgments, decrees, regulations, directions and requirements of all federal, state, local and other governments or governmental authorities, now or hereafter applicable to the leased premises. The contract provided, however, that the lessee should have the right to contest any such statutes, etc. and in such event compliance is to be postponed during the contest thereof, and:

> "[E]ven though a lien against the leased premises may be incurred by reason of such non-compliance Lessee may nevertheless delay compliance therewith during contests thereof, provided Lessee, if required, furnishes Lessor reasonably satisfactory security against loss by reason of such lien and effectively prevents foreclosure thereof."

Section 801 of the lease pertains to mechanic's liens and recites as follows:

> "After the completion of original construction and equipping, if any lien shall be filed against the interest of Lessor, Lessee, or the Trustee in the leased premises or asserted against any rent payable hereunder, by reason of work, labor, services or materials supplied or claimed to have been supplied on or to the leased premises at the request or with the permission of Lessee, or anyone claiming under Lessee, Lessee shall, within thirty (30) days after the receipt of notice of the filing thereof or the assertion thereof against such rents, cause the same to be discharged of record, or effectively prevent the enforcement or foreclosure thereof against the leased premises or such rents, by contest, payment, deposit, bond, order of Court or otherwise. Nothing contained in this Lease and Agreement shall be construed as constituting the express or implied consent to or permission of Lessor for the performance of any

labor or services or the furnishing of any materials that would give rise to any such lien against Lessor's interest in the premises."

The lease contract further provides that commencing with the completion of the project, or when the lessee takes possession if prior to the completion of the project, the lessee agrees to indemnify and save lessor harmless against and from all claims by or on behalf of any person, firm or corporation arising from the conduct or management, or from *any work* or *thing done* on the leased premises during the term.

Section 1001 of the lease provides that if the lessee shall fail to keep the leased premises lien free, the lessor has the right to satisfy such lien and charge the amount thereof back to the lessor as rent or to exercise the same rights and remedies as in the case of default by the lessee in the payment of back rent.

Under section 1501 of the lease it provides that the lessee may assign the lease or sublet the leased premises but in such event, the lessee is to remain liable and bound by the contract.

Section 1601 of the lease provides that the leasehold estate is, and shall continue to be, superior and prior to the trust indenture and any and all encumbrances, mortgages, deeds of trust and trust indentures constituting or granting a lien on the leased premises or any part thereof or interest therein.

Section 1801 of the lease provides the lease may be terminated by the lessor if:

"This Lease and Agreement or the leased premises or any part thereof shall be taken upon execution or by other process of law directed against the Lessee, or shall be taken upon or subject to any attachment at the instance of any creditor of or claimant against the Lessee, and said attachment shall not be discharged or disposed of within ninety (90) days after the levy thereof."

Mr. Jack Capps, acting plant manager for Dow Chemical, testified that Russco constructed the buildings involved in this case under a contract with Dow Chemical and that the contract was entered into through Dow Chemical's Houston office. He said it was his understanding that Russco was to be paid out of the bond money raised for the construction of the plant. He said that bids were taken on the job and that Russco was not the low bidder but the contract was awarded to Russco because it was a local construction company. He said that Russco was not bonded and that Dow Chemical did not generally require a bond on their contracts. He said that so far as he knows Dow Chemical was never advised by the City of Russellville, or anyone else, that there was supposed to be a bond required of a contractor on the job. He said that Russco had completely performed its contract.

Had the City of Russellville or its lessee Dow Chemical seen fit to comply with the mandatory provisions of § 51-632, *supra,* the difficulty presented in this case should never have arisen because under Ark. Stat. Ann. § 14-604 (Repl. 1968) a surety bond would have protected against the claims for labor and materials, and the provisions of the bond would have become a part of the contract. *New Am. Cas. Co.* v. *Detroit Fid. & Surety Co.,* 187 Ark. 97, 58 S.W. 2d 418; *Stewart-McGehee Const. Co.* v. *Brewster,* 171 Ark. 197, 284 S.W. 53.

In the case of *Nat'l Surety Corp.* v. *Edison,* 240 Ark. 641, 401 S.W. 2d 754, the City of Texarkana in a similar situation failed to exact a bond from the general contractor. Apparently as a device to circumvent the statute, it created a private corporation to go through the procedure of letting a contract for the construction of buildings before transferring the property to the city. In that case, however, National Surety had issued a performance bond to a subcontractor protecting the subcontractor from claims arising out of an additional subcontract. The bonding company contended it was not liable for labor and material lien claims under the general performance bond since the bond was not for the perfor-

mance of a public contract. We affirmed the liability of the bonding company and the concurring opinion pointed out as follows:

> "[T]he appellant must have known that the bond was made in connection with construction falling within the scope of Section 1 of Act 351, cited in the bond. In the circumstances the provisions of § 14-604 ought to be read into the bond, just as would have been the case if the city had complied with the law."

It would appear from the record in the case at bar, that the City of Russellville also attempted to circumvent the mandatory provisions of the statute by simply requiring its lessee, Dow Chemical, to assume all responsibility made mandatory under the statute for the protection of laborers and materialmen on municipal property not subject to materialmen's and laborer's liens. Such could have been the only reason and effect in requiring Dow Chemical to protect and hold harmless the city against unenforceable laborer's and materialmen's liens against public property. Dow Chemical agreed to assume this responsibility under its lease contract and apparently elected to forego a bond on its contractor. According to the testimony of Mr. Capps, Dow Chemical as a matter of practice simply does not require bonds of its contractors. There is no question that Dow Chemical's leasehold interest was assignable by it.

In *Grinnell Co.* v. *City of Crisfield,* 287 A. 2d 486, cited by the appellants, the Rubberset Company owned land and sold it to the city under a contract providing that the city would build a plant thereon and lease the property back to Rubberset at a specified rental over a 20 year period, at the end of which Rubberset had an option to purchase the property. In that case the city contracted with Weidemuller Construction Company (without written approval of Rubberset) to erect the building on the property. Weidemuller entered into a subcontract with Grinnell for the installation of a fire protection system for the plant and when Grinnell was not paid for the materials it furnished, it filed a mechanic's

lien on the property. The trial court held that the subcontractor Grinnell had no recourse against the city, and also held that the interest of Rubberset was subordinate to that of the city and was not subject to Grinnell's lien. The trial court sustained a demurrer filed by Rubberset. In affirming the action of the trial court, the appellate court remarked as "significant" the fact that Rubberset was not a signatory to the construction contract, as required in the lease agreement, and the court in *Grinnell* cited from a previous case as follows:

> " ' * * *[A] mechanic's lien ordinarily attaches to whatever interest the person responsible for the improvements has in the property.' "

The court in *Grinnell* seemed to place the emphasis on who was responsible for the improvements or who was the employer of the contractor and as the appellees readily point out in the case at bar, Dow Chemical was the party responsible for contracting with Russco for the construction of the buildings involved in this case.

In the case of *Tropic Builders, Ltd.* v. *United States,* 475 P. 2d 362 (Supreme Court of Hawaii 1970) Len Company and Associates was the prime contractor on a government housing project. The Aloha Company was performing construction work for Sam Len. A subsidiary of Len referred to as "NADLQ" had a 55 year lease on the site from the United States Government, and upon completion of the project the ownership stock was transferred to the federal government. Tropic was a subcontractor under Aloha and when it was not paid for its services, it filed a mechanic's lien against the *interest* of NADLQ and the improvements thereon. In the meantime NADLQ had merged into another corporate entity referred to as NCQ. The trial court held that Tropic had a valid lien against NCQ's lease on the project site and its interest in the improvements thereon. NCQ, Len, and his surety appealed and as assigned error contended that the mechanic's lien could not be enforced against property belonging to the United States or in which the United States had any interest. In affirming the trial court the Supreme Court of Hawaii said:

"The judgment recognized the existence and enforceability of mechanic's lien not on the fee simple interest of the United States but on the interest of NCQ, as successor to NADLQ, in the lease and leasehold improvements on the project site.

* * * The fact that the project site was owned by the United States in fee simple did not make NADLQ's lease and NADLQ's interest in the leasehold improvements immune from such liens. Basic Refractories v. Bright, 72 Nev. 183, 298 P. 2d 810 (1956); Crutcher v. Block, 19 Okla. 246, 91 P. 895 (1907).

* * *

It is stated in Keifer & Keifer v. Reconstruction Finance Corp., 306 U.S. 381, 388, 59 S. Ct. 516, 517, 83 L. Ed. 784 (1939), that the 'government does not become the conduit of its immunity in suits against its agents or instrumentalities merely because they do its work.' That statement was made with reference to a corporation organized under the authority of a Congressional act. It should apply with equal or greater force to a corporation organized under a state law relating to private corporations."

In the *Crutcher* case, cited by the Hawaii Supreme Court in *Tropic Builders, supra,* the lien was against houses erected by Crutcher in a housing project on land owned by the United States Government under lease to Crutcher. In approving the liens in that case the Oklahoma Supreme Court said:

". . . Under the rule here adopted, it is immaterial that the legal title to the land in question is in the United States. The United States authorized the leasing of such land for townsite purposes, and by the terms of such a lease an estate is created. The territory and the general government are bound by their contracts the same as an individual, and it is only the estate held by the appellant that can be affected by this lien.

. . . where the government leases land for a term of years, such lease must be measured by the general law applicable to such instruments, unless exceptions affirmatively are made by the law itself. . . . "

In 53 Am. Jur. 2d, § 44, at p. 557, is found the following:

"The courts generally hold that, subject to the paramount title of the owner in fee and the conditions of the lease, a leasehold estate is subject to a mechanic's lien for an improvement erected by or under a contract with the lessee. It has been so held even though the land is the property of a municipality or of the United States. Some statutes expressly provide that the lien extends to leasehold interests." See also 57 C.J.S., § 17, Mechanic's Lien.

We are of the opinion the chancellor did not err in holding that the materialmen's liens involved in this case attached to the leasehold interest of Dow Chemical and in ordering the foreclosure of same.

The decree is affirmed.

WANDA J. REAGAN *v.* ROY REAGAN

73-3 500 S.W. 2d 754

Opinion delivered November 5, 1973

Osborne W. Garvin, for appellant.

Eubanks, Files & Hurley, for appellee.

CONLEY BYRD, Justice. The trial court granted a divorce to appellee Roy Reagan on the grounds of personal indignities and awarded alimony to the appellant Wanda J. Reagan in the amount of $250 per month until remarriage or until further order of the court. For reversal the appellant contends:

"1. There was condonation of the conduct alleged;

2. Roy Reagan came into Court with unclean hands; and

3. The grounds of divorce were not established by a preponderance of the evidence."

The record shows that appellee asked for a divorce on the ground of personal indignities alleged to have occurred prior to March 15, 1971. Appellant filed a general denial and by way of cross complaint alleged non-support and desertion and requested a divorce from bed and board—*i.e.,* separate maintenance.

The proof shows that the parties were married April 1, 1944. They had two sons both of whom were born deaf. The older child died in 1967, and the other would be 21 on his birthday in October, 1972. The parties first separated in December, 1969. In January, 1970, appellee filed an action for divorce and appellant filed an answer and cross-complaint for a divorce. The complaint and cross-complaint were dismissed without prejudice in September 1971. Thereafter, the present action was in-

stituted in October 1971, alleging a separation in March 1971.

Appellee testified that most of their marital problems revolved around their son Dean, the son's desire to attend the Church of Christ, appellee's mother and appellant's extravagant spending. He stated that if a meal was cooked in his house, he did both the cooking and the cleaning-up afterwards.

Appellee stated that over the years appellant had developed an intolerance for his mother to such an extent that she had prohibited his mother from visiting in his home. As a result his mother went by his office to bring him a Christmas present, he and Dean and appellant having been somewhere together went by the office for just a minute. Appellant started a verbal barrage against his mother and wound up hitting his mother over the head with her purse. This incident was corroborated by Beverly Stubblefield, appellee's secretary at the time.

Both appellee and Joe Madey, a lawyer, had offices in the Donaghey Building. One evening while appellee was visiting in Mr. Madey's office near the end of the work day, appellant barged into Mr. Madey's office and unleashed a verbal barrage on appellee. Mr. Madey was reluctant to repeat the exact language used by appellant but explained to the court if his wife had used the same language against him in the privacy of his bedroom, he would have slapped her.

Witness Gilbert Leigh corroborated still another occasion and time when appellant unleased a verbal barrage and backed her car up and made a run at appellee as if she intended to run over him.

Appellee testified that his mother was deaf and that she attended the Church of Christ where the services were repeated in sign language. Dean had attended church there with his grandmother and this upset appellant. In fact appellant forbade Dean to attend church there. As a result of the conflict, Dean had asked the minister to visit and talk with his parents. At 7:30 p.m. one evening

he and Dean arrived home in time to find appellant using a pistol to run off the minister and another visiting minister from Ohio.

There was other testimony by appellee to the effect that he had been hit on the head with a candlestick and a shoe. On one other occasion appellant had attacked him with a knife with the stated purpose of cutting out his "black heart".

Appellee also testified that appellant did her shopping all over the United States without consulting him. He had received bills from Neiman Marcus in Dallas, Marshall Field's Company in Chicago and New York, Macy's in New York and other places in Chicago and Atlanta. Appellant had charged as much as $150 for a pair of shoes, $15 for a pair of hose and $5 for a bar of soap. Appellee says that he would not be aware of the charges until he was threatened with a suit.

Appellee also testified that the hostility between Dean and appellant had grown to such an extent that Dean had lived with his grandmother for the last two years.

Appellee readily admits that after the December, 1969, separation a reconciliation was attempted. However, he says that it was on condition that appellant would improve her attitude toward their son Dean and his mother and that she would stop her extravagant spending. Admittedly, during the period from April, 1970, to March, 1971, the appellee maintained the home place, and appellant lived in a rented apartment. Appellee sometimes spent the night with appellant at the apartment and took her to Memphis with him on some occasions. Appellee says that all efforts toward reconciliation broke off when the appellant surreptitiously forged his name to the title of a 1966 Cadillac and a 1967 Grand Prix and traded them in on a 1971 Grand Prix for herself.

Appellant's explanation of the cooking was that their son, during his last illness, could not stand the smell of cooking. At that time they started eating out

and they continued to eat out with the appellee's acquiescence. Her explanation of the incident at the office when she hit appellee's mother was that she was acting in self-defense. The incident in Joe Madey's office occurred because she was talking to appellee on the telephone and he hung up on her. As a result she went looking for him and found him in Mr. Madey's office. She says the incident with Gilbert Leigh occurred because appellee was wining and dining his friends while she was hungry. She does not deny getting the pistol after the ministers but says it was late at night. Her testimony was that she was no more extravagant than appellee—*i.e.,* "He earns a good, great deal of money, and we spend a great deal of money."

We find no merit in the appellant's argument that the evidence is insufficient to sustain the chancellor's award of a divorce nor in the contention that such conduct was condoned.

It is settled law that condonation of past matrimonial offenses is impliedly conditioned upon the future good behavior of the offending spouse, *Longinotti* v. *Longinotti,* 169 Ark. 1001, 277 S.W. 41 (1925). Moreover, the forging of titles to two automobiles on a trade for a new one without consent of the other spouse would cause some disharmony in most marriages.

Appellant's contention that appellee came into court with unclean hands has reference to a proffer of proof made with reference to appellee's conduct with one June Laney following the March, 1971, separation. The trial court sustained objections to all such testimony on the basis that appellant had not alleged adultery. Appellant does not here argue that the court erred in sustaining the objection to such testimony but merely argues her case as if the testimony had been admitted and considered by the court. The record also shows that the trial commenced March 16, 1972, and was recessed to April 18th. Some testimony was heard and trial was recessed to July 27th. Another recess was granted until August 9th, when the trial was concluded. During all of that time the appellant did not make a request to amend her pleadings.

Consequently, in view of the arguments made here, we must consider that the testimony is not before the court and that any error the trial court may have committed in sustaining objections to the testimony is waived.

In the alternative appellant has asked that we increase the $250 per month alimony and that we order a division of the property held by an estate of the entirety. There is a dispute in the testimony as to the appellee's earnings. He and his accountant fixed his last year's earnings at $10,118.31. Appellant claims that appellee's income was $42,620.96 at one place and from another formula and at another place in her brief she fixes his income at $24,-968.31. The chancellor in fixing alimony at $250 per month may have accepted the $10,118.31 which would place the alimony at about 30% of appellee's earnings. Then too the chancellor in fixing the amount of alimony had the benefit of the long drawn out trial. At the time of the temporary order appellant's earnings were $300 per month, but shortly after the entry of the temporary order allowing $530 per month support appellant lost her employment and thereafter stated that she did not look for work. Thereafter, appellant violated the trial court's temporary order by making additional charges to appellee and invading appellee's home and selling the air-conditioners therefrom. Under the circumstances we cannot say that the chancellor abused his discretion in making an award of $250.

Admittedly appellant did not ask in the trial court for a division of the property held by an estate of the entirety. In affirming the decree of the trial court, however, we do so without prejudice to appellant's right to apply to the trial court for a division.

Affirmed with all costs of the record and briefs being charged to appellee and appellant being responsible for her own counsel fees.

Affirmed.

FOGLEMAN and HOLT, JJ., dissent in part.

JOHN A. FOGLEMAN, Justice, dissenting. I dissent from that portion of the opinion and disposition of this case by which the allowance of only $250 per month alimony is affirmed. I do not see any appropriate basis for a reduction from the $530 allowed as alimony pendente lite and would allow at least that amount. I would also allow appellant some amount for attorney's fees.

Appellee in answering interrogatories and in his testimony stated both his gross and his net income as $15,000 per year. His 1970 income tax returns showed an adjusted net income of $15,846.33. His accountant testified that his 1971 gross income was $42,620.96, and his "net business income" was $10,118.31, and that Reagan's testimony did not agree with the accountant's records. In arriving at the business income, an item of $14,850 paid for a covenant not to compete, from an insurance agency acquired by appellee, was treated as a wholly deductible item in arriving at the accountant's "net business income," described as a method to avoid the "tax bite" otherwise involved. In other words, Reagan is paying for the insurance agency through this device and actually deducting the amount paid to the seller from his income. It is wholly unrealistic to treat his net income, for the purposes of this action, as $10,118.31. It should be treated at least as $25,000 annually.

There is no real evidence that appellant is employable. The only testimony on the subject indicates that she is not. She clearly has health problems. Her apartment rent is $185 per month. Her needs, as she related them, included $100 per month for drugs, a clothing allowance of $75 and utilities amounting to $65. These items were not seriously controverted, even though other estimates by her may have been extravagant. The scale of living of both parties had undoubtedly been high.

All circumstances considered, the $530 allowance seems modest.

I am authorized to state that Mr. Justice Holt joins in this dissent.

INEZ SIMS AND RUBY HEFNER *v.* FABER WILSON AND PEARL WILSON

73-114 501 S.W. 2d 214

Opinion delivered November 5, 1973
[Rehearing denied December 10, 1973.]

Guy H. Jones, Phil Stratton & Guy Jones Jr., for appellants.

Hartje & Hartje, by: *Geo. F. Hartje Jr.,* for appellees.

CONLEY BYRD, Justice. Appellants Inez Sims and Ruby Hefner appeal from a decree refusing reformation or recission of a deed to them from appellees Faber Wilson and his wife Pearl Wilson. Appellants contend that the trial court erred in overruling a demurrer to the third party complaint against their husbands and in holding that the proof was not sufficiently clear and convincing to order reformation.

The record shows that appellees ran a roofing business adjacent to their home. The property, including the home, fronted 291 feet on Tyler Street in Conway. There was a circle drive for the business and the property behind the dwelling. The negotiations for the purchase of the property by appellants were carried out by their husbands William O. Sims and Opie Hefner. In reaching the terms for the purchase of the property all parties agree that there was a metal tab in the driveway and that

it was understood that the parties would share the costs of a partition fence to the rear of the building. The deed conveyed all but the east 90 feet. Admittedly, the description in the deed leaves from 2.7 to 2.8 feet of the business building on the Wilson 90 feet of the property.

Mr. Wilson says that the property line was discussed before the sale and that he placed marks on the building and pointed them out to Mr. Hefner before the sale. Shortly after the conveyance and before the appellants started their remodeling, the appellants caused a survey to be made. The survey in fixing the western boundary did so in accordance with the metal tab in the driveway. Wilson also caused a fence to be erected along the common boundary in back of the building before appellants started their remodeling, and the appellants, upon completion of the fence, paid their half of the costs thereof.

George Lachowsky, a surveyor, fixed the boundary in accordance with the metal tab in the driveway and along the fence line where it joined the building.

William O. Sims testified that it was mutually understood that the driveway would be shared and that the property included everything from the corner of the building west. Mr. Sims admits that the stake or metal tab was viewed by the parties and that the first survey was made after the sale and before the fence was put up. He also admits that the partnership fence was put up before appellants moved in and occupied the building.

Opie Hefner testified that they were buying from the east end of the building west. He saw the metal tabs in the driveway but does not remember what was said about the metal tabs. He also saw the location of the partnership fence when it was finished but made no complaint.

The record is rather conclusive that this litigation was not commenced until after Wilson erected an electric power pole at the location of the metal tab and strung a temporary fence so as to prevent the use of the circle drive by appellants.

Appellants admit that one seeking to reform or rescind a deed is put to the task of proving his case with clear, cogent and convincing evidence. Here the proof shows: that the appellants viewed the metal tab before the purchase; that they caused a survey to be made; that the partnership fence was built before they remodeled the buildings in accordance with Wilson's understanding of the location of the boundary; and that appellants paid for their half of the cost of construction without making complaint of the location thereof. Under the circumstances we cannot say that appellants have sustained their burden of proof by clear, cogent and convincing evidence.

In arguing that the trial court erred in not sustaining the demurrer to the Wilsons' cross-complaint against appellants' husbands, appellants contend that reversible error was committed because the husbands' testimony as witnesses would be entitled to more weight than as parties. Even if we should agree with appellants still the alleged error would be harmless here. When we give full credit to testimony of the husbands who negotiated on behalf of their wives and to the fact that one does not ordinarily purchase property when the improvements are located partly on and partly off the property, still such evidence does not become clear and convincing when it is viewed in the light of the parties subsequent conduct—*i.e.*, having the property surveyed and participating in the erection of the partnership fence.

Affirmed.

HARRIS, C.J., dissents.

CARLETON HARRIS, Chief Justice, dissenting. I cannot agree with the conclusions reached by the majority. In the first place, in my view, the chancellor decided the case on an erroneous premise. He stated, "The cases seem to hold that the proof required for reformation must be such that there is *no possibility of error* [my emphasis] in the decision," and cited the case of *Mitchell* v. *Martindill,* 209 Ark. 66, 189 S.W. 2d 662. The language

referred to is a quote from the earlier case of *Sewell* v. *Umsted,* 169 Ark. 1102, 278 S.W. 36, and reads:

> "The authorities all required that the parol evidence of the mistake, and of the alleged modification, must be most clear and convincing, . . . or else the mistake must be admitted by the opposite party; the resulting proof must be established beyond a reasonable doubt. Courts of equity do not grant the high remedy of reformation upon a probability, nor even upon a mere preponderance of the evidence, but only upon a certainty of the error."

To me, this is no more than saying that the evidence must be clear, cogent, and convincing, which is what practically all of our cases hold, though some use the reasonable doubt language. Certainly, I do not agree that the case can be construed as saying that the proof must be such that there is *no possibility of error.*

In my view, the evidence was clear, cogent, and convincing, and I do not depend upon the fact that two witnesses testified as to the transaction on behalf of appellants, while only appellee Faber Wilson testified on behalf of appellees. Of course, this portion of the evidence was a "swearing match," Faber Wilson testifying that he told Sims and Hefner that the east line of the property did not clear the building, and Sims and Hefner testifying that Wilson did not tell them that the east line severed a portion of the building. Therefore, considering this testimony a "stand-off", I think the balance of the evidence, and the conclusions to be drawn therefrom bring appellants' evidence to the required status of being clear, cogent, and convincing. The testimony is undisputed that appellants had full use of the entire building, painted the exterior after acquiring title in August, 1970, and had the interior renovated and adapted to their use as a day care center; also enjoying the full use of the circle drive until subsequently halted by Wilson. I consider it incredible that one would purchase land which conveyed only a portion of a building situated on the premises, and which was to be used daily. Not only that, I consider it so unusual, that I believe a prudent seller, who was

attempting to reserve a portion of a building, would spell out such reservation clearly and unequivocally. That, of course, was not done. Of even more significance to me is the fact that appellees, approximately a month after this litigation was instituted by appellants, conveyed the residue of their property constituting a homesite to Dr. James Smith Garrison, subsequently made a party defendant by appellants. *The warranty deed from the Wilsons to Garrison excluded the area in dispute in this litigation,* but on the same day, the Wilsons gave Dr. Garrison a *quitclaim deed* to the disputed area. It is significant to me that the Wilsons were unwilling to warrant the title to the disputed property, and even more interesting is the reason Mr. Wilson gave for giving two deeds. He said he "didn't want Doc Garrison involved in it, and that's the reason I gave it." I suggest that a more likely reason would be that he felt that he did not have title to the disputed area, and not wanting to become liable to Garrison, executed only a quitclaim deed. In my judgment, the decree should be reversed.

JERRY MOORE, SPECIAL ADMINISTRATOR OF THE ESTATE OF MICHAEL MOORE, DECEASED *v.* JOHNNY RYE

73-119 500 S.W. 2d 751

Opinion delivered November 5, 1973

Bon McCourtney & Associates, by: *Troy L. Henry,* for appellant.

Barrett, Wheatley, Smith & Deacon, for appellee.

CONLEY BYRD, Justice. This is a wrongful death action brought by appellant Jerry Moore, Special Administrator of the estate of Michael Moore, deceased, against appellee Johnny Rye. The jury found the issues in favor of Rye, and Moore appeals on the ground that the trial court erred in giving and denying the instructions hereinafter discussed and in overruling objections to testimony elicited on cross-examination.

The record shows that West Second Street in Marked Tree at the intersection with Oak Street is straight and without obstructions along side the road to block the vision of a driver. There are six homes on the east side facing West Second, and on the west side there is one home facing West Second. There are other homes just off Second Street on Oak Street.

Mr. Rye states that he was traveling north on West Second Street and that when he was 50 yards from the house on the west side, he noticed some people standing in the front of the porch. At the same time he also noticed some people sitting on the porch of the Moore house on the east side. He admittedly waved to the people on the west side and after they waved back looked straight ahead down West Second Street. He neither saw the 13 month old Michael Moore standing in the road, nor his mother racing across the yard toward him and did not

know anything had happened until he heard a scream and then a thud. Mr. Rye had previously seen children about 150 yards from the houses where the collision occurred.

Mrs. Phyllis Moore states that when she saw the pickup truck driven by Rye, the decedent was by the ditch. She hollered at the decedent, but by the time she got to the ditch the decedent had climbed up at the side of the road and was struck as he stood up.

Mrs. Mary Lassiter who lived at the house where Gene Herrod was standing testified that as Mr. Rye waved, she saw the Moore baby and hollered, "Watch that baby." In addition to the Moore's three children, Mrs. Lassiter had a thirteen month old child, and another girl living on West Second had three or four children all below school age.

POINT NO. 1. Over the objection of appellant the trial court gave AMI 604 on unavoidable accident. To sustain the trial court appellee argues that because a child of such tender years is not chargeable with negligence and because there was evidence that the mother, not a party, may have been negligent, this instruction was proper. We disagree, and for the reasons set forth in *Houston* v. *Adams,* 239 Ark. 346, 389 S.W. 2d 872 (1965), we hold that the trial court committed reversible error in giving the instruction. See also, *Connor* v. *Cooper,* 245 Ark. 386, 432 S.W. 2d 761 (1968).

POINT NO. 2. The trial court refused to instruct the jury, in accordance with AMI 909, as follows:

> "Streets and highways are available for the use of both pedestrians and motorists. The driver of a motor vehicle must anticipate the presence of pedestrians on streets and highways and use ordinary care to avoid injuring them."

Appellee argues that the trial court did not abuse its discretion in refusing this instruction because a thirteen months old baby is not a pedestrian. We hold that the

trial court erred in refusing the instruction. Nothing is more common or accepted as a way of American life than the visiting that takes place between neighbors living along and across the streets in the many cities of this nation.

POINT NO. 3. The proof here shows that the West Second Street was a busy industrial street with a few remaining residences on both sides of the street. Furthermore, the appellee admittedly knew that children habitually played within 150 yards of the point of collision. Under the circumstances we hold that the trial court erred in refusing to instruct the jury, in accordance with the second paragraph of subsection "B" of AMI 901, to the effect that "when the driver sees danger ahead, or it is reasonably apparent if he is keeping a proper lookout then he is required to use ordinary care to have his vehicle under such control as to be able to check its speed or stop it, if necessary, to avoid damage to himself or others." The proof here also shows that both Mary Lassiter and the mother tried to warn appellee of the presence of the baby before it was struck.

POINT NO. 4. The trial court refused to give AMI 605 which provides:

> "A person who knows or reasonably should know, that a child may be affected by his act, is required to anticipate the ordinary behavior of children and to use care commensurate with any danger reasonably to be anticipated under the circumstances. A failure to use this degree of care is negligence."

As we understand the record, there is proof that tends to show no reason why appellee did not see the child crawling in the slight ditch along the street before the child stood up on the edge thereof and was struck by appellee's vehicle. Furthermore, since appellee's attention was attracted to the people on the west side of the street, one could logically expect the same conduct to attract the attention of a child living in the homes on the east side of the same street. Under the circumstances we hold that the instruction should have been given.

POINT NO. 5. Appellant on direct had testified that he and the child's mother had been separated some four or five months at the time of the accident. On cross-examination he was interrogated, over objections, with reference to the amount of child support he had contributed during that time and as to the amount of fines he had paid for driving while intoxicated and public drunkeness during the same time. When we consider that to recover for mental anguish one must show that he suffered more than normal grief, we cannot say that the trial court abused its discretion in permitting the evidence to go to the jury. The evidence as to the support of a child or the lack of support would certainly be relevant as to appellant's affection and attitude toward the child during his life time. The testimony as to the amount of fines paid for driving while intoxicated and for public drunkeness would show a source of funds or the ability to raise funds that were not used for support.

The trial court also permitted appellant to be interrogated relative to a divorce suit filed by the mother of the child against him and the service of the summons on him that day. This we hold was error. We fail to see how the filing of the divorce action could have any relevancy to the issue of whether appellant suffered mental anguish as a result of the death of his child.

Reversed and remanded.

FOGLEMAN, J., dissents in part.

JOHN A. FOGLEMAN, Justice, dissenting in part, concurring in part. My dissent is directed to one point only. It seems to me that this case presents one of those exceptional cases in which the unavoidable accident instruction should be given. It was recognized in *Houston* v. *Adams,* 239 Ark. 346, 389 S.W. 2d 872, that there are such cases.

There is testimony from which a jury would be warranted in finding that this unfortunate incident was an unanticipated and unexpected occurrence which no reasonable person would have foreseen and for which

no one is to blame. This, then, would be an unavoidable accident. *St. Louis-San Francisco Ry. Co.* v. *Bryan,* 195 Ark. 350, 112 S.W. 2d 641. Because the infant could not be guilty of negligence, the occurrence could well have been found to have occurred without negligence on the part of either party. This, in my opinion, would bring the facts within the exceptional circumstances which would make the occurrence an unavoidable accident. *Caldwell* v. *McLeod,* 235 Ark. 799, 362 S.W. 2d 436. The instruction should be given when there is evidence *tending* to prove that the injury resulted from some cause other than the negligence of the parties. *Elmore* v. *Dillard,* 227 Ark. 260, 298 S.W. 2d 338; *Rhoden* v. *Lovelady,* 239 Ark. 1015, 395 S.W. 2d 756. If a case, in which the sole proximate cause is the unpredictable and unanticipated action of a child, does not fall into the category of an unavoidable accident, then I doubt that any case can.

Certainly the giving of the instruction would not be error, even if it could be said that its refusal would not have been error. I concur in the opinion as to all other points.

SHARON KAY JONES *v.* AMERICAN PIONEER LIFE INSURANCE COMPANY

73-120 500 S.W. 2d 748

Opinion delivered November 5, 1973

Tom Allen and *Murphy, Arnold & Blair,* by: *H. David Blair,* for appellant.

Davidson, Plastiras & Horne, Ltd., by: *Allan W. Horne,* for appellee.

FRANK HOLT, Justice. Appellant is the beneficiary of a life insurance policy issued by appellee to her former husband who was accidentally killed. The appellee refused payment on the basis that the policy had lapsed for nonpayment of premium. Appellant contended in the trial court and now on appeal that the policy had not lapsed because the appellee had accepted a check as absolute payment for the premium due and, in the alternative, the appellee had waived any forfeiture and by reason of its conduct should be estopped from claiming a forfeiture. The issues were submitted to the trial court, sitting as a jury, upon the pleadings, request for admissions and the answers, exhibits, including the policy, and a stipulation of facts. The trial court found the policy had lapsed for nonpayment of premiums. We affirm the trial court.

The $15.03 monthly premium on the $10,000 policy (accidental death) was to be paid on the fifth of each month by a pre-authorized or sight draft. A thirty-one day grace period was provided. The policy was in effect approximately one year when the March, 1971, sight

draft was returned on March 15 because of insufficient funds. The appellee so notified the insured. A March 17, 1971, sight draft was then issued and it was also returned due to insufficient funds. On April 5 the thirty-one day grace period for the March payment expired. On that date the appellee insurance company drew a draft for the April monthly payment which was returned on April 8 because of insufficient funds. On that date the appellee insurer forwarded the insured's personal check for the March premium for collection to the bank with instructions to hold it for five days and if not paid to return the check. Three days later the insured was accidentally killed. The check was never paid and at no time during the month did the insured ever have sufficient funds in the bank to pay his personal check. Following the death of the insured, payment for the March premium was mailed on April 14, 1971, by a third party. On April 15 the insurer addressed a letter to the insured not yet knowing of his accidental death, advising that he should forward a money order for the March and April premiums if he desired to continue his policy in force. On April 23, having learned of the insured's demise, the appellee refused payment on the policy and returned the premium paid by the third party.

Appellant first contends for reversal that "appellee accepted the insured's check as payment of the premium for the relevant period, and therefore, the trial court erred in holding the policy to have been forfeited for nonpayment of premiums." The thrust of appellant's argument, as we understand it, is based upon the assertion that the March draft was accepted as absolute and not conditional payment of the premium. In support of this contention, appellant makes the argument that appellee's failure to expressly condition the receipt of the drafts, the failure to explain the terms of any agreement by which the appellee drew the drafts, the invitation to pay by draft, and the repeated collection attempts are consistent with the intent of the appellee insurer to regard the policy as being continued in force upon mere receipt of the drafts. Appellant asserts this is true despite the fact that the policy provides the insurance coverage is automatically terminated upon the expiration of the grace

period for the payment of the monthly premium, subject to reinstatement, and that no liability exists except for injury sustained following reinstatement. The reinstatement provision is in accord with Ark. Stat. Ann. § 66-3607 (Repl. 1966).

The burden of proof on these asserted factors was upon the appellant to demonstrate and convince the trier of the facts that the pre-authorized or March sight draft or insured's personal check was intended as an absolute payment. The law is well settled that receiving a check as payment for an insurance policy is conditional and will not prevent a forfeiture of the policy for nonpayment of the premium. *Nation Life Co.* v. *Brennecke,* 195 Ark. 1088, 115 S.W. 2d 855 (1938). Of course, if the insurance company's acts indicate that receipt of the check is payment then such will justify a finding that the insurance company is so bound. *Brennecke, supra,* and *National Fire Insurance* v. *Wright,* 163 Ark. 42, 257 S.W. 753 (1924). We have held that when the insured attempted to pay the premium the day before the grace period expired the policy lapsed because the check was dishonored when presented for payment five days later. *Webb* v. *The Manhattan Life Insurance Company,* 220 Ark. 478, 248 S.W. 2d 385 (1952). In accord is *Hare* v. *Illinois Bankers Life Assurance Company,* 199 Ark. 27, 132 S.W. 2d 824 (1939), where the insured failed to pay his premium within the grace period and subsequent thereto sent a check to his insurance company which was dishonored and the policy was never reinstated. Appellant says that a "check or draft may itself constitute payment of the premium and whether it does so depends primarily upon the manifest intent of the insurer." In the case at bar, the sight drafts for the March and April premiums were dishonored and the insured's personal check was never paid even though the bank was instructed to hold it for five days for collection. We find no merit in appellant's contention that the court erred in not finding the "insured's check" was accepted and constituted payment of the premium. There is substantial evidence to support the contrary finding made by the court.

Appellant next asserts for reversal that "appellee's conduct was totally inconsistent with an intent to forfeit

policy until it learned of insured's death and therefore should be deemed to have waived any right to forfeit policy." The terms of the policy are clear that the policy lapses if the monthly premium is not paid within the thirty-one day grace period. To continue the policy the appellee's activities must be inconsistent with the lapse provision. Therefore, we have held that where the insurance company repeatedly accepted premiums ranging in tardiness from two to seventeen days, it would justify finding a waiver of the grace period until notice was given that such favor would no longer be extended. *American Life Ins. Co.* v. *Claybough,* 227 Ark. 946, 302 S.W. 2d 545 (1957), and in accord, *Universal Life Ins. Co.* v. *Bryant,* 196 Ark. 1143, 121 S.W. 2d 108 (1938). In the case at bar the insurance company had on one occasion accepted a premium payment (January, 1971) one day after the grace period. Appellant insists that the one tardy payment (another one previously occurred during the grace period), together with the other activities of or transactions with the insurer previously discussed, is so inconsistent with the forfeiture provision of the policy as to constitute a waiver. Even so, this presented a factual issue for the fact finder.

Appellant finally contends that "appellee represented to insured that he had a period of five (5) additional days to pay premium, within which five days insured was killed and therefore appellee should be estopped from forfeiting policy until expiration of this period." The letter to the insured's bank, following nonpayment of the March and April sight drafts, stated:

> We are enclosing for collection a check in the amount of $15.03 drawn on your bank and signed by Dale Williams.
>
> We are advising Mr. Williams that we have mailed the check direct to your bank for collection. Would you please hold it for five days and if Mr. Williams fails to pay, return to us?

The letter indicated that a copy was being sent to the insured. Certainly the court could draw the inference

that the check was to be held as a conditional payment and nothing in the language of the letter indicated that the policy was absolutely or unequivocally considered to be in force and effect and extended for five days. Further, there is no evidence that the deceased received a copy of the letter or relied upon it.

On appeal we review the evidence and all deducible inferences therefrom in the light most favorable to the appellee and affirm the fact finder if there is any supportive substantial evidence. *Fanning* v. *Hembree Oil Co.,* 245 Ark. 825, 434 S.W. 2d 822 (1968). When we consider the facts and circumstances, together with the policy provision and other exhibits, we cannot say there is no substantial evidence to support the findings of the trial court.

Affirmed.

JEFFERSON COOPERATIVE GIN, INC. *v.*
DR. MAX MILAM, DIRECTOR OF THE DEPARTMENT OF FINANCE & ADMINISTRATION FOR THE STATE OF ARKANSAS (COMMISSIONER OF REVENUES)

73-125 500 S.W. 2d 932

Opinion delivered November 13, 1973

Smith, Williams, Friday, Eldredge & Clark, by: *Byron Eiseman Jr.* and *Lewis H. Mathis,* and *Chowning, Mitchell & Hamilton,* by: *Robert C. Lowry,* for appellant.

Walter Skelton, Karl Daly Glass Jr., John F. Gwatney Jr., Alexander W. Nisbet, Dewey Moore Jr., and *J. R. Nash,* for appellee.

CARLETON HARRIS, Chief Justice. Appellant, Jefferson Cooperative Gin, Inc., is an agricultural cooperative organized under the provisions of Act 153 of 1939 (Chapter 10, Ark. Stat. Ann. §§ 77-1001—77-1025 [Repl. 1957 and Supp. 1971]). Section 77-1001 *inter alia* provides that associations organized under the act shall be deemed to be non-profit, not being organized for the purpose of making profits for themselves or the members, as proprietors, but only for their members, as patrons and employees of the association. Section 77-1023 provides that each association organized under the act shall pay an annual license fee of ten dollars to the Secretary of State, and "shall be exempt from all privilege, franchise, license or other taxes, but not from taxes upon its real estate and personal property." In 1969, the General Assembly enacted Act 311 amending the section just mentioned, and providing that each association shall pay an annual license fee of ten dollars to the Secretary of State, "and in addition shall be subject to the Arkansas Gross Receipts Tax Act of 1941 (§§ 84-1901—84-1929), as amended, and the Arkansas Compensating Tax Act of 1949 (§§ 84-3101—84-3128), as amended, and all other taxes levied in this State, except that any association which immediately distributes at the close of each business year all surpluses by cash or certificate to its members

shall not be subject to the Arkansas Income Tax Act (§ 84-2001 et seq.) with respect to such income. All such associations shall be subject to taxes upon its real estate and personal property."

Following enactment of this legislation, the Department of Finance and Administration levied a corporate franchise tax in the amount of $222.79 plus penalties upon appellant; the tax was paid under protest and thereafter appellant sought relief by instituting suit in the Pulaski County Chancery Court, praying that the court declare the assessment and collection of said tax to be illegal, and asking that the court declare it (Jefferson) entitled to a refund of said tax. The matter was heard upon a stipulation between the parties, it being *inter alia* stipulated that appellant is an Arkansas agricultural cooperative association, organized under the aforementioned act and that it had exhausted its administrative remedies before instituting suit. It was also stipulated that the question before the court was whether Act 311 of 1969, or any other statute of this state, authorized the assessment and imposition of the corporate franchise tax on agricultural marketing associations organized under Act 153 of 1939, as amended by Act 311 of 1969. On trial, the court entered its decree holding that the assessment and collection of franchise taxes against appellant was legal and valid; appellant's complaint was dismissed, and judgment rendered for appellee for the taxes as collected, together with costs. From the decree so entered, appellant brings this appeal.

At the outset, it should be borne in mind that certain basic differences exist between an agricultural cooperative and a general corporation. It has already been pointed out that under Ark. Stat. Ann. § 77-1001, agricultural cooperatives (although not eleemosynary) are deemed to be non-profit, existing solely for the purpose of making a profit for the members in their individual capacities as producers. Chapter 18 (§§ 84-1833—84-1842), entitled "Corporate Franchise Taxes", passed as Act 304 in 1953, deals with the franchise tax for profit making corporations. However, the act makes clear that

non-profit associations are not included, § 84-1833 providing:

> "The term 'corporation,' as used in this act (§§ 84-1833—84-1842), shall mean and include all corporations, domestic and foreign, active and inactive, organized or qualified to do business under the laws of the State of Arkansas *permitting the doing of business for profit* [our emphasis], and shall include all corporations operated by receivers and trustees of any court, and corporations which rent or lease their property to any person, firm or corporation."

With this background, it is argued by the state that it is clear that the legislature, in enacting Act 311 of 1969, removed agricultural cooperatives from the franchise tax exemption. In construing the statute, the state points out that the primary rule is to ascertain and give effect to the intention of the law makers, and it is correctly stated that there are several aids in determining this intent. Appellee calls attention to the title of Act 311, as follows:

> "AN ACT to Amend Section 24 of Act 153 of 1939 (Ark. Stats. [1947] Section 77-1023) to Subject Agricultural Cooperative Associations to All Taxes Now or Hereafter Imposed On Corporations; and for Other Purposes."

Contemporaneous legislation passed during the same session is also mentioned, viz., Act 395 of 1969, whereby the exemption for rural telephone cooperatives from the sales tax and use tax was specifically removed; also Act 119 of 1969 removed the exemption for electric cooperative corporations from the sales tax and the use tax. It is demonstrated, says appellee, that in the last mentioned acts, exemptions were removed for specific taxes only, but that in the act, now under discussion, by adding the words "and all other taxes levied in this State," the General Assembly made it clear that it had in mind subjecting agricultural cooperatives to additional taxes besides those specifically mentioned.

However, let us bear in mind that there is also a cardinal rule which must be observed in construing taxing legislation. In *Commissioner of Revenues* v. *Arkansas State Highway Commission,* 232 Ark. 255, 337 S.W. 2d 665, we said, quoting an earlier case[1]:

> "It is the general rule that a tax cannot be imposed except by express words indicating that purpose. The intention of the Legislature is to be gathered from a consideration of the entire act, and where there is ambiguity or doubt it must be resolved in favor of the taxpayer, and against the taxing power."

See also *Cook, Commissioner of Revenues* v. *Ayers,* 214 Ark. 308, 215 S.W. 2d 705, and cases cited therein.

The franchise tax was levied on corporations doing business for profit, but *none* of the acts mentioned levy a franchise tax on non-profit corporations, or associations. Section 84-1833, relating to general corporations, provides for the payment of a franchise tax by those corporations "permitting the doing of business for profit" and this language clearly does not include non-profit corporations, and we have so held. In *State* v. *Bankers' and Planters' Mutual Insurance Association,* 152 Ark. 182, 238 S.W. 17, the state attempted to impose the franchise tax upon a mutual insurance association that paid death benefits to its members. In finding the state's position to be unsound, this court held that the insurance company was not liable for the tax because it was not doing business for profit, stating:

> "The term, 'doing business for profit,' as used in the statute, refers to the operation of the corporation itself—whether it is doing business for profit—and has no reference to the remuneration received by its officers.
>
> "In order to impose liability for tax it must be found that the character of business sought to be taxed falls, either expressly or by fair implication, within the language used. It does not appear to us that

[1]*Scurlock* v. *City of Springdale,* 224 Ark. 408, 273 S.W. 2d 551.

the language of the statute includes a corporation doing business according to the method pursued by appellee."

This opinion construed Act 122 of 1913, the corporation franchise tax act in effect at that time, and in 1953, the General Assembly passed Act 304 of 1953, the present corporation franchise tax act, but the language as affecting non-profit corporations is not substantially different, i.e., neither act subjects a non-profit corporation to the franchise tax. We have held that the legislature is presumed, in enacting a statute, to have had in mind court decisions pertaining to the subject legislated on and to have acted with reference thereto, *Terral* v. *Terral, Admx.,* 212 Ark. 221, 205 S.W. 2d 198; accordingly, under the presumption of legislative awareness, the General Assembly is presumed, in enacting Act 311 of 1969, to have acted with full knowledge that this court had construed the franchise tax act as being inapplicable to non-profit corporations. Ark. Stat. Ann. § 77-1018 (a part of the agricultural cooperative associations act) provides that the provisions of the general corporation laws of the State apply to the associations organized under the act except where such provisions are in conflict with or inconsistent with the express provisions of §§ 77-1001 —77-1025. As already pointed out, this act declared associations organized under its authority to be non-profit. This provision has not been changed by any legislation.

Summarizing, the language of Act 311 of 1969 "and all other taxes levied in this State" certainly does not itself levy a tax; as herein pointed out, since there is no act that, by express words, indicates the intent to levy such a tax on agricultural cooperatives, and ambiguity or doubt being resolved in favor of the taxpayer, we hold that appellant is not liable for the tax.

Reversed.

ROY LEE ROBINSON *v.* STATE OF ARKANSAS

CR 73-96 500 S.W. 2d 929

Opinion delivered November 13, 1973

Guy H. Jones, for appellant.

Jim Guy Tucker, Atty. Gen., by: *James W. Atkins,* Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. The appellant's first trial upon a murder charge resulted in a hung jury. At a second trial he was found guilty of involuntary manslaughter and sentenced to imprisonment for one year. Officer Vonnie Taylor had testified at the first trial, but he was not available at the second. The defense sought to introduce Officer Taylor's earlier testimony, but the court excluded parts of it as hearsay. Asserted error in that ruling is now relied upon for reversal.

Officer Taylor investigated the homicide, which occurred in a cafe in Conway. The number and type of weapons involved in the affray were critical facts. At the second trial the court excluded certain questions and answers, such as the following excerpt from the record made at the first trial:

> Q. [By Mr. Jones, a defense attorney.] And did you get any information from Gloria Burgess about any weapons?

A. Yes, sir.

Q. Not what she said, but did you get any information from her?

A. Yes, sir.

Q. And from her, how many weapons did you get information about?

A. Two.

Q. And what where they?

A. A knife and a gun.

Mr. Streett [the prosecutor]: If it please the Court, now Mr. Jones is doing exactly what the Court instructed him not to do. This witness can't testify what somebody else said.

Mr. Jones: I did not ask that.

The Court: Ladies and gentlemen of the jury, disregard any testimony at all of this witness, or any other witness, based upon hearsay. If the defendant did not say it, or if it was not said in the presence of the defendant, forget about it. Go ahead.

No error appears. Counsel seems to have been under the impression that the hearsay rule can be avoided by asking for the substance of an out-of-court statement rather than for an exact quotation. The rule cannot be evaded in that way. McCormick on Evidence, § 249 (2d ed., 1972). The prohibition against hearsay would cease to exist if it could be so easily circumvented.

It is also argued that there was no objection by the State to the testimony when it was given at the first trial. We have quoted the objection and the court's ruling that the testimony should not be considered by the jury. Even though the witness answered the questions before the objection was made, the delay of a few

seconds was not sufficient to warrant our holding that the trial court abused his discretion in sustaining the objection. See *Warren* v. *State,* 103 Ark. 165, 146 S.W. 477, Ann. Cas. 1914B, 698 (1912), and *Clardy* v. *State,* 96 Ark. 52, 131 S.W. 46 (1910).

Affirmed.

WHITE POULTRY SUPPLY, INC. *v.* BROWER MANUFACTURING CO.

73-127 & 73-150 500 S.W. 2d 927

Opinion delivered November 13, 1973

David R. Malone, for appellant.

Wade, McAllister, Wade & Burk, P.A., for appellee.

LYLE BROWN, Justice. These two appeals, No. 73-127 from the Washington Chancery Court and No. 73-150 from the Washington Circuit Court, were consolidated for purposes of briefing and submission. The cases are so interrelated that they cannot be segregated for discussion. In the chancery case the court approved the findings of a master which concluded that appellant, White Poultry Supply, Inc., was indebted on account to

appellee, Brower Manufacturing Co., in the sum of $83,-565.79. It is White Poultry's contention for reversal of the chancery case that the chancery court was without jurisdiction. Following the finding in chancery, the circuit court granted Brower Manufacturing's motion for summary judgment in accordance with the finding of the master in chancery. (The judgment was slightly less than the finding of the master, being based on the amount sued for.) White Poultry here contends that at the time the judgment was granted, the circuit court was without jurisdiction over the accounting action. In addition to challenging the merits of White Poultry's points for reversal, Brower Manufacturing contends that we should modify and affirm the chancery court with directions to enter judgment in that case, or we should grant Brower Manufacturing's motion to dismiss White Poultry's appeal in the chancery case for want of a final judgment and affirm Brower Manufacturing's judgment rendered in the circuit court case.

This litigation was initially instituted in the chancery court. White complained its business had a gross income in excess of $75,000 annually; that it bought from Brower substantial supplies each year in connection with White's business of retailing equipment and supplies used in the poultry, livestock, dairy and other agricultural industries; that White had returned consigned merchandise to Brower in the approximate sum of $27,-000 and had not received credit; and that White had made a payment of $15,000 and had not received credit therefor. (White also included in its complaint, allegations in tort and breach of contract.) White conceded that it was indebted to Brower but was unable to state the amount of debt with certainty. White asked that Brower be required to state the account after allowing all credits due it. In May 1971 the chancery court transferred White's cause of action to the circuit court.

In September 1971 Brower filed in circuit court a counterclaim against White on a statement of account in the sum of $83,445.42. White countered that Brower was indebted to White in the sum of $10,099.80. White again asked that Brower be required to file an accounting

between the parties covering a specified period of time. White also alleged that the claim of Brower for $83,445.-42 was incorrect and White filed its version of the status of the account between the parties.

In March 1972 Brower filed a motion in circuit court to transfer to chancery. The circuit court retained jurisdiction of the tort and contract actions and transferred the claim and counterclaim for accounting to the chancery court. The chancery court accepted jurisdiction over the objection of White, the latter contending that the cause of action was not in equity jurisdiction and that jurisdiction was vested in the law court.

In May 1972 the chancery court appointed a master in chancery to state an account between the parties and report to the court. The master's accounting was filed in December 1972, finding that Whte was indebted to Brower in the amount of $83,565.79 and that Brower was not indebted to White. That sum was $120.37 in excess of the amount for which Brower sued White. White filed no exceptions to the master's report.

On February 7, 1973, Brower filed a motion in chancery to confirm the master's report. White did not respond to the motion. Thereupon the chancery court on February 26, 1973, entered an order confirming the master's report. White appealed here from the order of confirmance and that case was docketed as No. 73-127. Brower filed here a motion to dismiss the White appeal. The motion was denied but "without prejudice to appellee [Brower] to raise the appealability of the order when case heard on merits."

On February 27, 1973, Brower filed in the circuit court case a motion for summary judgment on its counterclaim for $83,445.42. The motion was supported by pleadings, affidavit of Brower's secretary, the master's report, order in chancery court confirming the master's report, and a request for admissions of fact propounded by Brower to White which were unanswered. White responded that the action taken in chancery was irregular; that the action of the chancery court had been

appealed to the supreme court; that the circuit court had no jurisdiction over the master's report because it would not become final until the appeal to the supreme court had been decided. The circuit court ruled that it had jurisdiction over the parties and subject matter, that there was no material question of fact to be resolved, and that judgment should be entered, which was accordingly done on April 20, 1973. The amount of the judgment was for $83,445.42.

On May 16, 1973, White dismissed without prejudice its claims pending in the circuit court sounding in tort and contract. On the same day White filed notice of appeal from the summary judgment and that appeal is docketed here at 73-150. That left no matters pending in the circuit and chancery courts except those matters now before this court on appeal:

1. The motion of Brower to dismiss the White appeal from the order of the chancery court confirming the master's report.

2. The White appeal from the order of the circuit court granting Brower's motion for summary judgment. (No. 73-150)

3. The White appeal from the order of the chancery court confirming the master's report. (No. 73-127)

So much for the facts. The summary judgment (73-150) awarded Brower in the circuit court is reversed. That is because the judgment was based on the account between the parties; at the time summary judgment was rendered, that phase of the case was, and still is, in the chancery court. White's appeal in No. 73-127 (the chancery case) is dismissed for want of a final judgment. Our holdings above recited leave only the issue of accounting between the parties to be litigated, which, as we have said, is presently pending in the chancery court.

It is so ordered.

RUTH TOMPKINS *v.* DON DUNCAN

73-135 501 S.W. 2d 210

Opinion delivered November 13, 1973

Jeff Duty, for appellant.

Sidney H. McCollum and *Little & Lawrence,* for appellee.

JOHN A. FOGLEMAN, Justice. Appellant Ruth Tompkins was injured when the automobile driven by appellee Don Duncan struck her vehicle, which was stopped behind a school bus. She brought suit against appellee for injuries suffered by her. She appeals from a judgment based upon a jury verdict awarding her damages of $1,000. Her sole ground for reversal is that the jury verdict is grossly inadequate. Her hospital expenses were $55.25. The cost of replacing her glasses broken in the collision was $50.00. She was treated for a month or two by Dr. Billy V. Hall, whose bill was $89.00. She was examined two or three months after the collision by Dr. Coy Kaylor, whose bill to her amounted to $50.00. There was evidence that she had taken, and was still taking, medication, but there is no evidence as to its

cost. Appellant testified that she was "off work" three days. The abstract reveals no evidence as to present or future loss of earnings.

Appellant was 47 years of age, with a life expectancy of 25 years, according to the American Table of Mortality. She suffered injuries which, according to her testimony, left her with a stiff neck and headaches. She said that she still had continuous pain and that sitting at a desk for any length of time, as she must do as a clerical employee at Gravette Hospital, causes stiffness and tension in her neck for which she has taken pain pills. She also stated that she has a few problems with her normal household duties. She has played some golf since the incident, but said that she experienced difficulty. She drives her automobile, but testified that she has difficulty in backing it because she must turn her head and is unable to twist her neck.

Dr. Kaylor testified that Mrs. Tompkins suffered a 25% loss of motion of the cervical spine in all ranges, and evaluated her permanent disability to the body as a whole at 10 to 15%. He felt that Mrs. Tompkins will need to continue pain medication and muscle relaxants.

Appellant recognizes the impact of Ark. Stat. Ann. § 27-1902 (Repl. 1962) and such decisions as *Harlan* v. *Curbo,* 250 Ark. 610, 466 S.W. 2d 459, but argues that this particular verdict is so grossly inadequate on its face that it shocks one's sense of justice. She suggests that the award, in view of her injuries, should be considered as nominal. Neither the statute nor our decisions permit any exception because of gross inadequacy of any verdict when the damages are not susceptible of precise pecuniary measurement with reasonable mathematical certainty. See *Harlan* v. *Curbo,* supra; *Munson* v. *Mason,* 245 Ark. 686, 434 S.W. 2d 815; *Worth James Construction Co.* v. *Herring,* 242 Ark. 156, 412 S.W. 2d 838; *Law* v. *Collins,* 242 Ark. 83, 411 S.W. 2d 877.

This brings us to a consideration of appellant's claim that the damages should be considered as only nominal. In fixing an amount to be awarded as nominal

damages in *Cathey* v. *Arkansas Power & Light Co.,* 193 Ark. 92, 97 S.W. 2d 624, we said that the amount of nominal damages may be variable, dependent somewhat upon the amount of the recovery and the circumstances of the particular case. In that decision we followed and quoted extensively from *Western Union Telegraph Co.* v. *Glenn,* 8 Ga. App. 168, 68 S.E. 881. In that case it was recognized that the term was a relative one, which contemplated a trivial sum. These cases, of course, relate to the propriety of the amount awarded when the party recovering was only entitled to nominal damages, but the principles should be equally applicable when we attempt to distinguish between nominal and substantial damages, even though the words may have a slightly different shade of meaning in the different contexts. See Black's Law Dictionary, Third Edition; *Kluge* v. *O'Gara,* 227 Cal. App. 2d 207, 38 Cal. Rptr. 607 (1964). In the context of a case similar to this we made the distinction by considering nominal damages to mean damages in name only, not real or actual. *Riley* v. *Shamel,* 249 Ark. 845, 462 S.W. 2d 228. For the purpose of setting aside a personal injury judgment in the absence of any other error, as appellant seeks to do here, the inadequacy of damages not susceptible of reasonably precise pecuniary measurement will be considered as an appropriate ground only when the award of damages is so nominal as to amount to a refusal to assess damages. *Riley* v. *Shamel,* supra. See also, *Dunbar* v. *Cowger,* 68 Ark. 444, 59 S.W. 951; *Carroll* v. *Texarkana Gas & Electric Co.,* 102 Ark. 137, 143 S.W. 586; *Martin* v. *Kraemer,* 172 Ark. 397, 288 S.W. 903. When we consider that the verdict is more than four times the damages which are subject to precise mathematical determination, and that the excess amounts to more than $750, we cannot say the damages awarded were merely nominal rather than substantial, even though the verdict seems conservative.

The judgment must be affirmed.

GILBERT WEIR & LOTTIE WEIR *v.*
REVO TRUCKS & SADIE TRUCKS

73-131 500 S.W. 2d 923

Opinion delivered November 13, 1973

Paul K. Roberts, for appellants.

Huey & Vittitow, for appellees.

J. FRED JONES, Justice. This is an appeal by Gilbert and Lottie Weir from an adverse chancery court decree on a petition they filed against Revo Trucks and Sadie Trucks for the removal of obstructions from a public road.

The appellants, Gilbert and Lottie Weir, are husband and wife and so are the appellees, Revo and Sadie Trucks. For convenience the parties will be referred to hereafter as Weir and Trucks. Weir and Trucks own adjoining properties. The Weir property lies north and east of the Trucks property and the road involved in this litigation runs east and west and then north and south between the two properties. Throughout the record the road is referred to in separate parts as the "East-West road" and the "North-South road." That portion of the East-West road in litigation extends the full east-west width of the Trucks property between it and the Weir property to the north, and the North-South road extends from the northeast corner of the Trucks property south

between the Trucks property and the Weir property lying east of the Trucks property. The Trucks home is in the northwest corner of his property near the west end of the East-West road. There are also two abandoned houses and a barn on the Trucks property south of the East-West road. One of the abandoned houses and the barn were built by Otto Harding who subsequently sold the property to Trucks. The Weir home is located on his property north of the Trucks property and has access to and from the county highway system over Weir's own property and has no connection with the East-West road between the Weir and Trucks properties. Weir contends that he needs access over the road here involved to and from his property lying east of the Trucks property, and that he has a right to such access as a member of the traveling public. Trucks built a wire fence within three or four feet of Weir's fences on the north side of the East-West road and on the west side of the North-South road and this litigation arose when Trucks attached a "Posted, Keep Out" sign on the gate across the west end of the East-West road near his home.

Weir filed the present action against Trucks alleging that a public road had existed between his and Trucks' land for more than fifty years; that Trucks had built fences and gates across the road and he prayed an order for the removal of the obstructions. Trucks denied the allegations and specifically denied that there had been a public road between the lands for more than fifty years.

The chancellor found some evidence that a public road had been established by prescription over the area many years ago but found that its use had been abandoned by the public for more than seven years, and the chancellor dismissed Weir's petition for want of equity. The chancellor set out in some detail his findings from the evidence in this case and from our own examination of the record, we agree with the findings made by the chancellor.

The substance of Mr. and Mrs. Weir's testimony was to the effect that Mrs. Weir's father owned a part of their land many years ago and by mutual agreement about 1915 he and the then owner of the Trucks land set their

fences back 7½ feet from their true common boundary line and established a road between their properties for the use of the general public. They said the general public continued to use the road until Trucks built a fence within two or three feet of their own fence and placed a "Posted, Keep Out" sign on the gate at the west end of the road near Trucks' house.

Otto Harding, the last person besides Trucks who lived on the road, testified that the road had been an old log road but had grown up in bushes and trees when he purchased his ten acres twenty years ago. He said when he told Weir he had purchased the land and intended to build a house on it, Mr. Weir remarked that there was no road to it. He said he purchased the land from Trucks and Trucks agreed to give him all the land necessary for a road. He said he borrowed the money with which to purchase the land and it was necessary to prove to the satisfaction of the lender that a road would be built to the property before the loan was made. He said he cleared out the road from its west end to his house and finally prevailed upon the county judge to pull a ditch on each side of the road. He said the road was used by people coming to his home. Mr. Harding testified that gates were maintained at the west and east end of the East-West road and a gate was maintained and kept locked at the south end of the North-South road. He said he built the gate across the west end of the East-West road about 18 or 19 years ago, and that he maintained two other wire "gaps" across the East-West road adjacent to his property.

Mr. Weir admitted the existence of gates for many years across the west and east ends of the East-West road and at the south end of the North-South road, and admitted the existence of wire gaps across the road. The gate at the east end of the East-West road was owned and maintained by Weir.

Mr. Trucks testified that many years ago, before Weir purchased the property east of his own, a family lived on that portion of the property at the east end of the East-West road and traveled the East-West road to and from their home. Trucks said he placed the no trespassing

sign on the gate to keep people from dumping trash on his property and he built his fences so close to Weir's fences to retain his bull, which would not jump a double fence. He said he had his property lines surveyed and built his fences within his legal boundary lines. His testimony as to the survey and its accuracy is not controverted. Harding also testified that he had his ten acres surveyed and Weir's fence was on the true division line according to the survey.

There was some evidence that hunters and fishermen visiting local stock ponds still used the road and that on occasion adjacent landowners used it on foot and horseback in visiting their property; but from the overall evidence, if the road involved in this case was ever a *public road,* we agree with the chancellor that it became a public road by prescription and has long since been abandoned by the public as a public road and, that was actually the only question before the chancellor.

A public road may be established by judgment of the county court rendered in accordance with the statute or by voluntary dedication or by prescription. *Craig* v. *Greenwood Dist. of Sebastian County,* 91 Ark. 274, 121 S.W. 280.

In the case of *McLain* v. *Keel,* 135 Ark. 496, 205 S.W. 894, partially relied on by the chancellor in the case at bar, this court said:

> "It is well settled that where a highway is used by the public for a period of more than seven years, openly, continuously and adversely, the public acquires an easement by prescription or limitation of which it can not be disposed by the owner of the fee. * * * But it is also equally well settled that the right to a public highway once established by limitation or prescription may be abandoned by non-user, and if so abandoned for a period of more than seven years, the right of the owner of the fee to re-enter and to thereby exclude the public from the use of the highway is restored."

See also *Martin* v. *Bond,* 215 Ark. 146, 219 S.W. 2d 618.

In the case of *Porter* v. *Huff,* 162 Ark. 52, 257 S.W. 393, the facts were much like those in the case at bar, and in that case we said:

> "It is unnecessary to decide whether the public acquired a right to the use of the road as a public road by prescription or seven years adverse possession, for it lost any right it may have acquired by acquiescing in permissive use thereof for a period of more than seven years after the road was closed by gates. When appellee inclosed his land and placed gates across the road, it was notice to the public that thereafter they were passing through the land by permission, and not by right. The undisputed evidence shows that these gates were maintained by appellee across the road for ten or eleven years, without objection on the part of the public."

See also *Pierce* v. *Jones,* 207 Ark. 139, 179 S.W. 2d 454, and *Munn* v. *Rateliff,* 247 Ark. 609, 446 S.W. 2d 664. In *Munn* v. *Rateliff* this court said:

> "The rule is well established that when a gate is maintained for more than 7 years across a road in which the public has a prescriptive easement, then it is deemed that the public has abandoned the road and the landowner has the right to close it permanently and restrict the road to permissive use. *Brooks* v. *Reedy,* 241 Ark. 271, 407 S.W. 2d 378 (1966); *Nelms* v. *Steelhammer,* 225 Ark. 429, 283 S.W. 2d 118 (1955); *Mount* v. *Dillon,* 200 Ark. 153, 138 S.W. 2d 59 (1940); *Porter* v. *Huff,* 162 Ark. 52, 257 S.W. 393 (1924). In these cases we recognized the rule that the installation of the gap or gate was notice to the public that the road was being used by permission and not as a matter of right. It is the existence of the gate and not how continuously it is closed that constitutes notice. In *Brooks* v. *Reedy, supra,* we said: '* * * But it is, we think, clearly established that the gates were in existence at all times from 1952 on, whether up or down.' And further: '* * * It may well be that

those using the roadway did not always put up the gaps; however, be that as it may, the important fact is that the fence and gates were in place for the statutory period, and, under the language in *Mount* v. *Dillon, supra,* the fact that the gates were not always closed does not make any difference.

In the case at bar the chancellor had the opportunity to see and hear the witnesses in evaluating the evidence which was in conflict. In such a situation our rule is that when the evidence is conflicting and evenly poised or nearly so, the judgment of the chancellor on the question of where the preponderance of the evidence lies is considered as persuasive. *Turnage* v. *Matkin,* 227 Ark. 528, 299 S.W. 2d 831 (1957). In view of this well established rule and after a review of the testimony and exhibits presented in the case at bar, we cannot say the findings of the chancellor are against the preponderance of the evidence."

See also *Simpson* v. *State,* 210 Ark. 309, 195 S.W. 2d 545; *Lusby* v. *Herndon,* 235 Ark. 509, 361 S.W. 2d 21.

We agree with the chancellor in the case at bar, that if the public did ever have any right to use the road in question, such right was acquired by prescription and was lost when the public acquiesced for more than seven years to the building and maintenance of the gates and gaps across the road. Following such period of acquiescence by the public without complaint, the traffic over the road became permissive and the owner of the land over which the road runs has the right to close the road to the public.

In addition to the appellants' contention that the chancellor erred in failing to order the roads opened as *public roads,* they now contend on this appeal that the chancellor erred in failing to order the roads opened as *private roads.* This second contention was not before the chancellor at the trial and we are unable to consider assignments of error on contentions raised for the first time on appeal. *Wright* v. *Ark. State Highway Comm'n,* 255 Ark. 158, 499 S.W. 2d 606.

The decree is affirmed.

ELAINE WARREN, A MINOR, AND WILLIAM C. WARREN *v.* BETTY HAYES

73-138 500 S.W. 2d 923

Opinion delivered November 13, 1973

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

Howell, Price, Howell & Barron, for appellee.

CONLEY BYRD, Justice. Late in the afternoon of the day before trial of this rear end automobile collision case appellants Elaine Warren, a minor, and William C. Warren amended their general denial answer to plead contributory negligence. Over objections of appellee Betty Hayes and notwithstanding a motion for a continuance, the case was tried to a jury resulting in a $1,000 personal injury verdict. The trial court granted appellee a new trial. We cannot say that the trial court abused its discretion under the circumstances.

Affirmed.

DANNY JEFFRIES *v.* STATE OF ARKANSAS

CR 73-112 501 S.W. 2d 600

Opinion delivered November 13, 1973
[Rehearing denied December 17, 1973.]

Christopher C. Mercer and *James R. Howard,* for appellant.

Jim Guy Tucker, Atty. Gen., by: *Philip M. Wilson,* Asst. Atty. Gen., for appellee.

CONLEY BYRD, Justice. Appellant Danny Jeffries was charged in the Municipal Court of Little Rock on informations filed by the prosecuting attorney with four violations of Act 590 of 1971 involving the sale of marijuana. Before a preliminary hearing was had in municipal court, the prosecuting attorney filed informations in the circuit court alleging the same violations. Appellant was found guilty by a jury upon one of the charges. The remaining three charges were consolidated and tried before the court resulting in four nine year sentences running concurrently. For reversal appellant contends:

"I. The Court erred in failing to quash the informations in all cases and remand the case to the Municipal Court for a preliminary hearing.

II. The Court erred in the procedure followed in forming the Jury in this case and in not permitting the Defendant to exercise peremptory challenges prior to the time that the Jury was sworn to try the case.

III. The Court erred in not granting the Appellant a mistrial because of the remarks of a Juror before the entire panel prior to the time the Jury was sworn to try the case."

POINT NO. I. We have consistently construed our preliminary hearing statutes as directory and not mandatory. In fact we have held that the failure to take one before a magistrate for a preliminary hearing is not reversible error. See *Jones* v. *State,* 246 Ark. 1057, 441 S.W. 2d 458 (1969).

Under this point appellant also complains of the expense and unfairness of having to make bail bonds both in the municipal court and the circuit court. In a review on appeal where the chief concern is whether appellant received a fair and impartial trial, we must hold that no reversible error has occurred. Whether the law may otherwise afford a remedy for the supposed wrong is not before us in this proceeding.

POINT NO. II. The record shows that the trial court strictly followed the procedure set out in Ark. Stat. § 43-1924 by requiring the State to first exhaust her challenges to a particular juror and then requiring defendant to exhaust his challenges. After some of the jurors had been accepted by both the State and the appellant, the latter moved to excuse a juror previously accepted. Upon the showing here made the trial court did not abuse its discretion in refusing to permit appellant to then peremptorily challenge the juror. See *Allen* v. *State,* 70 Ark. 337, 68 S.W. 28 (1902).

POINT III. During the voir dire of the jury one of the prospective jurors stated:

"Your Honor, May I say something as a juror? I have been a prospective juror on other cases and I

> have told the Defending Attorney that I feel like I am more prejudice than others in drug cases and I also believe in entrapment, which I feel like most of these cases are, and I also believe that even possession of drugs, of an illegal drug is evidence of guilt. . . . "

The juror was promptly dismissed by the court, but appellant contends without citing authority that the trial court should have granted a mistrial. The granting of a mistrial is a rather extreme remedy and is a matter in which the trial court has considerable discretion. Under the circumstances it would appear that the trial court properly denied the motion for a mistrial.

Affirmed.

R. B. TURNEY *v.* WAYNE ROBERTS, ET AL

73-116 501 S.W. 2d 601

Opinion delivered November 13, 1973
[Rehearing denied December 17, 1973.]

Charles W. Atkinson, for appellant

Jeff Duty, for appellees and cross-appellants.

Womack & Lineberger, for intervenor and cross-appellee.

FRANK HOLT, Justice. The appellant, a Florida resident, brought this action to reform a $20,000 note and mortgage given to him by the appellees, Wayne Roberts and his wife, Hazel Bishop Roberts. Reformation was sought upon the allegations of fraud and other inequitable conduct on the part of the Robertses. Appellant Turney also sought foreclosure and subrogation as to a previous encumbrance (Denham) on the real property. The Robertses admitted execution of the note and mortgage and interposed usury as a defense. Subsequently, cross-appellee Richardson filed an intervention alleging that the Robertses were indebted to him for $3,000. He also sought subrogation. The Robertses invoked, *inter alia,* the statute of frauds to avoid payment of the Richardson loan. The chancellor sustained the Robertses' defense of usury and cancelled their note and mortgage to Turney who brings this direct appeal. The chancellor upheld the contentions of intervenor Richardson. The Robertses cross-appeal from that part of the decree favorable to Richardson.

Appellant Turney and cross-appellee Richardson had loaned $17,000 and $3,000 respectively to the Robertses to redeem their property (bid in for $33,250) before the actual sale in a foreclosure proceeding instituted by Edward Denham and his wife. After receipt of the alleged loans, the appellees paid into the court registry the sum of $19,424.21 to redeem their property.

We review the pertinent evidence with reference to both loans. For approximately a year preceding the Turney loan, the Robertses and the Richardsons had lived in Texas as neighbors and frequently visited each other. Richardson and the Robertses were employed at a Mexican Baptist children's home. During this time and before the $3,000 loan, it appears that the Robertses had borrowed money occasionally from the Richardsons and $862.62 of these loans remains unpaid. When the Denhams' foreclosure proceeding was instituted against the Robertses' Arkansas property, they endeavored to secure a $20,000 loan from the Richardsons. Roberts represented to them that the value of their Arkansas home and property was approximately $250,000 and, by the foreclosure proceeding, they would lose everything including opening a children's home, which they were planning to do. Roberts "bothered us all the time" about loaning him funds to pay off the Denham note. Roberts himself persisted to the extent he actually drafted a note and mortgage for $20,000, saying he would like to make it $25,000 in order to meet his needs for living capital. Richardson told Roberts that he and his wife were unable to raise the money for the requested loan. About a month later the Richardsons loaned $3,000 to Roberts when he exhibited to him a $17,000 cashier's check which represented a loan recently made to him by appellant Turney. Roberts insisted in his renewed plea for assistance he was in desperate need of another $3,000 and told the Richardsons their name would be on the $20,000 Turney mortgage. He gave them a receipt (check) indicating that the loan was part of a mortgage payment. No rate of interest was discussed. Roberts had shown them an abstract, deed and an appraisal of the property when he told them it was worth $250,000. He persuaded them to believe that he wanted to sell it and use the proceeds for building a children's home and the property had increased in value because an organization was going to build a shopping center on the Arkansas property. He assured them the loan would be needed no longer than three weeks. Through a minister friend, Arnold Lawrence Robertson, the Richardsons understood that appellant Turney was a very religious man who

devoted much of his time and effort to Christian work and projects.

Robertson, the minister, testified he had known appellant Turney and his Christian endeavors for almost twenty years. The minister further testified that he had known the Robertses for about seven years. He was in Texas and present when a discussion arose between the Robertses and the Richardsons about building a children's home. Roberts, however, mentioned that his Arkansas property was being foreclosed and Mrs. Roberts was upset and weeping about it. The possibility of getting money from foundations that build children's homes was discussed as a source of a loan. Robertson told the Robertses that he had no contacts in Texas and if he found anybody in Greensboro, North Carolina, where he was going he would let him know. Shortly thereafter, the minister was surprised when he received a call from Roberts who was in Greensboro. Roberts wanted to see a local individual which he was unable to do that day. The minister then called appellant Turney, a friend of his, in Orlando, Florida, and told Turney in Roberts' presence that Roberts, also a friend, was in Greensboro; that it would be necessary for him, Roberts, to borrow approximately $17,000 to pay off a mortgage on his home in order for him to be able to sell it and invest the proceeds in a children's home. Then he heard Roberts talk with appellant Turney on the phone telling him he would pay 10% interest on the requested loan and would give him a bonus if he, Roberts, could sell his property within a short time. He heard Roberts assure Turney that his home was valuable property which included fifty or sixty acres. As previously indicated, the minister and appellant Turney had been friends for several years. They had worked together in children's projects and each assisted in the Christian Missionary Movement called Transworld Radio.

Appellant Turney verified the minister's testimony about his introduction to Roberts by telephone from North Carolina. This conversation lasted about one hour. Roberts was in urgent need of $17,000 to pay off a mortgage on his home. He was so desperate he cried

during the conversation. Thereafter, Roberts persisted in calling Turney from different locations in Texas and said he would like to come to Florida. On September 3, 1971, after calling Turney, Roberts flew to Orlando where Turney picked him up at the airport. Roberts did not know whether Turney had funds for a loan; however, Turney and his wife went to a bank and raised $17,000 by pledging their son's college funds, a life insurance policy, and by cashing their savings bonds and checking accounts. Roberts had told Turney before he arrived that he would have a note and mortgage made to them on his Arkansas property which was worth $275,000. Roberts had with him one note for $20,000 dated September 1, 1971, drawing 10% interest, secured by a mortgage of even date payable in forty-five days. The length of the loan was determined at the bank. He also left his deed to the property. He was in Orlando about three hours during this transaction at the bank. Roberts again assured him that the property was worth between $250,000 and $275,000. Roberts "broke down and cried" at the bank when he received the $17,000 loan. At that time Roberts voluntarily, to Turney's surprise, acquired a blank note and completed it in the face amount of $5,000, without interest, and tearfully presented it as a gratuity or bonus to Turney. Roberts showed Turney some papers involving the sale of two pieces of property at $700,000 to $800,000. He assured Turney that within a month and a half that the large real estate transaction would be completed.

Turney testified that Roberts "assured me at the bank that he was well aware of all legal implications, and that's the reason why he had everything fixed up [$20,000 note and mortgage] before he came; and he assured me, gave me assurance that everything was right, and everything was above board. That's the reason why he had taken care of it so well. I was amazed with the experience that he seemed to have, and with the portfolio that he brought down with him, with—showing me the pictures of his property in Texas—the children and all like that." At the bank Turney told the banker he was loaning $17,000 to Roberts, showed him the mortgage, and consulted with the banker who said it "looks alright to me."

Appellant Turney testified that he and Robertson, the minister who introduced Roberts to him on the phone, were very close friends and that his introduction about Roberts was "good enough for me." Turney is on the board of directors of the Transworld Radio Gospel Broadcasting operation which broadcasts in 26 languages off the coast of South America. He spends each weekend trying to raise funds for this cause and pays his own expenses. Appellant is approximately fifty years of age, and has served in the U. S. Air Force as a supply systems analyst for twenty-seven years. For the past year he has been in business for himself. His experience in loan transactions is limited to the purchase of his house, buying a car, and a bank loan. In fact, he did not have the Roberts mortgage recorded until it became necessary to file a suit for collection of his loan. Although the appellant filed a verified complaint seeking recovery of $25,000 or the total of the two notes, he denied he authorized a local Florida attorney to instruct the Arkansas attorney to seek recovery in excess of the actual loan which was $17,000. The Arkansas attorney promptly amended the complaint to seek recovery of only $17,000 plus 10% interest per annum when it was first brought to his attention that this figure was the correct amount of the loan. Neither of the Robertses testified.

The chancellor correctly held that the transaction is usurious. Ark. Constitution, Art. 19, § 13, renders a contract void and unenforceable when the contract exceeds 10% interest. Here the loan bearing 10% interest was exceeded by $3,000. Obviously the chancellor was troubled in cancelling the indebtedness. As abstracted, he observed:

> Roberts deserves the strongest condemnation and by all basic equitable principles [clean hands], should be 'sent hence without day,' but for the strong public policy of this state. If it were not for the posture of Turney and the Constitution [Ark. 19, § 13] as construed by the Court, the decision would be against appellee.

We agree that the transaction presented a troublesome

problem in view of our rather strict interpretation of our usury law. However, we have long recognized that written instruments are subject to reformation. In *Arnett & Arnett* v. *Lillard,* 245 Ark. 939, 436 S.W. 2d 106 (1969), we said:

> Equity will reform written instruments in two cases: [1] Where there is a mutual mistake—that is, where there has been a meeting of minds—an agreement actually entered into, but the contract, deed settlement, or other instrument, in its written form, does not express what was really intended by the parties thereto, and [2] Where there has been a mistake of one party accompanied by fraud or other inequitable conduct of the remaining parties.

To the same effect is *Hervey* v. *College of The Ozarks,* 196 Ark. 481, 118 S.W. 2d 576 (1938), *Davidson* v. *Peyton,* 190 Ark. 573, 79 S.W. 2d 734 (1935), *Commonwealth Bldg. and Loan Assn.* v. *Wingo,* 189 Ark. 1033, 75 S.W. 2d 1008 (1934), *Barton Mansfield Co.* v. *Wells,* 183 Ark. 174, 35 S.W. 2d 337 (1931), and *Welch* v. *Welch,* 132 Ark. 227, 200 S.W. 139 (1918). In order to reform a written instrument, the evidence must be clear, convincing, and decisive. *Hervey* v. *College of The Ozarks, supra.*

In *Welch* v. *Welch, supra,* the court recognized that "[A]lmost all written instruments may be reformed when a proper occasion is furnished." In the case at bar, we are of the view "a proper occasion" is presented for reformation of the note and mortgage, based upon clear, cogent, and convincing evidence. The evidence is uncontradicted that the lender was mistaken in that be believed, due to the borrower's misrepresentations, that the transaction met the requirements ("legal implications") of Arkansas law. In addition, the borrower's conduct and misrepresentations certainly taint the transaction with fraud or at least with inequitable behavior. We perceive no valid rationale why a usurious contract is immune to reformation. Our usury law is not so ironclad nor designed to provide an impenetrable shield so as to prevent absolutely an action for reformation of a written instrument. We hold that the Roberts

note and mortgage should be reformed to reflect $17,-000 indebtedness, bearing ten percent per annum interest, to appellant Turney. To that extent the decree is reversed. However, we do not determine any subrogation rights as to appellant.

On cross-appeal the Robertses contend that the "court erred in subrogating Leonard E. Richardson to the rights and priorities of" the Denhams. Cross-appellants, the Robertses, invoke the statute of frauds with respect to the collection of the $3,000 Richardson Loan. They make the argument there is nothing to support the existence of this loan other than the testimony of Richardson and his wife that their name would be on the $20,000 mortgage which the Robertses had executed to Turney. Further, they assert there is no evidence that the $3,000 borrowed from the Richardsons was for the purpose or used to redeem the Roberts land from the foreclosure proceedings. We disagree. The cashier's check for $19,424.21 made payable to Denham on September 16, 1971, (following both loans) in redemption of their property from the foreclosure sale, is marked "R. D. Turney and T. [L.] E. Richardson for Wayne Roberts." Roberts' individual check (apparently a receipt), also dated September 16, 1971, was made payable to Richardson and marked "Loan balance on Denham payoff of purchase price money on 10 A. Real Prop." This coincides with the date of the Richardson loan. Therefore, as the chancellor held, the evidence is amply sufficient that the Richardsons loaned $3,000 to Roberts to pay off the Denham indebtedness and, further, the evidence is sufficiently clear to take Richardson's claim out of the statute of frauds which the Robertses asserted as a defense to payment of the loan. As the chancellor held, Richardson is entitled to subrogation to the rights and priorities of the Denhams. The doctrine of subrogation is of equitable principles. *Cowling* v. *Britt,* 114 Ark. 175, 169 S.W. 783 (1914). Whenever one loans money to another to pay off a realty encumbrance with the understanding that the loan is for that purpose, he is entitled to be subrogated to the rights of any previous encumbrances. *Stephenson* v. *Grant,* 168 Ark. 927, 271 S.W. 974 (1925).

The Robertses, as cross-appellants, next contend that the court erred in rendering any judgment against Hazel Bishop Roberts, wife of Wayne Roberts, as to the $3,000 Richardson loan. We find merit in this contention. We do not consider, as asserted by Richardson, the issue is raised the first time on appeal. In answer to Richardson's intervention, Mrs. Roberts, in her joint answer with her husband, raised the issue of her alleged indebtedness by a general denial. The record, as abstracted, does not appear to reflect the parties presented memorandum briefs limiting the issues. As to the evidence, a cashier's check, previously mentioned, was remitted by Turney and Richardson "for Wayne Roberts" as payment of the Denham judgment. Richardson himself testified, as to his individual loan, "Mr. Wayne Roberts is the one who asked us [Richardson and his wife] for it and it was loaned to Mr. Wayne Roberts."

The decree is affirmed as to Richardson's judgment except as to Mrs. Roberts. The decree is reversed and the cause remanded on direct appeal and on Mrs. Roberts' cross-appeal for proceedings not inconsistent with this opinion.

Affirmed in part and reversed in part.

GEORGE COWGER AND BRUCE STEWART *v.* FAY MATHIS ET AL

73-180 501 S.W. 2d 212

Opinion delivered November 13, 1973

Donald Poe, for appellants.

Alex G. Streett, David A. Stewart and *Gordon, Gordon & Eddy,* for appellees.

FRANK HOLT, Justice. The appellants, who are tax payers of the Danville school district, brought this action to contest and void a tax millage levy approved by the voters in a regular school district election held on the date fixed by law (March 13, 1973). The school directors, the superintendent of the school district, various election and county officials were made defendants (appellees). The appellants alleged numerous election irregularities including the allegation the school directors did not give notice of the election as is required by law; that, although other parties did publish a notice, such publication was an improper and inadequate instrument and not in conformity with the law requiring notice of the election in which the millage levy was voted upon. Furthermore, that the election was conducted by persons who were not properly selected as officials and who were directly interested in a favorable vote on the tax millage proposal. Also, that unqualified voters participated in the election and, therefore, all ballot boxes, including the absentee box, should be thrown out and the election voided. The trial court sustained a demur-

rer to the petition and refused to permit the original petition to be amended because the amendment was filed after the expiration of the statutory period of time to contest the election.

Appellants first contend for reversal that "[T]he petition as originally filed stated a cause of action for contest of an alleged tax levy and demurrer should not have been sustained." Appellants, in support of their argument that the court erred in sustaining the demurrer to their petition, limit and ably summarize their first contention by stating:

> In the first instance, the petition states acts of misfeasance and malfeasance of selecting and equipping of the required voting precincts by persons other than the election commissioners, nullifying and negating the school election to the extent that if no election had been held: and, secondly, the usurpation of the duties and responsibilities by others instead of election commissioners, designating polling precincts, and selecting of judges and clerks: thirdly, the permitting of individuals, who were not qualified voters and non-residents, to vote in the alleged absentee box, mixed with votes in other districts, which destroyed the integrity of the box to such an extent as to throw out the entire box.

In *William H. Jones* v. *Etheridge,* 242 Ark. 907, 416 S.W. 2d 306 (1967), we said:

> We have repeatedly held that a petition for contest of an election does not state a cause of action where it does not charge that any specified vote was illegally cast, or does not contain sufficient information which would identify any such illegal voter, and contain only generalities or conclusions of law to the effect that illegal votes were cast.

To the same effect is *Wheeler* v. *Jones,* 239 Ark. 455, 390 S.W.2d 129 (1965). When we apply the foregoing criteria to the case at bar, we quickly hold that appellants' petition does not state a cause of action and was subject to appellees' demurrer.

Appellants do not favor us with any argument that the election was invalidated because of improper or insufficient notice. Of course, an issue not argued on appeal is deemed waived. *Sarkco* v. *Edwards Plan Service,* 252 Ark. 1082, 482 S.W.2d 623 (1972).

Appellants next contend the court erred in refusing appellants' amendment to their petition. We cannot agree. It appears undisputed that the amendment was proffered after the twenty days allowed for commencing the contest of the election. Ark. Stat. Ann. § 80-322 (Repl. 1960). It was not permissible to amend the original petition to now state a cause of action. To do so would in effect allow the appellants for the first time to assert a cause of action after the expiration of the twenty days. In such a situation, appellants' amendment is not permissible. *Wheeler* v. *Jones, supra, Wilson* v. *Ellis,* 230 Ark. 775, 324 S.W.2d 513 (1959).

Neither can we agree with appellants that the asserted delegation of duties and responsibilities by election commissioners constituted legal fraud which would invalidate the election. We do not construe appellants' petition to assert actual fraud. Furthermore, in *Wilson* v. *Ellis, supra,* we recognized that ordinarily election regulations are mandatory before the election and directory afterwards, "and that the courts do not favor dis-franchising a legal voter because of the misconduct of another person." A presumption attends every election that it is conducted according to the law and the presumption of validity cannot be overcome by mere charges of fraud or illegalities. *Cain* v. *McGregor,* 182 Ark. 633, 32 S.W. 2d 319 (1930).

Affirmed.

JONES, J., dissents.

J. FRED JONES, Justice, dissenting. I do not agree with the majority opinion in this case. This was not an election contest in the sense that the vote by which the tax levy was declared adopted was in question. This was a case in which the legality of the *entire election* was questioned.

The complaint named the commissioners and the school directors and set out their statutory duties pertaining to holding a school election and specifically in regard to preparing and furnishing ballots as related to school tax levy. The complaint then alleged that other people substituted themselves for the school directors and attempted to give notice and prepare the ballot's title contrary to the law. The complaint then alleged that the election commissioners did not select nor appoint the judges or clerks, nor perform the other duties required by law, but that other persons usurped the power and authority of the election commissioners and selected the judges and clerks and that the judges and clerks who served at said election were not judges and clerks selected by the election commissioners.

I agree that the complaint also alleges other matters directed at the validity of the votes, but it is my opinion that the complaint as a whole, stated a cause of action in a taxpayers suit attacking the entire election as absolutely void and I would hold the complaint good on demurrer.

HAROLD SHERMAN UPTON *v.* JOHN M. GRAVES, CIRCUIT JUDGE

CR 73-149 509 S.W. 2d 823

November 13, 1973

Richard H. Mays, for petitioner.

Jim Guy Tucker, Atty. Gen., for respondent.

Petition for admission to bail.

PER CURIAM

This is a petition for bail pending retrial of petitioner Harold Sherman Upton following the reversal of his first degree murder conviction, *Upton* v. *State,* 254 Ark. 664, 497 S.W. 2d 696. The trial court in refusing bail as in capital offense cases recognized the effect of *Furman* v. *Georgia,* 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed. 2d 346 (1972), on our death penalty statutes, but took the position that Act 438 of 1973 reinstated the death penalty as to felony murder cases committed prior to the effective date thereof. We disagree.

Since the authorities define an ex post facto law as one that renders an act punishable in a manner in which it was not punishable when committed, *White* v. *Brown,* 468 F. 2d 301 (9th Cir. 1972), it follows that, in view of *Graham* v. *State,* 253 Ark. 462, 486 S.W. 2d 678 and *Kuehn* v. *State,* 253 Ark. 889, 489 S.W. 2d 505, the capital felony provisions of Act 438 cannot be applied retrospectively to offenses committed prior to its adoption, Ark. Const. Art. 2 § 17.

This matter is referred back to the trial court for the fixing of bail.

EWELL THOMAS d/b/a THOMAS TERMITE CONTROL *v.* COMMITTEE "A" ARKANSAS STATE PLANT BOARD

73-145 501 S.W. 2d 248

Opinion delivered November 19, 1973

Warren E. Dupwe, for appellant.

Jim Guy Tucker, Atty. Gen. by: *Milton Lueken,* Asst. Atty. Gen., for appelleee.

CARLETON HARRIS, Chief Justice. On September 10, 1970, Committee "A" of the Arkansas State Plant Board conducted a hearing wherein evidence was taken on whether the license of Ewell Thomas, d/b/a Thomas Termite Control, appellant herein, should be revoked.

Testimony and numerous written exhibits were presented to the committee, Mr. Thomas not appearing personally, or by counsel, at said hearing. Subsequently, on September 22, 1970, appellant was advised that his license had been revoked. On appeal to the Circuit Court of Pulaski County (Third Division), the order of revocation was affirmed, and from the judgment so entered, appellant brings this appeal. Several allegations for reversal are urged and we proceed to discuss these points.

It is first asserted that the matter should have been remanded to the State Plant Board because the license revocation by Committee "A", "being made upon unlawful procedure was in excess of the agency's statutory authority." It is first argued under this point that appellant was denied the right to counsel as granted by Ark. Stat. Ann. § 5-709 (a) (Supp. 1971) because the notice sent to him by the board of the hearing made no mention of this right. We cannot agree with this contention. The statute gives one the right to appear in person or by counsel, but there is no requirement that the notice of hearing contain such information. Appellant, however, is hardly in a position to make such a contention because the record reflects that after receiving the notice from the board, he wrote a letter of reply in which he said, "I am turning all of this mess you sent me to my lawyers and they will decide what to do with it." He added that if the board decided to revoke his license, he was "taking this to the United States Supreme Court and my Lawyers will handle this for me." About two weeks later, appellant wrote another letter advising that his lawyers "will be asking you and your Inspectors to appear in court to answer several Questions." Accordingly, it is very evident that Thomas was aware of his right to counsel.

It is next averred that the license was revoked by Committee "A" rather than the entire board.[1] The record is not entirely clear in this regard, but does re-

[1]Rules and regulations of the Arkansas State Plant Board provide that Committee "A" shall consist of the board member who is head of the Department of Entomology of the University of Arkansas, the board member who

flect that the decision was reduced to writing with the supporting evidence, and the law, as required by Ark. Stat. Ann. § 5-710 (b), and made a part of the record of the hearing as required by the Administrative Procedure Act (Act 434 of 1967, Ark. Stat. Ann. § 5-701 - 714 [Supp. 1971]). Discussion of this allegation is unnecessary since this argument was not raised in the trial court. In fact, appellant's own pleadings filed in the Pulaski County Circuit Court appear to be contrary to his argument. On November 22, in his motion to set aside revocation of the pest control license held by Thomas, appellant states:

> "The decision rendered by the *Arkansas State Plant Board* [our emphasis] to permanently revoke defendant's pest control license and the entire proceedings thereon was based upon hearsay testimony and evidence and denied defendant his right to confront witnesses against him and to allow said evidence on appeal is only to repeat the violation of defendant's constitutional rights."

On the same date, he filed a motion for a trial by jury, stating:

> "On September 11, 1970, the *State Plant Board* [our emphasis] permanently revoked defendant's pest control license. To deny defendant a jury trial of that decision is to deny defendant of his livelihood without due process of law."

It thus appears that appellant recognized that his license had been revoked by the full board, but, if otherwise, as already pointed out, we still cannot consider the argument since this matter was not raised in the trial court and cannot be raised here on appeal for the first time. *Gregory* v. *Gordon,* 243 Ark. 635, 420 S.W. 2d 825.

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represents the Arkansas Pest Control Association, board member who represents the Arkansas Feed Manufacturers Association and the board member who represents the Arkansas Pesticides Association. This committee hears matters relating to the licensing of pest control operators. Committee "B" is likewise composed of four members who hear matters pertaining to different classifications.

It is also mentioned that only three members of Committee "A" were present at the hearing, rather than the full committee of four. Of course, the three constituted a majority of the committee, but, inasmuch as this argument too was not presented to the trial court and is here raised for the first time, it likewise cannot be considered.

It is contended that the court erred in not granting appellant's motion to exclude hearsay evidence taken at the committee hearing. Gerald King, head of the Commercial Pest Control Section of the Division of the Plant Industry, State Plant Board, and who notified appellant of the hearing, together with Martin Bracy, Inspector for the Board, investigated numerous jobs that had been performed in northeast Arkansas by Mr. Thomas, and offered in evidence various statements from persons who had entered into contracts with Thomas to have their homes treated for pest control, together with some contracts; also appellant's monthly report form for two months was offered, and evidence presented that numerous jobs performed by Thomas had not been reported to the board as required;[2] some checks and photostats of checks received by Thomas were also placed in evidence. We find no merit in this contention. Ark. Stat. Ann. § 5-709 (d) of the Administrative Procedure Act provides that, except where irrelevant, immaterial, or unduly repetitious, any oral or documentary evidence, not privileged, may be received if it is of a type "commonly relied upon by reasonably prudent men in the conduct of their affairs." The bulk of the evidence certainly appears to be such as would be relied upon by reasonably prudent men in the conduct of their affairs. Let it be remembered that this was a hearing before an administrative committee which is not bound by strict rules of evidence. See *Fisher* v. *Branscum,* 243 Ark. 516, 420 S.W. 2d 882.

It is next argued that the court erred in failing to grant appellant's motion for a jury trial. Again, we do

[2]The investigation of Thomas related to statutes and regulations concerning (1) his failure to report work within the time and manner specified and pay inspection fees due and (2) performing work in a classification for which he did not have a license.

not agree. Ark. Stat. Ann. § 5-713 (g) of the Administrative Procedure Act provides:

> "The review shall be conducted by the court without a jury and shall be confined to the record, except that in cases of alleged irregularities in procedure before the agency, not shown in the record, testimony may be taken before the court."

Finally, it is urged that the action taken in revoking the license of Mr. Thomas was too harsh and should be modified. Board records, as shown by the minutes of various meetings, reflect previous violations of the act, and numerous instances were included in the present charge. The statute, Ark. Stat. Ann. § 77-1807 (Supp. 1971), sets out the grounds for invalidation or nonrenewal of a license and the violations charged against appellant are included in this section. We are unable to say that the finding of the board was arbitrary or capricious.

Affirmed.

GARY McCLURE ET AL *v.*
CITY COUNCIL OF PARAGOULD ET AL

73-133 501 S.W. 2d 247

Opinion delivered November 19, 1973

L. V. Rhine, Douglas Bradley and *Jon R. Coleman,* for appellants.

Robert F. Thompson and *Kirsch, Cathey, Brown & Goodwin,* by: *Donis B. Hamilton,* for appellees.

GEORGE ROSE SMITH, Justice. This action was brought by the appellants, as property owners of Water Improvement District No. 3 of Paragould, for a writ of mandamus to compel the city council of Paragould to call an election pursuant to Act 268 of 1969, for the selection of a board of directors for the improvement district. Ark. Stat. Ann. §§ 20-141 *et seq.* (Supp. 1971). While the suit was pending Act 268 was repealed by Act 145 of 1973. The defendants filed a motion for summary judgment on the ground that the controversy had become moot. This appeal is from an ensuing summary judgment in favor of the defendants. For reversal the appellants contend that the repealing act is unconstitutional, as an invasion of the judicial province, because it recites that the act being repealed is a local and special act.

That contention is without merit. The improvement district was created in 1920. The complaint alleges that, owing to the repeal of certain statutes, there was no procedure for the election of a board of directors when Act 268 of 1969 was adopted. That act, by its terms, applied to "any municipal water improvement district, organized and in operation for more than forty years, . . . in a city having a population of not less than 9,000 nor more than 12,000 according to the last regular census, and not being operated by an elected commission or board." Section 20-141. Section 1 of Act 145, the repealing act, reads: "That Act No. 268 of the Acts of Arkansas of 1969 being a local and special act, is hereby repealed."

The repealing act is unquestionably constitutional. To begin with, the legislature did not declare the earlier act to be unconstitutional. It merely declared that Act 168 was a local and special act. That declaration was true, because the act did not apply to the entire state. "The

exclusion of a single county from the operation of the law makes it local." *Webb* v. *Adams,* 180 Ark. 713, 23 S.W. 2d 617 (1929). In the second place, the General Assembly "may repeal any law it enacts . . . and the motive or reason for the legislative action cannot be inquired into by the court." *Gentry* v. *Harrison,* 194 Ark. 916, 110 S.W. 2d 497 (1937). The trial court was right in upholding Act 145 and in finding this case to be moot.

Affirmed.

TOWN OF WRIGHTSVILLE, ARK. *v.* FRED R. WALTON

73-134 501 S.W. 2d 241

Opinion delivered November 19, 1973

George Howard Jr., for appellant.

Rose, Nash, Williamson, Carroll & Clay, by: *J. Richard Johnston,* for appellee.

LYLE BROWN, Justice. The Pulaski County Court granted a petition to incorporate the Wrightsville community. Appellee Walton attacked that order by proper

complaint filed in the Pulaski Circuit Court. The circuit court set aside the order of incorporation on the ground that the petition to incorporate was not signed by a majority of the inhabitants of the area, citing Ark. Stat. Ann. § 19-106 (Repl. 1968). The propriety of that interpretation is the sole issue on appeal.

The petition for incorporation was granted because the county court found that it was signed by more than twenty electors of the territory. In so doing the county court took the position that the signatures of a minimum of twenty qualified voters were the requisite number required for the granting of the petition. Ark. Stat. Ann. § 19-103 (Repl. 1968). The circuit court, in setting aside the order, held Sec. 19-106 required it to be shown that a majority of the inhabitants approved the incorporation. It is not disputed that the number of signatures (26) did not constitute a majority of the inhabitants.

By Act No. 1, March 9, 1875, the General Assembly enacted a comprehensive code covering the incorporation of communities into towns. In resolving the issue before us, three sections of that act must be considered. The pertinent parts provide:

> When the inhabitants of a part of any county, not embraced within the limits of any city or incorporated town, shall desire to be organized into a city or town, they may apply by petition, in writing, signed by the inhabitants so applying, to be in number not less than twenty (20) qualified voters, to the County Court. . . . Ark. Stat. Ann. § 19-101 (Repl. 1968).
>
> If the County Court shall be satisfied, after hearing such petition, that at least twenty (20) qualified voters reside therein, or within the limits described by said petition, and that said petition has been signed by them; . . . . and it shall, moreover, be deemed right and proper, in the judgment and discretion of the Court, ... then it shall make out and indorse on said petition an order, to the effect that the incorporated town as named and described in the pe-

tition may be organized, . . . Ark. Stat. Ann. § 19-103 (Repl. 1968).

Then it is provided by Ark. Stat. Ann. § 19-105 (Repl. 1968) that one month shall elapse before notice shall be given of an election of officers; during that period any interested person may make complaint to the circuit court for the purpose of preventing the organization of the proposed town. Then Ark. Stat. Ann. § 19-106 (Repl. 1968) provides:

> It shall be the duty of the court or judge to hear such complaint in a summary manner . . . and if it shall appear to the satisfaction of the court or judge that the proposed incorporated town does not contain the requisite number of inhabitants, or that a majority of them have not signed the original petition, . . . then the said court or judge shall order the record of said incorporated town to be annulled.

If we adopt the position of appellant then we must write out of the statute (§ 19-106) the requirement that the majority of the inhabitants must have signed the petition. The rules of statutory interpretation require, among other things, that we must "give to the statute such a construction, if possible, as will enable the Act and all parts thereof to be effective". *Russell* v. *Cockrill, Judge,* 211 Ark. 123, 199 S.W. 2d 584 (1947). To the same effect see *Compton* v. *State,* 102 Ark. 213, 1443 S.W. 897 (1911). *Compton* quotes from 2 Lewis' Sutherland, Stat. Con. (2 ed.) § 368: "[A] statute must receive such reasonable construction as will, if possible, make all its parts harmonize with each other, and render them consistant with its scope and object."

Appellant argues that the phrase in § 19-106 "or that a majority of them have not signed the original petition" refers to the term "requisite number of inhabitants". Sec. 19-103 says the required number of inhabitants of the proposed town is twenty qualified electors. If we accept appellant's argument then § 19-106 would only require the signatures of eleven qualified electors. Such an interpretation is not in harmony with the provisions of § 19-101 and § 19-103.

We have no way of knowing why the legislature provided that articles of incorporation can be granted by the county court upon petition of twenty qualified electors and then provides that if complaint is timely filed in circuit court, the signatures of a majority of the inhabitants would have to be shown. Nevertheless, we are unable to arrive at any conclusion other than § 19-106 requires the signatures of a majority of the inhabitants. We would point out that the proceeding in circuit court is not an appeal from the county court. The jurisdiction of the circuit court is invoked by the filing of a complaint which, of course, constitutes an entirely new preceeding.

Affirmed.

SECURITY INSURANCE COMPANY OF HARTFORD
v. WILLIAM MAURICE OWEN AND MAURICE OWEN

73-101 501 S.W. 2d 229

Opinion delivered November 19, 1973

Bridges, Young, Matthews & Davis, for appellant.

Jones, Matthews & Tolson, for appellees.

JOHN A. FOGLEMAN, Justice. This is the second appeal of this case. In the first, *Security Insurance Company of Hartford* v. *Owen,* 252 Ark. 720, 480 S.W.2d 558 (1972), we reversed a judgment against appellant because of error in submitting to the jury the question of construction of one of the insurance policies involved. The case is a suit by William Maurice Owen and his father Maurice Owen against Security Insurance Company of Hartford, the insurer of W. H. Marks on two policies. One of them is an automobile liability policy with a limit of $50,000. The other is a Farmer's Compre-

hensive Personal Liability Policy with a limit of $25,000. The question at issue is which policy applies.

Owen, then a minor, was injured on August 7, 1965, while guiding a tractor belonging to Marks and being towed by a pickup driven by Marks. The purpose of the trip was to take the tractor and equipment to a duck hunting club in which Marks was interested. In a suit brought by Maurice Owen in behalf of himself and his son, a judgment for $34,250 was recovered. Appellant provided the defense in that suit, having acknowledged coverage under the comprehensive personal policy but denying coverage under the automobile policy. Appellant then paid the amount of its comprehensive policy limits but continued to deny liability under the automobile policy on the basis of a clause excluding employees of Marks from coverage. This suit was then brought against appellant by appellees to recover the balance of $9,250, interest, statutory penalty and attorney's fees, as a subrogee of Marks, pursuant to Ark. Stat. Ann. § 66-4001 (Repl. 1966). Of course, appellees asserted that the automobile policy provided coverage to Marks. Appellant has consistently maintained its position that the exclusion in that policy applied. Obviously, Marks has not paid any part of the judgment.

After the reversal of the judgment on the first appeal, a second trial, presided over by a special circuit judge because of illness of the regular judge, resulted in a jury verdict favorable to appellant. Timely motion for new trial was filed. It was heard and granted by the regular circuit judge, who had the transcript of the proceedings before him. This appeal was taken from the order granting a new trial. Appellant contends that this order constituted an abuse of the circuit judge's discretion because it was premised upon an error of law.

The grounds for the motion were allegations of error in the admission into evidence of two pretrial statements made by W. H. Marks, a witness but not a party to this action, and error in the failure of the trial judge to admonish the jury that such statements were to be considered by them only as bearing upon the credi-

bility of the witness. The new trial was granted solely upon the finding of the regular circuit judge that there was error in the admission of the statements.

Error of law occurring at the trial and objected to by the moving party is one of the statutory grounds for a new trial. The trial court has a broad latitude of discretion in the granting of new trials. This discretion is not limited to cases where sufficiency of the evidence is the ground for the motion. See, e.g., *Heil* v. *Roe,* 253 Ark. 139, 484 S.W.2d 889; *Millers Casualty Insurance Co.* v. *Holbert,* 253 Ark. 69, 484 S.W.2d 528; *Hardin* v. *Pennington,* 240 Ark. 1000, 403 S.W.2d 71; *Thomas* v. *Arnold,* 192 Ark. 1127, 96 S.W.2d 1108. Of course, the latitude of the trial judge's discretion is much broader where the question is whether a jury verdict is supported by a preponderance of the evidence, because of the peculiar advantage of his position in evaluating all the factors bearing upon it. In determining questions as to errors of law, his position is not of the same superiority to that of the appellate court. Still, the action of the trial judge on a motion for new trial upon a statutory ground should not be reversed in the absence of manifest abuse of his discretion. *Law* v. *Collins,* 242 Ark. 83, 411 S.W.2d 877; *Blackwood* v. *Eads,* 98 Ark. 304, 135 S.W. 922. See also, *Millers Casualty Ins. Co.* v. *Holbert,* supra; *Hardin* v. *Pennington,* supra; *Thomas* v. *Arnold,* supra. The showing that this discretion was abused must be much stronger when a new trial has been granted than when it is denied. *Heil* v. *Roe,* supra; *Worth James Construction Co.* v. *Herring,* 242 Ark. 156, 412 S.W.2d 838; *Blackwood* v. *Eads,* supra.

The party who was the beneficiary of the verdict set aside by the granting of a new trial has much less basis for a claim of prejudice than does an unsuccessful movant for a new trial. In *Porter* v. *Doe,* 10 Ark. 186, the trial court, after a verdict for the defendants, granted the plaintiffs a new trial which resulted in a verdict for the plaintiffs. The defendants alleged that the new trial was improperly granted, apparently upon the basis that the verdict was not contrary to the evidence or instructions. This court said that since the verdict was

in favor of the defendants they could not complain of either the misdirections of the judge, improper evidence admitted or a like cause, adding:

> A verdict was all that they could ask, and when it was set aside they could only complain that the Circuit Court had exercised its discretion to their prejudice. The Supreme Court has already extended its revising control over the discretionary powers of the Circuit Court as far as the most liberal practice will warrant upon the subject of new trials. This is a new case and must be predicated solely upon the ground of abuse of the discretionary power of the Circuit Court. Whether this power was exercised prudently or not there was offered the defendants another opportunity for presenting their defense, and if they had injustice done them in that trial, this court is open to hear their complaint.

In *Heil* v. *Roe,* we said:

> In Blackwood v. Eads, 98 Ark. 304, 135 S.W. 922, we pointed out that this court will much more reluctantly reverse the final judgment in a cause for error in granting than for error in refusing a new trial. Such reluctance is based on sound and practical reasoning. In the first place any competent judge is simply not as likely to find and admit error where none exists as he is to overlook or fail to recognize or accept error where it does exist. In the second place, final justice may be totally denied by the wrongful refusal of a new trial whereas final justice should be only postponed by the wrongful granting of a new trial.

Manifest abuse of discretion in granting a new trial means a discretion improvidently exercised, i.e., exercised thoughtlessly and without due consideration. *Blackwood* v. *Eads,* supra. Under the circumstances prevailing here we are unable to say that the circuit judge exercised his discretion improvidently, thoughtlessly or without due consideration.

Marks testified in the first trial of this case. He was subpoenaed and called to testify at the second trial by

appellant. The issue in the case was whether young Owen was an employee of Marks. Appellees' cause of action, when the judgment against Marks remained unsatisfied for 30 days, was by statutory subrogation to the right of Marks under the policy. Ark. Stat. Ann. § 66-4001. Obviously, the interest of Marks in a favorable result in this litigation was identical to that of the Owens. Even though Marks was not a party to the action, or, strictly speaking, in privity with either of the Owens, a judgment unfavorable to the Owens would likely be binding upon Marks in any action he might bring against appellant, particularly when he could have asked to be made a party and his knowledge of the pendency of the action arose from his having been called as a witness on the critical issue. See *Carrigan* v. *Carrigan,* 218 Ark. 398, 236 S.W. 2d 579; *Roberson* v. *Hamilton,* 240 Ark. 898, 405 S.W.2d 253; *Hill* v. *Village Creek Drainage District,* 215 Ark. 1, 219 S.W.2d 635; *Moreland* v. *Meade,* 162 Md. 95, 159 A. 101 (1932); *Bacon* v. *Gardner,* 38 Wash. 2d 299, 229 P.2d 523 (1951); *Talbot* v. *Quaker State Oil Refining Co.,* 104 F.2d 967 (3rd Cir. 1939); *Terry and Wright of Kentucky* v. *Crick,* 418 S.W.2d 217 (Ky. 1967); 50 C.J.S. 322, Judgments, § 786. By the same token, a judgment against appellant would certainly relieve Marks from the payment of the judgment against him.

In this situation, the testimony of Marks and young Owen was critical because they appear to be the only ones who can actually shed any light on the existence of an employer-employee relationship. Appellant had promptly made inquiries of both soon after the wreck occurred. Young Owen testified Marks said nothing about paying him for steering the tractor, that he had not done any other work for Marks or been to the duck camp during the year in which he was injured, that he had never been paid any money by Marks, and that Marks had never offered to make any payment to him. On cross-examination, he admitted making a statement to George Sims, an insurance adjuster, that he was working for Marks at the time of his injury and that Marks was going to pay him. The statement was introduced. It contained a clause stating, in effect, that Owen was an occasional employee and that Marks paid him $7.00 per day for eight hours' work. Owen explained the statement by saying he did

not tell the adjuster the things contained in it. He said that, at the time, he had been "doped up" for his fourth surgical procedure due to his injury and that Sims read the content of the statement, and, after each sentence, asked him if he agreed. Owen attributed his affirmative answers and his signing the statement to the influence of drugs. He admitted that all of the statement except those parts pertaining to the employment relationship was essentially correct. Appellees' case on the issue rested on this testimony.

Marks had also signed statements pertaining to the employment status of young Owen. One of them was dated August 11, 1965, and the other December 20, 1967. Marks testified, when called by appellant, in the second trial, that his regular employee who was scheduled to drive the tractor did not show up on the morning the tractor was to be taken to the duck club and that young Owen took his place. He stated he would have paid the regular employee and doubtless would have paid young Owen, because he had paid others who had cleaned up a levee with a chain saw. He could not recall whether he had paid Owen anything, but his regular rate of pay for the type of work done was $7.00 per day. He then stated he intended to pay Owen had it not been for the wreck, but probably would not have paid him at the rate of $7.00 per day.

After Marks had given this testimony, he stated he could not recall what he might have told appellant's counsel earlier, but admitted he had previously given a statement to the insurance adjuster, George Sims. Both statements were then offered and admitted into evidence over appellees' objection. These objections included the following: the statement was hearsay and was taken without opportunity for cross-examination, and that the testimony of a witness cannot be bolstered by showing his out-of-court statements. The statement was offered by appellant for impeachment without any suggestion that it might have probative value as substantive evidence. No limiting or cautionary instruction was requested or given.[1] Marks

[1]The failure to give such instruction is not reversible error in the absence of a request. *Perry* v. *State,* 255 Ark. 378, 500 S.W. 2d 387. Where the testimony is admitted for impeachment purposes only, it seems that the better practice would be to give a limiting instruction.

admitted, during his testimony, that at the time of signing the statements he had no idea that the employment status of young Owen had any bearing on the extent of his insurance coverage and that he showed the insurance policies to the elder Owen and the attorney for the Owens at a later date. The first statement contained the following sentence: "Owen works for me by the day and I pay him $7.00 per day for average days." After the statement was introduced, Marks admitted having told the adjuster this. The second statement was to the effect that Owen had worked for Marks on occasion, usually cleaning up, cutting weeds, working on the club house, and had been paid from Marks' pocket, but that Marks did not think that the youth's name had ever appeared on his payroll.

It was shown on cross-examination of Marks that, during the first trial, he had testified he did not pay young Owen anything, had never paid him anything, he did not think he ever discussed paying him anything and had never paid Owen anything out of his pocket. On redirect examination it was shown that he had also stated, at the first trial, that it was possible he had paid young Owen something out of his pocket and that he had admitted telling the insurance adjuster on August 11, 1965, that Owen worked for him part-time and that he paid Owen $7.00 per day.

Appellant now argues that the statements were admissible, under the peculiar circumstances existing here, and particularly that the identity of interest of Marks and the Owens made the statements admissible, so that, in any event, there could be no error in admitting them, relying upon *Sherman* v. *Mountaire Poultry Co.,* 243 Ark. 301, 419 S.W. 2d 619; *Smith* v. *Clark,* 219 Ark. 751, 244 S.W. 2d 776; *Home Insurance Co.* v. *Allied Telephone Co.,* 246 Ark. 1095, 442 S.W. 2d 211, among other authorities. There is no indication that this latter argument, which is presented rather forcefully and persuasively here, has ever been presented to the trial court. If we agreed with appellant and our agreement resulted in affirmance of the trial court, this fact would be immaterial. *Lisko* v. *Uhren,* 130 Ark. 111, 196 S.W. 816, 88 C.J.S. 189, Trial, § 82. But we cannot say this matter is unimportant under these conditions. Appellees had no opportunity to object to the statements as substantive evidence or to take counter measures.

Both statements by Marks were in evidence in the first trial, and Marks' testimony as outlined in our opinion on the first appeal does not materially differ from that given at the second trial. However, the recollection of the witness may have been hazier on this occasion. Similar objections to the introduction of the statements were then made by appellees but withdrawn.

Appellant's argument that the statements were admissible for impeachment purposes would be compelling had Marks not been used as a witness by appellant in an effort to prove the critical issue. It does not appear that appellant claimed to have been surprised by the testimony elicited, and appellant does not argue that it was entrapped into using Marks as a witness. The requirement of surprise before a party may impeach a witness called by him has been criticized. See IIIA Wigmore on Evidence, Chadbourne Revision, 981, § 905 n 6; Diffey, Impeaching One's Own Witness in Arkansas, 8 Law School Bul. 34, 36. This criticism would not justify a change in our construction of the statute, but the statute has not been so applied in the circumstances which prevailed here. We are not necessarily bound to extend the requirement of surprise as a condition precedent to the situation that existed when Marks testified, or to that which may prevail when, and if, he testifies again. A recognized exception to the rule against impeachment of one's own witness exists when it appears that the witness is hostile. See 58 Am. Jur. 444, Witnesses, § 799; Annot. 21 L.R.A. 418, 423 (1893). The determination whether a witness is hostile lies within the sound judicial discretion of the trial judge, in the exercise of which he should be accorded great latitude and may consider, among other things, such matters as the extent of the deviation of the testimony from previous statements by the witness, and inferences that the witness is attempting to suppress the truth, drawn from his testimony and conduct. *Lerma* v. *United States,* 387 F. 2d 187 (8th Cir. 1968), cert. denied, 391 U.S. 907, 88 S. Ct. 1658, 20 L. Ed. 2d 421; *State* v. *Hutnik,* 39 Wis. 2d 754, 159 N.W. 2d 733 (1968); *State* v. *Davis,* 400 S.W. 2d 141 (Mo. 1966), cert. denied, 385 U.S. 872, 87 S. Ct. 142, 17 L. Ed. 2d 99; *Fox* v. *Schaeffer,* 131 Conn. 439, 41 A. 2d 46, 157 A.L.R. 132 (1944).

The question of admissibility of the evidence is

certainly not free from doubt, and much lies in the discretion of the trial judge. If we could say with assurance that the statements were admissible in the trial, either for impeachment of appellant's own witness or as substantive evidence, we might be able to say that there was an abuse of the trial court's discretion in granting a new trial. Marks' interest in the case may have been such as to render him a hostile or adverse witness, in which case he might properly be impeached by the party calling him. It is certain that after young Owen testified as he did, appellant had little choice in the matter of calling Marks as a witness. Even for impeachment purposes, there are elements other than hostility of the witness calling for the exercise of judicial discretion in determining admissibility. Among these is the matter of prejudice of his statements to the party calling him.

Since the propriety of admitting the evidence is doubtful, the doubt should be resolved in favor of the granting of a new trial. 58 Am. Jur. 327, New Trial, § 121; *Marks* v. *Haas,* 166 Iowa 340, 147 N.W. 740, Ann. Cas. 1917D 543 (1914); *Steensland* v. *Iowa-Illinois Gas & Electric Co.,* 242 Iowa 534, 47 N.W. 2d 162 (1951). We see little difference in a case such as this and the cases where we sustained the granting of a new trial because the trial judge did not feel that his instructions to the jury had properly presented the issues to the jury. No sound reason exists for a different rule or procedure where admissibility of evidence, rather than jury instructions, is concerned, and the error is not manifest.

Ordinarily we would undertake to resolve the questions posed which are likely to arise upon a new trial, but cannot do so in this case. The statements of Marks are not wholly consistent and his recollection will not likely improve with time, so there is no way to anticipate exactly what his testimony might be in another trial. Nor can we predict whether the statements will be offered in evidence, the time or state of the record when they may be offered, the circumstances or conditions which will prevail when they are offered, or the purpose for which the statements may be offered. Consequently, we are unable to satisfactorily answer the questions which might arise. Since these matters are subject to so much speculation, we are not called upon to resolve questions

of admissibility which may arise on a new trial.

We do not consider that the regular judge's discretion to grant a new trial was limited in this case by the fact that he did not preside at the trial, particularly in view of the fact that in considering the motion he had the transcript of the trial before him. We find no merit in appellant's argument that the mere showing, on cross-examination, that Marks had given testimony at the first trial different from his pretrial statements and perhaps different from his testimony on direct examination by appellant constituted a waiver of the evidentiary question.

Since we find no abuse of discretion, we affirm the judgment.

BYRD, J., dissents.

WILLIAM E. MOSLEY *v.* STATE OF ARKANSAS

CR 73-106 501 S.W. 2d 225

Opinion delivered November 19, 1973

No brief for appellant.

Jim Guy Tucker, Atty. Gen., by: *O. H. Hargraves,* Deputy Atty. Gen., for appellee.

J. FRED JONES, Justice. William E. Mosley was convicted of the crime of voluntary manslaughter in connection with the death of Garland Little and was sentenced to seven years in the penitentiary. Mosley has designated the entire record on appeal to this court but has filed no abstract and brief.

The Attorney General has filed a brief in support of

the state's motion to affirm for want of error appearing on the face of the record, and has filed an abstract of the record in accordance with rule 11 (f) of this court. We have examined the entire record and find no error that would call for a reversal in this case.

The homicide in this case grew out of a free-for-all brawl in a combination bar and pool hall in which the appellant Mosley and several other people were involved. It appears that the brawl started when a barmaid tripped over a wire behind the bar and her boyfriend, who was present, thought another one of the patrons had pushed her. The record discloses that practically all of the patrons got into the act of fighting each other with fists, bar stools and pool cues.

Donald Thacker testified that he was not involved in the fight but was present and observed all of it from behind the bar. He said people were swinging pool sticks and bar stools and that he saw Garland Little on the floor getting beat up. He said that Little was crippled and as he got up from a bar stool where he was sitting, he pulled Mosley's hair. He said Jimmy Burris struck Little in the side with a bar stool and knocked him down. He said that Mosley then seemed to go berserk and started beating Little on the chest and head with a pool cue. He said Little remained on the floor while Mosley stood over him and beat him with the pool cue. He said he observed Lloyd Lonberger trying to get Mosley to stop beating Little, and that the fight was all over when Mosley did finally stop beating Little with the pool cue. He said he did not see Little get to his feet again after the beating. He said that one of Little's eyes was hanging out of its socket; that his other eye was badly swollen and he was unable to talk when the ambulance came for him. Little died in a hospital from subdural hematoma approximately ten days following the beating.

We are of the opinion that there was ample evidence to go to the jury in this case and that the evidence is sufficient to sustain the verdict and the judgment rendered thereon. Finding no error in the record, the judgment is affirmed.

Affirmed.

KATE BUFORD (DEARING) ET AL *v.* EVIA LEE DEARING, CALVIN DEARING, AND VERA DEARING

73-143 500 S.W. 2d 931

Opinion delivered November 19, 1973

Shaver & Shaver, for appellants.

Giles Dearing, for appellees.

FRANK HOLT, Justice. Appellants, the widow and heirs of Buford Dearing, brought this declaratory judgment action based on their contention that the written provision in a deed created a life estate in Evia Lee Dearing with a remainder interest which vested in Buford Dearing at the time the deed was executed. The cause was submitted upon the complaint, the answer, a stipulation of facts, and a deposition together with the briefs of the parties. The chancellor denied appellants' contention and dismissed the cause for want of equity. Appellants contend on appeal that it was the intention of B. F. Dearing to convey to Evia Lee Dearing a life-estate in the 40 acres of land involved in this suit and a vested remainder in fee to Buford Dearing when he inserted a written provision in the deed.

In 1937, B. F. Dearing, now deceased, executed a printed form warranty deed conveying the land in question to his daughter. The granting clause of the deed conveyed a fee simple title to her. It read:

> That I, B. F. Dearing, for and in consideration of One and 00/100 hereby Grant, Bargain, Sell and Convey unto the said Evia Lee Dearing and unto her heirs and assigns forever, the following lands . . . .

The description clause was followed by this provision which was handwritten by someone for the grantor:

> This is my will, and the herein described land is to be conveyed to my son, Buford Dearing, at the death of Evia Lee Dearing.

The habendum clause warranted a fee simple title as to the grantee. The grantor, being unable to write, affixed his signature by his mark (x), which was witnessed by a Mrs. Horton.

Buford Dearing died intestate in August, 1968. In December, 1968, Evia Lee Dearing conveyed the property by warranty deed to appellees, Calvin and Vera Dearing.

We recognize that we give primary consideration to the intent of the grantor in interpreting written instruments. *Aluminum Co. of America* v. *Lipke,* 230 Ark. 72, 320 S.W. 2d 751 (1959), *Carter Oil Co.* v. *Weil,* 209 Ark. 653, 192 S.W. 2d 215 (1946), *Wallace* v. *Wallace,* 179 Ark. 30, 13 S.W. 2d 810 (1929). We also recognize that a preference is given to the written over the printed provisions of a deed when in conflict. *Lawless* v. *Caddo River Lumber Co.,* 145 Ark. 132, 223 S.W. 395 (1920).

However, in the instant case, we need not necessarily venture into the realm of the grantor's intent. The written provision in the deed purports to be a will. The writing obviously cannot function as a will since it is improperly witnessed. *Graves* v. *Bowles,* 193 Ark. 546, 101 S.W. 2d 176 (1937). The defective testamentary provision, which is ambiguous and not a clear limitation, should not be construed as part of the deed. The written provision is void since it is repugnant to the deed which clearly conveyed a fee simple title. The language is surplusage and merely a legally ineffective wish. Therefore, Evia Lee's fee simple title was unaltered by the written provision and consequently her conveyance to

Calvin and Vera Dearing by warranty deed properly conveyed to them a fee simple title.

Affirmed.

WILLIAM EARL FIELDS *v.* STATE OF ARKANSAS

CR 73-89 502 S.W. 2d 480

Opinion delivered November 26, 1973
[Rehearing denied January 14, 1974.]

Oscar Fendler, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Phillip M. Wilson,* Asst. Atty. Gen., for appellee.

CARLETON HARRIS, Chief Justice. William Earl Fields, appellant herein, age 25, stationed at the Air Base in Blytheville, was charged on three separate instances of knowingly and intentionally exposing his private parts to several minor children under the age of 16 years, and on trial was found guilty by a jury on all three charges, receiving a sentence of six months on one, one year on another, and one and one-half years on the third. The trial court directed that these sentences run consecutively and judgment was so entered. From that judgment, appellant

brings this appeal. For reversal, eleven points are asserted, which we proceed to discuss in the order listed.

I.

The trial court erred so many times that it was impossible for defendant-appellant Fields to obtain a fair and impartial trial.

II.

The trial court erred when it ruled that the case be tried in Division 2 of the Second Judicial District when it should have been tried in Division 1.

III.

The trial court erred when it limited defendant-appellant Fields and his counsel in the time in which he could file additional pleadings.

IV.

The trial court erred when it denied defendant-appellant Fields' Motion to Quash Venire or Jury Panel.

V.

The trial court erred when it failed to disqualify itself after testimony of defendant-appellant Fields and of his father.

VI.

The trial court erred when it failed to prohibit the testimony of a minor who had no understanding of the obligation of an oath.

VII.

The trial court erred when it failed to prohibit the testimony relating to prior alleged similar acts of defendant Fields in March 1972.

VIII.

The trial court erred when it allowed to remain in evidence State's Exhibit 1, the football jersey, because it was obtained under a faulty search warrant.

IX.

The trial court erred when it denied defendant's offered Instruction No. 3.

X.

The trial court erred when it denied the defendant's offers of evidence because this proffered evidence did relate to degree of punishment the jury might assess against Fields if it found him guilty.

XI.

The trial court erred when it allowed the State to discuss in the presence of the jury the refusal of defendant to sign printed form concerning his constitutional rights.

I.

This point is what is known as a "scatter-load", based on the other alleged errors, and need not be discussed separately.

II.

Appellant asserts that error was committed because his case was tried in Division 2 of the Second Judicial District when it should have been tried in Division 1. In support of this allegation, appellant relies upon Ark. Stat. Ann. § 22-322.12 (Supp. 1971).[1] This contention was

[1]"The Circuit Court Clerks of each of the courts in the several counties shall keep and maintain two (2) separate dockets, one (1) for criminal cases and one (1) for civil cases, and each case filed shall be entered in the proper docket. The Judge of the First Division shall preside over cases assigned to the Criminal Docket and the Judge of the Second and Third Divisions shall preside

first made before the court on the day before trial when a motion was filed to release appellant on bond, the objection to the trial during the civil term was made, and a continuance was requested until April 2, 1973, when the First Division Court would be trying criminal cases. It is argued that the record does not reflect that Judge Harrison, in Division 2, entered an order assigning these cases on the criminal docket of Division 1 to his division for trial. This contention refers to Ark. Stat. Ann. § 22-322.3 (Repl. 1962) which requires a written order by the court before the clerk could assign cases. That provision, however, was superseded[2] by § 22-322.12 which requires an "appropriate" order for the reassignment of a case from one docket to another. The standard for the assignment is that the arrangement is found to be best for the dispatch of business. When the pretrial hearing was held on January 2, no complaint was raised about the dates set for trial, nor was there any complaint about the court that would try the case. Therefore, it would not appear that there was any prejudice because of the clerical methods employed by the court in making the transfer; nor does there appear to be any abuse of discretion on the part of the court, for the record discloses that Division 1 conducted the preliminary handling of the case at a time when Judge Harrison was the presiding judge of the Criminal Division, and was thus actually in a better position to continue with the disposition of the case.[3] We pointed out in *Gardner* v. *State,* 252 Ark. 828, 481 S.W. 2d 342, that one of the main purposes of Act 505 of 1965 (creating the several divisions, designating one as "Criminal" and the other two as "Civil") was to permit the transfer of civil or criminal cases in order that litigation

over cases assigned to the Civil Docket. During each term of either division of the Circuit Court, the presiding Judge, by appropriate orders, may assign the first instance, or reassign, any case, Criminal or Civil, from one docket to the other as may be found best for the dispatch of business. The Judges of the three (3) Divisions will alternate in the holding of courts in the three (3) divisions so that each judge will hold approximately one-third (1/3) of the first division (criminal) terms in each county of the district, and two-thirds (2/3) of the second and third division (civil) terms in each, county of the district."

[2]The compiler also comments, "This section is deemed to be superseded by § 22-322.12 effective January 1, 1967."

[3]Judge Harrison had conducted the hearing when appellant was sent to the State Hospital for observation.

would be disposed of more expeditiously.[4] We fail to see how appellant suffered prejudice because of the transfer, and it might also be mentioned that Ark. Stat. Ann. § 22-322.7 (Repl. 1962) provides that it "shall not be reversible error that any case is tried in the division to which it has not been especially assigned***." Also, see *Blackstead Mercantile Co.* v. *Bond,* 104 Ark. 45, 148 S.W. 262.[5]

III.

Two of these charges were filed in the month of July, 1972, and the third was filed in September of that year. A pretrial conference was set for, and held, on January 2, 1973, at which time the case was set for trial for January 16, 1973. Although the length of time mentioned was more than adequate for the filing of motions, and although a pretrial conference was held on January 2, it was not until January 15, one day before the time set for trial, that counsel for appellant announced that he had other pleadings to file. The court told counsel that he would not entertain any pleadings the next morning,[6] and gave counsel until 11:00 A.M. to file whatever he desired to file, the time period amounting to about an hour. It is vigorously argued that this limitation was unreasonable, and requires a reversal.

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[4]Appellant says that his consent was necessary for he was not seeking a speedy trial. We do not agree. In *Standards Relating to a Speedy Trial* promulgated by the American Bar Association Project on Minimum Standards for Criminal Justice, Section 1.1 [Approved Draft, 1968], it is pointed out that the principles set out in the report deal primarily with the protection of the defendant, but that the public too is interested in a speedy trial. "From the point of view of the public, a speedy trial is necessary to preserve the means of proving the charge, to maximize the deterrent effect of prosecution and conviction, and to avoid, in some cases, an extended period of pretrial freedom by the defendant during which time he may flee, commit other crimes, or intimidate witnesses."

[5]This case came from the same Chickasawba District where two divisions were then in existence.

[6]From the record:

"This Court is not going to entertain any pleadings in the morning, Mr. Fendler. If you have any, you have to get them in and get them filed before noon today. You have had since July '72 to file your pleadings, and to get ready for trial. You announced ready for trial on the 2nd of January. You then told the Court you wanted to plead the defendant guilty because he was guilty. You then had a conference and came back and told the Court that you didn't want to plead him guilty, and then I was informed again Friday

Of course, under some circumstances, the period of time allotted would quickly be considered unreasonable, but as previously pointed out, adequate time had already been afforded for the filing of any pleadings. Within the hour, counsel returned and filed a Motion to Quash the Jury Panel. In oral argument, counsel candidly admitted that at the time he said that he would file more pleadings, he had no particular pleading in mind, but simply intended to study the matter further and determine what pleadings he did care to file. He seemed rather surprised that he was not permitted to file additional pleadings up until the time the trial started; however, we can take judicial notice that many trial courts, as a matter of precluding continuances after witnesses have been notified to appear, and as a matter of preventing disruption of the orderly process, have rules limiting the time that additional motions may be filed before the date of trial. This is not a matter relating to a sudden occurrence of some unexpected event that made necessary the filing of an additional motion. We find no merit in this contention.

IV.

This was the motion that was filed the day before the trial and it asserts that the "Jury Panel or Venire does not have any colored persons on it.[7] It is a well-known fact that between 25% to 30% of the registered voters of the Chickasawba District of Mississippi County, Arkansas, are colored. This failure to have colored persons on the venire is in violation of the constitutional rights of this defendant."

In the first place, let it be pointed out that the United States Supreme Court has never said that the failure to have members of the black race on a particular panel,

or Saturday that you had informed the prosecuting attorney again that he was guilty and you were going to plead him guilty this morning, and then this morning you appear with this motion, and say he is not guilty, and you want a trial, so the matter will be for trial in the morning."

[7] In *Peters* v. *Kiff*, 407 U.S. 493, 33 L. Ed. 2d 83, the Supreme Court pointed out that the right to seek relief because of discrimination against members of a particular race in the selection of juries is not limited to a criminal defendant of that particular race, but may be exercised by a defendant of any race where jury members of any other race have been arbitrarily excluded.

is discriminatory; rather their holdings have been based on systematic exclusion of members of that race from the jury panel.

In *Apodaca* v. *Oregon,* 406 U.S. 404, 32 L. Ed. 2d 184, the court rejected an argument that every distinct voice in the community has a right to be represented on every jury, stating:

> "All that the Constitution forbids, however, is systematic exclusion of identifiable segments of the community from jury panels and from the juries ultimately drawn from those panels; a defendant may not, for example, challenge the makeup of a jury merely because no members of his race are on the jury, but must prove that his race has been systematically excluded. [Citing cases]."

In *Swain* v. *Alabama,* 380 U.S. 202, 13 L. Ed. 2d 759, the court said:

> "Although a Negro defendant is not entitled to a jury containing members of his race, a State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause."

In the case now before us, there is no evidence of systematic discrimination and remarks of counsel clearly indicate that his contention is that there were no black persons on the panel *at the time of this trial.* Counsel offered the testimony of the Deputy Circuit Court Clerk to the effect that there was only one Negro on the panel for the term of court beginning the first of January, 1973, and that person had been excused for the term. However, the deputy clerk testified that members of the Negro race had served as jurors in 1972 and, to her knowledge, for at least six to eight prior years. In *Peters* v. *Kiff, supra,* the Supreme Court held that since discrimination in jury selection will not be presumed, a defendant carries the burden of proving such discrimination, but once a *prima facie* case, or strong inference of race discrimination in jury selection has been presented, the burden shifts

to the state to overcome the presumption. Appellant offered only the evidence mentioned; he was not refused the right to offer additional testimony, and the evidence offered certainly was not sufficient to establish a *prima facie* case, or raise a presumption of discrimination.

V.

Appellant and his father testified in chambers that they believed Judge Harrison was biased and should disqualify himself in the case. Appellant, in reply to a question from his counsel, stated that he was present when the judge "turned down your motion for continuance, he stated that—when he turned down your motion to lower the bond to $5,000—he said 'You were out on bond before and you committed two other criminal acts *** to me that in his eyes I am already guilty.' "

Appellant's father testified:

> "On two occasions when I talked to the Judge in front of you [Mr. Fendler] and Mr. Partlow and the two clerks, I asked if anything could be done at all that would get him medical treatment rather than be put in the pen, and he stated that when he was in the pen, he could get medical help. On two occasions he made this statement, and the statement he made this morning, so far as he was concerned, my son is already guilty."

Let it first be pointed out that, according to the record, on October 9, 1972, formal arraignment was waived and a plea of not guilty by reason of insanity had been entered; likewise, a motion had been made to commit appellant to the State Hospital for thirty days observation and examination, which had been granted, and Judge Harrison had signed the order of commitment. In addition, at the pretrial hearing on January 2, counsel for appellant had acquainted the court with his efforts to get appellant into a mental hospital, stating that his client needed psychiatric treatment, having a nervous disorder related to sex. So—the remark of the court certainly did not indicate any prejudice. Be that as it may, it must be remembered that all remarks herein mentioned were

made prior to the commencement of the trial, and outside the hearing of any members of the jury panel. In *Walker* v. *State,* 241 Ark. 300, 408 S.W. 2d 905, the trial court made remarks considerably stronger than those in the present instance, but we held no showing of disqualifying prejudice had been shown, pointing out that the fact that a trial judge may have a personal opinion as to the merits of the case does not make the trial court so biased and prejudiced as to require his disqualification, and commenting that the "mischief occurs when the trial court communicates to the jury by word or deed a personal bias, prejudice or animus toward the accused, causing the accused to be denied a fair and impartial trial." It is mentioned that statements by a trial court, in no way communicated to the trial jury, could not constitute bias or prejudice requiring disqualification.[8] We find no merit in this contention.

VI.

Wayne Porter, a ten-year-old boy, testified as to the charge occurring on July 21, being in the company of Donna Pipkin, age 15, Lisa Bigham, age 8, and Vickie Carner, age 14. When asked if he understood that he was under oath, the boy replied, "I didn't know that until you just now told me." He stated that he realized that he was supposed to tell the truth but when first asked if he knew what would happen if he didn't tell the truth, he replied, "Well, not really." He said that he knew that it would be bad if he didn't tell the truth and stated in reply to what would happen if an untruth were told, "I imagine I would get punished for it." At the suggestion of counsel for appellant through a leading question, Wayne testified that he meant he would get a spanking from his Mother and Dad. He stated that he did not attend Sunday School and Church. Over objections, the court permitted Wayne to testify. The next morning, in chambers, before the trial resumed, the court asked counsel for appellant if he desired to renew his motion as to this witness and

[8]The United States District Court for the Eastern District of Arkansas, Pine Bluff Division, concurred in this view, stating:

"But, as pointed out by the Supreme Court, latent, subjective prejudice of that sort is not enough to require a judge to disqualify himself in a jury case." See *Walker* v. *Bishop,* 295 F. Supp. 767, 773.

upon being told that counsel still desired to so move, the record reveals the following:

> "The Court is going to strike the testimony of the witness, Wayne Porter, giving to this defendant something which the Court really doesn't feel he is entitled to, but in order to ensure to the defendant an absolutely and completely fair trial in every respect, and so that no question can be raised whatsoever about the competency of any testimony, and in view of the fact that this request has been made, it will be honored and the jury will be admonished to disregard it.
>
> "MR. FENDLER: At this time on behalf of the defendant, Judge Harrison, I am moving the Court to declare a mistrial on these cases because the testimony was given over my objection as defense counsel. My motion at that time should have been granted and at this time is prejudicial to my case and will cause a very bad effect on the jury. I am making a motion for mistrial at this time. In the alternative, if you don't grant my motion for mistrial, then I would request the strongest admonition to the jury; you will very strongly tell them to get it out of your mind once you have heard it, but since Mr. Fendler asked it be denied yesterday and the motion was overruled; and no reference to be made to it in the arguments.
>
> "COURT: In view of the rulings of the Court, you were not entitled to it initially. Of course, the Court is of the same feeling you are not entitled to it now, but the Court, as I stated, in order to give to you and this defendant every avenue that might be available to present for the defendant in an effort to see and ensure an absolutely fair trial, this is the only reason the Court brings this up at this time, and if this is the attitude of the defendant, and he doesn't care to have this granted except and on condition a mistrial be granted, that will be denied, and we will continue with the trial.
>
> "MR. FENDLER: Note my exceptions.

"COURT: The ruling will remain as initially made."

Taking the matter from the outset, the actual point for reversal is that Wayne "had no understanding of the obligation of an oath", and appellant principally relies upon the cases of *Crosby* v. *State,* 93 Ark. 156, 124 S.W. 781, and *Hudson* v. *State,* 207 Ark. 18, 179 S.W. 2d 165. In the first, this court held, that in understanding the nature of an oath, the child must be under the immediate sense of his responsibility to God with a conscientious sense of the wickedness of falsehood. In the last cited opinion, Hudson was convicted of murdering his wife. The daughter of the deceased, an eight-year-old girl named Pauline, testified and it was contended that this little girl was not competent to testify. The opinion reveals the following facts:

> "Counsel for appellant cross-examined Pauline in respect of qualification and asked : 'Did you hold up your hand today when they called the names of all those folks back in the courtroom?' (2) 'Do you know what an oath is?' (3) 'When (the Circuit Clerk) asked you if you agreed to tell the truth, the whole truth, and nothing but the truth, did you know what he was asking?' To each question a negative answer was given. The little girl asserted that she knew the difference between right and wrong, but did not know what happened to one who did wrong; but she knew about God, and if she did wrong she knew He would do something about it. She later said: 'He will kill you.' She knew what the truth was, but when asked to define it replied, 'I don't know.' " [9]

[9] "(5) Amplifying this line of examination, the following questions were asked and answers given: 'Q. What do you mean by that? A. Tell the truth. Q. Tell the truth? A. Yes, sir. Q. And if you *didn't* tell the truth, what would happen to you? If you are *not* telling *me* the truth about what I am asking you, what is going to happen to you? A. I don't know . . . Q. As far as you know, there wouldn't anything happen to you if you didn't tell (those men over there) the truth. Is that right? A. Yes, sir.'

(6) Question: 'Pauline, you say you know the difference between right and wrong? A. Yes, sir. Q. You have been taught that at home, and in Sunday School? A. Yes, sir. Q. Is it right or wrong to tell a story? A. It's right. Q. It is right? A. It's wrong. Q. What happens to you if you tell a story? A. The bad man will get you. Q. Where did you learn that? A. Nowhere. Q. Now, do you know what swearing is? A. No, sir. Q. Would you swear something is

The court then held her testimony admissible "having had her attention called to a Supreme Being who rewards or punishes in a manner she thinks she understands [and] assents to the proposition that the testimony given will not be false." We then commented:

> "The distinction is one of *definition,* rather than understanding. It is the exceptional person who, when called to testify, *knows* what punishment will result from perjury; nor is Pauline to be held incompetent because she did not know what the Circuit Clerk meant when he asked her if she agreed 'to tell the truth, the whole truth, and nothing but the truth.' That she did not hold up a hand when 'they called the names of all those folks back in the courtroom' is not of controlling importance. She *was* interrogated by the Judge, who impressed upon her full solemnity of the situation in so far as her degree of maturity permitted."

Over the years, these holdings have been somewhat modified and the *Crosby* case is mentioned in our last case on this subject, *Allen* v. *State,* 253 Ark. 732, 488 S.W. 2d 712. There, Allen was charged with the rape of an eight-year-old girl, convicted, and sentenced to life imprisonment. On appeal, *inter alia,* appellant contended that the trial court abused its discretion in permitting this little girl to testify. On this point, this court said:

> "As to the requirement of understanding the nature and effect of the oath, we said in *Crosby* v. *State,* 93 Ark. 156, 124 S.W. 781, that the child must be under an immediate sense of his responsibility to God with a conscientious sense of the wickedness of falsehood. But this court has found no abuse of discretion in the trial court's determination of competency where the child realizes that he is obliged to tell the truth and that he will be punished for not doing so, i.e., that he will be punished for not telling the truth because telling falsehoods results in punishment. In

so that is not so? A. No, sir. Q. If you were to sit here today in that chair and tell these people a story, or something . . . that wasn't true, what would happen to you? A. The bad man would get me. Q. Would that be right, or wrong, for you to do that? A. It would be wrong.' "

Crosby, the witness did not know what the consequences of his failure to testify truthfully would be and was not asked anything from which it could be inferred that he had a sufficient sense of the danger and wickedness of false swearing or that he comprehended and appreciated the sanctity and obligation of an oath. In *DeVoe* v. *State,* 193 Ark. 3, 97 S.W. 2d 75, we had this to say regarding an eight-year-old prosecutrix in a rape case:

> 'As to her competency, it may be said, first, that her competency was peculiarly within the trial court's discretion, and the trial court's ruling on the question will not be disturbed unless there was a gross abuse of discretion ***. The witness in the present case was eight years old, appeared to be intelligent, to understand what was meant by an oath, and she testified intelligently. We are of the opinion that the trial court did not abuse its discretion in permitting the witness to testify.'

"We cannot say that there was an abuse of the judge's discretion in this case. Our view in this regard is bolstered by the apparent intelligence of the witness disclosed by her testimony and the responsiveness of her answers to the questions propounded to her."

Actually, in *Allen* the record does not reveal that anything at all was said about an oath, and in qualifying the witness, *no questions* were asked relative to whether the prosecuting witness understood the obligation of an oath. In the case presently before us, Wayne did testify that he realized that he should tell the truth and that he would likely be punished for not doing so, and he also stated that the taking of the oath had been explained to him. No such evidence as this last appears in *Allen.* Further, questioning indicated normal intelligence for one that age. He mentioned his friends, how far away they lived from his home, what the children were doing at the time of the occurrence testified about, and he gave a clear description of what the party who exposed himself was doing when he observed him. His identification of appel-

lant was weak, and it appeared that he was reluctant to disagree with counsel on cross-examination. Yet, a reading of the record very definitely leaves the impression that the little boy was endeavoring to tell the truth.

Apparently, the court subsequently, as a matter of avoiding any possible error, made the offer heretofore set out to strike the testimony. As shown by the record, counsel for appellant moved for a mistrial, with an alternative request, that if this be denied, that the "strongest admonition" be given to the jury. It would appear that the court did not hear the alternative for the judge then said that if counsel did not care to have the motion to strike granted "except and on condition a mis-trial be granted, that will be denied and we will continue with the trial." Counsel did not further pursue the matter other than to say "Note my exceptions", and did not call to the attention of the court that he had made an alternate request, and it certainly appears, if he were insistent on the alternative that this would have been done. At any rate, the court consistently stated that it considered the little boy competent, and we are of the view that, certainly under our most recent case, no abuse of discretion was shown.

It might be well to also point out that nine other children testified to the acts committed by appellant; that three others, including a fourteen and fifteen-year-old girl, testified to this particular act, and the testimony was only cumulative. Without any hesitation, under the circumstances herein, we would say that, if error was committed, it could not have been prejudicial. In other words, in viewing all of the testimony herein and considering its overwhelming nature, we think unquestionably that the removal of Wayne's testimony from the case would not have affected the jury verdict.

VII.

This alleged error refers to the testimony of Sandra Mitchell, 13 years of age, and Teresa Shoemaker,[10] 13

[10]Sandra was one of those to whom Fields allegedly exposed himself on July 17 and Teresa was also present on that occasion but did not view the act, Teresa, upon observing the car, hollering "Run".

years of age, both of these little girls testifying that Fields deliberately exposed himself to them in March, 1972. This was not one of the offenses charged, but was offered by the state as a matter of showing the intent of appellant. The statute itself, Ark. Stat. Ann. § 41-1127 (Repl. 1964), reads:

> "It shall be unlawful for any person with lascivious intent to knowingly and intentionally expose his or her private parts or genital organs to any other person, male or female, under the age of sixteen (16) years."

It is thus apparent that intent is an integral part of the offense, and the evidence mentioned was offered for this purpose. These two children testified to practically the same acts on the part of appellant as had been allegedly committed before the other children, and we think the evidence was admissible. In *Ward* v. *State,* 236 Ark. 878, 370 S.W. 2d 425, appellant was charged with fondling a male child under the age of 14 years in violation of § 41-1128. There, evidence of a similar offense committed several years before was offered by the state, and on appeal, was approved by this court. We pointed out that a different rule, as to evidence reflecting intent, applies to unnatural sex cases and quoted from an earlier case. See *Alford* v. *State,* 223 Ark. 330, 266 S.W. 2d 804, and cases cited therein. The alleged offense, here offered in testimony, had only occurred a few months before the instances of similar conduct with which appellant was charged, and we think unquestionably, under our cases, that this was competent testimony. The court's instruction 16 told the jury that evidence of the similar offense was admitted solely for the purpose of showing appellant's intent, motive, habits, and practices, and could only be considered for that purpose.

VIII.

Sandra Mitchell, Teresa Shoemaker and Sherry Richardson all stated that the person who exposed himself was wearing a maroon and white football jersey; the first two said that it bore the number 67, and the last men-

tioned that it bore the number 78, though she said that she was not sure about the number.[11]

Officer Robbie Cox, Chief of Police at Blytheville, obtained a search warrant, the affidavit for the warrant stating that Cox had reason to believe that at Barracks 612, No. 3, Blytheville Air Force Base, there was concealed one maroon football jersey with the numerals 67 which Fields was wearing at the time of the alleged incident. The facts tending to establish the grounds for issuance were listed as statements from Teresa Shoemaker and Sandra Mitchell, who had been interviewed separately. Appellant objected to the exhibit, pointing out that the affidavit listed a maroon football jersey, and the officer came back with a white football jersey. The jersey, offered in evidence, is white with a maroon number 67 on both front and back. It was pointed out by the court that when this jersey was offered in evidence, no objection was offered until after the state had finished its examination and the witness had been taken on cross-examination. Aside from that, however, we find no merit in the contention of error. Cox testified that the description of the jersey as maroon, was either his error or that of a typist because he did receive the information from the little girls that the jersey was maroon and white, and with the numerals 67. Appellant cites the old case of *State* v. *Nejin,* 74 So. 103 (1917), where the Louisiana Superior Court said that "Where the purpose of the search is to find specific property, it should be so particularly described as to preclude the possibility of seizing any other." This same language is used in *Lea* v. *State,* 181 S.W. 2d 351 (1944) and *Cagle* v. *State,* 180 S.W. 2d 928 (1944). *Nejin,* however, also points out that the language "particularly describing the place to be searched and the persons or things to be seized" is to be reasonably interpreted and does not necessarily mean a minute and detailed description of the property to be seized. In the Tennessee case of *Poole* v. *State,* 467 S.W. 2d 826 (1971), the defendants insisted that the property for which a search had been made, was not adequately described with particularity, the description being "one electric heater, one orange colored ice jug,

[11]On another similar occasion, Vicki Carner obtained the license number of the automobile.

16 gauge shotgun, shells, 22 shells and so forth." In rejecting this contention, the Court of Criminal Appeals of Tennessee said:

> "We think, as did the trial judge, that these items were about as particularly described as such commodities can be. Such merchandise is difficult to describe. It may be said that the heater should be described as a 'G.E.' or a 'Westinghouse', it could also be argued there are thousands of G.E. heaters and thousands of Westinghouse heaters. Shotgun shells might be described as Remington, Western or Winchester or by name of the manufacturers, still it could be argued there are untold numbers of Winchester, Remington or 'Peters' shotgun shells 12's 16's and 20's."

A somewhat comparable situation existed in the Arkansas case of *Easley* v. *State,* 249 Ark. 405, 459 S.W. 2d 410. There it was contended that the description of the property to be searched was insufficient, the search warrant stating that the property sought was concealed in "the house occupied by Bud Easley in or near Hiwasse in the County of Benton." In rejecting the contention, this court said:

> "A search warrant is directed to the officer who is to make the search and Easley does not contend that the officers searched the wrong house under the warrant. Common sense dictates that the constitutional requirement that a search warrant contain a particular description of the property to be searched, is designed and intended to aid the officers in locating the right property to be searched, as well as to protect innocent property owners from unreasonable searches and seizures and prevent officers from searching the *wrong* property."

Here, the testimony reflects that the *information given* was correct, but that a mistake was made in the affidavit. After all, what was the most important part of the description relative to identifying the property? Unquestionably, it was the number 67. This was a *particular,*

specific description, and we think, in accord with the authority quoted, would have prevented the officers from taking the wrong property. Of course, by necessity, a football jersey bearing numerals, would have to be of two colors, in order that the numbers could be identified. We conclude that the contention is without merit.

IX.

Appellant's Offered Instruction No. 3 was AMI Civil Instruction 102, which provides,

> "In considering the evidence in this case you are not required to set aside your common knowledge but you have a right to consider all of the evidence in the light of your own experiences and observations in the affairs of life."[12]

In considering this point, it might be stated at the outset that we are puzzled as to the purpose in offering this instruction. What would be the experiences and observations of members of the jury as related to the evidence offered in this case? What would be the "common knowledge" referred to? At any rate, it certainly appears that the requested instruction is abstract and we cannot see where it is at all germane to the factual issues being tried. It is not error to refuse to give an abstract instruction. *Stevens* v. *State,* 246 Ark. 1200, 441 S.W. 2d 451. For that matter, the instruction, at most, could only have been cautionary, and we have held that the giving or refusing of a cautionary instruction lies within the sound discretion of the trial court. *Baxter* v. *State,* 227 Ark. 215, 298 S.W. 2d 47.

X.

The evidence referred to under this point was competent, says appellant, because it related to the degree of punishment the jury might assess against Fields if it found him guilty. It will be recalled that Fields first entered a plea of not guilty by reason of insanity, but subsequently

[12]The word "of" does not follow "all" in AMI Instruction 102, and the requested instruction transposed the words "observations" and "experiences."

changed that plea to "not guilty". There is a great deal of difference in the proof that would be relevant under these two pleas. Of course, under the first plea, there is an admission of guilt of the act charged, but one contends that because of a defective mental condition and the inability to determine right from wrong, such defendant is not responsible for his act. Under this plea, evidence of a psychiatrist would, of course, be most pertinent, and evidence of irrational acts would be admissible, but the plea of "not guilty" simply means that a defendant is saying, "I didn't do it!" Appellant offered the evidence of Dr. Joe E. Hutchison, Psychiatrist at the Arkansas State Hospital in Little Rock, Dr. Hutchison being one of the staff who observed appellant during his thirty-day stay in the hospital for observation. The doctor explained the tests that are given, stated that the function of the staff was to determine "whether there is enough ego or personality disintegration which would disable the accused, make them irresponsible or mentally incompetent", and testified that Fields probably was not mentally ill to the degree of legal irresponsibility. Counsel then asked if the doctor thought Fields was amenable to therapy and the court suggested that further hearing be conducted out of the presence of the jury. In chambers, Dr. Hutchison said that, speaking personally, he felt that Fields would be one of the most favorable candidates for therapy. He described this therapy as "Psychotherapy. Group psychotherapy treatment, and also they call it behavorial modification, which specifically would be deconditioning. *** If he had the right type of therapy, in my personal opinion his prognosis would be good." The doctor said that Fields had a superior I.Q.; that is, between 130 and 140. Finally, counsel asked Dr. Hutchison if "in your observation as a psychiatrist for years, and particularly in the State Hospital, what do you think is going to happen to him if he is sent to the penitentiary or given any confinement?" The court, after objection, held this question, as well as the doctor's other testimony, to be incompetent because no defense of insanity had been interposed, and stated that further questions along that line would not be permitted. Counsel then made his offer of what the witness would state as follows:

"Judge, if he were allowed to answer, this witness would say that sending this man to the penitentiary would destroy him; that it would be the worst possible thing that could happen, having him confined. This man needs to be treated as an outpatient and not even as an inpatient in an institution, and that if he were treated as an outpatient, with the proper type of psychiatrists handling this that knew these problems, that very likely, most likely, there will be a complete recovery."

Counsel then referred to lay witnesses, persons who had known appellant for a number of years, stating that these persons would all testify that in their opinion, even a short stay in the penitentiary would "destroy" appellant. It was stipulated by the state that those particular people would give the answer stated.

The court acted properly in refusing appellant's request to present this evidence. The effect upon an individual of being sent to the penitentiary has nothing to do with one's guilt or innocence on the charge being tried. Unfortunately, it may well be that many young people who are sent to the penitentiary are not "helped", i.e., made better citizens by virtue of having been there. We daresay that this same contention could be raised by divers persons who have violated the law, but, in determining guilt or innocence, such testimony is entirely and completely irrelevant.

Of course, evidence of good reputation in the community is admissible, and the trial court not only permitted this type of evidence, but also permitted witnesses to mention specific acts of good conduct. For instance, Lt. George Bolton, III, located at the Blytheville Air Force Base and working in Personnel, testified that the records did not reflect any type of military disciplinary action taken against Fields during his service and the witness was permitted to read a portion of the last Airman Proficiency Report on Fields,[13] and also commented from

[13]From the report:

"Staff Sgt. Fields is a personable and conscientious individual. He strives for perfection in everything. He is dependable, self-confident, and is con-

the report that "Staff Sgt. Fields was selected as pride man of the month for June, 1972 in the A.G.E. Branch." The witness further read under "Educational and Training Accomplishments" from a report dated between December 3, 1970 and December 2, 1971, "Staff Sgt. Fields is an outstanding Airman. He has demonstrated his willingness to get ahead by having enrolled in off-base college courses during his off duty hours."

Col. William C. Brewer, Deputy Commander for Maintenance for the 97th Bomb Wing at the Air Force Base, testified in a similar vein.

Numerous other witnesses, some of whom had known appellant for many years, testified as to his generally good reputation, including his former Scoutmaster, a former District Executive of the Boy Scouts of America, and one of his school teachers. His father, Chief Switchman for Southwestern Bell Telephone Company in that area, testified in detail about the boy's civic activities, the numerous honors that he had been awarded, and various other similar favorable facts. A hearing was then conducted out of chambers as to evidence appellant desired to offer through the father that the latter had contacted a psychologist and psychiatrist in Memphis, and made arrangements for appellant to have psychiatric treatment. As previously stated, this last was inadmissible evidence. Appellant also offered testimony, which was rejected by the court, of the parents of one of the little girls, that they did not desire to prosecute, considering the defendant to be sick.

Appellant vigorously argues that testimony of the various people relating to the effect of sending appellant to the penitentiary was admissible, but we cannot agree. Of course, had appellant entered a plea of guilty, extraneous factors could have been presented as a matter of aiding the court in determining the proper sentence. A sentencing court is entitled to receive reports of a probation officer, and any other evidence that might be

tinually striving to improve his performance in his job knowledge. He has a deep sense of responsibility and is loyal to both his subordinates and superiors alike."

helpful in this respect, but, in determining guilt or innocence, this evidence is not proper for a jury.[14]

XI.

Officer Mike Richardson of the Blytheville Police Department was asked, following the arrest of Fields, if the latter was advised of his constitutional rights. The witness answered in the affirmative and said that any person arrested is given a form that explains those rights.[15] He testified that Fields was given such a form and then started to state what the form reflected when counsel for appellant objected, saying, "Judge, I would object to this, whatever the form is, to show he signed it, would be the best evidence; not what this witness says." Counsel then demanded that the signed form be shown. The prosecuting attorney thereupon stated that the defendant had refused to sign the form and counsel objected. In chambers, it was contended that appellant had been prejudiced by the statement made in the presence of the jury that the form had not been signed. We do not agree. No confession was given by appellant, nor was any evidence offered that he had admitted any charge or circumstance; in fact, there was no testimony as to anything that appellant might have said. It is difficult to say how the failure to sign the rights form could have been prejudicial. The refusal to sign frequently occurs, and it certainly is not any sort of admission of guilt; at most, it could only be argued that failure to sign demonstrates that one has not been told his rights before making a statement—and since no statement was here involved, there could have been no prejudice. In oral argument,

[14]As pointed out in the *American Bar Association Minimum Standards for Criminal Justice as Relating to Sentencing Alternatives and Procedures,* Section 1.1 (b), p. 46:

"It is also clear that sentencing by the jury is inconsistent with the principle that the sentencing decision should be based upon complete information about the defendant himself as well as his offense. *Much of the information most helpful at the sentencing stage is properly inadmissible on the question of guilt,* and to admit it only on the question of sentence is highly prejudicial if the jury is to consider both questions at the same time. Separation of the questions, on the other hand, involves separate trials, a time consuming and costly venture that presents little gain in compensation." [Our emphasis].

[15]*Miranda v. Arizona,* 384 U.S. 436 (1966).

counsel stated that it would cause the jury to think that appellant was "non-cooperative" with the officers, but we fail to see the significance. It might be said that, in chambers, the prosecuting attorney mentioned that he thought the refusal to deny the charge was an admission against interest and that he intended to argue that to the jury. If the state had made such an argument to the jury, prejudicial error would have resulted, but this was not permitted and was not done. The incident did not constitute error. Of course, counsel brought the matter up himself in asking the officer to present a signed form. More than that, however, the court instructed the jury to disregard the questions relative to advising the defendant as "to his rights and the form that was presented to the defendant." Counsel expressed his appreciation to the court for this admonishment and the matter thus rested.

Appellant was diligently represented and it appears that every possible defense to the charge was presented on trial. In this opinion, we have discussed these contentions at length and found them to be without merit. The matter mentioned in Point X, and which is so fervently argued by counsel, is one that properly addresses itself to the Executive Branch of Government.

Finding no reversible error, the judgment is affirmed.

It is so ordered.

BYRD, J., dissents.

FOGLEMAN, J., not participating.

WALTER COMSTOCK ET UX *v.* ALCYE SMITH

73-148 501 S.W. 2d 617

Opinion delivered November 26, 1973

Joe Purcell, for appellants.

Wright, Lindsey & Jennings, for appellee.

GEORGE ROSE SMITH, Justice. In 1969 Grace Buffington sold a house and lot in the city of Benton to the appellants, Mr. and Mrs. Walter Comstock. The pur-

chase price was to be paid in monthly installments. Mrs. Buffington died testate in 1971, leaving her interest in the property to her sister, the appellee Alcye Smith. Mrs. Smith brought this suit to cancel the contract. The chancellor found the agreement of sale to be void, as a violation of the rule against perpetuities. Whether that finding is correct is the principal issue here.

The facts are undisputed. For 25 months before the sale the Comstocks had been occupying the property as tenants, at a rental of $85 a month. The contract of sale recited down payment of $2,125, but no money was actually paid, the recited figure being merely the total amount of rent previously paid by the Comstocks. The true sales price was $18,000, payable in monthly installments of $85 each until the purchase price, together with interest at the rate of 7½ per cent per annum, was paid in full.

The original complaint sought cancellation of the contract on the grounds that the seller was mentally incompetent and that the agreement was unfair and impossible of performance. When the case was tried upon that theory the chancellor sustained the defendants' demurrer to the evidence at the close of the plaintiff's proof. Thereafter, and apparently before a decree was entered, the court permitted the plaintiff to amend her complaint to assert a violation of the rule against perpetuities. We cannot say that the court abused its discretion in allowing the complaint to be amended, especially as no prejudice to the defendants resulted from the slight delay that occurred. Ark. Stat. Ann. § 27-1160 (Repl. 1962); *Harris* v. *Starr,* 226 Ark. 127, 288 S.W. 2d 332 (1956).

The chancellor was right in concluding, after a second hearing, that the contract violates the rule against perpetuities. Under that rule an interest must vest within a period measured by a life or lives in being plus 21 years. Gray, The Rule Against Perpetuities, § 201 (3d ed., 1915). In the case at hand the monthly payment of $85 was less than the interest upon $18,000, at 7½ per cent per annum. There was no requirement that the prin-

cipal debt be paid at any specified time. Consequently the purchasers and their successors in interest might have made payments for scores or even hundreds of years without violating their contract or acquiring a right to a conveyance of the property. Thus the alienability of the title might be fettered for a period far beyond that allowed by the rule against perpetuities. While the rule does not apply to executory contracts not affecting an interest in property, it does apply to a contract which creates a property right that can be enforced by specific performance. Gray, *supra,* § 330; Restatement of Contracts, §§ 393 and 401 (1944); *First Nat. Bk. & Tr. Co. of Lexington* v. *Purcell,* Ky., 244 S.W. 2d 458 (1951); *Kershner* v. *Hurlburt,* Mo.,. 277 S.W. 2d 619 (1955); *First Huntington Nat. Bk.* v. *Gideon-Broh Realty Co.,* 139 W. Va. 130, 79 S.E. 2d 675 (1953). The contract in the case at bar falls within that category.

The appellants, in arguing that the contract is valid, rely upon a paragraph in the agreement which provides that the purchasers cannot sell, transfer, or assign the contract, or lease the land, without the consent of the seller, and that if such a sale, transfer, assignment, or lease is made contrary to the contract the seller may declare the entire balance of the purchase price immediately due or may rescind the contract. The appellants contend that since they must have the seller's consent to transfer the property by deed, by will, or by intestacy, the contract must be performed if at all within their own lifetimes.

That argument is unsound. The interest *must* vest within the time allowed by the rule. If there is any possibility that the contingent event may happen beyond the limits of the rule the transaction is void. Gray, *supra,* § 214; *Moody* v. *Walker,* 3 Ark. 147 (1840). In *Tucker* v. *Pulaski Fed. S. & L. Assn.,* 252 Ark. 849, 481 S.W. 2d 725 (1972), we held that a court of chancery will not permit an acceleration clause to be exercised in a manner that is unfair to the debtor. Consequently, as that opinion recognizes, there could be many situations in which the appellants or their successors might validly transfer their interest in the contract without the consent

of the seller or her successors. Thus there is unquestionably a possibility that the life of the agreement might extend beyond the time allowed by the rule.

The chancellor awarded the appellants $775.75 to reimburse them for taxes, insurance, and an improvement to the land. He refused, however, to allow them to recover their monthly payments, since the rental value of the land offset the amount of those payments. The court was right. The appellant, under a void contract, occupied the property as their residence. In the circumstances they have no standing in a court of equity to obtain the return of their payments without any deduction for the benefits they received. Compare *Penney* v. *Vessells,* 221 Ark. 389, 253 S.W. 2d 968 (1952); *Dodd* v. *Mills,* 219 Ark. 91, 240 S.W. 2d 25 (1951); Restatement of Restitution, § 157 (1937). One who demands equitable relief must in turn do equity.

Affirmed.

STATE OF ARKANSAS *v.* JOSEPH H. WESTON

CR 73-122 501 S.W. 2d 622

Opinion delivered November 26, 1973
[Rehearing denied December 24, 1973.]

Jim Guy Tucker, Atty. Gen. by: *O. H. Hargraves,* Deputy Atty. Gen., for appellant.

Ted Boswell and *Laser, Sharp, Haley, Young & Boswell,* for appellee.

GEORGE ROSE SMITH, Justice. The appellee was charged by information with the offense of criminal libel. The information was amplified by a bill of particulars filed by the State at the defendant's request. The trial court sustained a demurrer to the information and dismissed the charges, on the ground that the statute defining the offense is so vague as to be unconstitutional. Ark. Stat. Ann. § 41-2401 (Repl. 1964). The constitutionality of the statute on its face, as it applies to this information and bill of particulars, is the issue now before us.

The information charged that Weston, unlawfully and maliciously, in writing in a publication identified as the Sharp Citizen, blackened the memory of Larson Dickey, Sr., deceased, and defamed Larson Dickey, Jr., a living person, by the publication of writings tending to impeach their honesty, integrity, veracity, or reputation and thereby expose them to public hatred, contempt, and-or ridicule. In response to the motion for a bill of particulars the State filed a copy of the article, apparently an editorial, which gave rise to the charges.

That article, using the "editorial we," states that Weston has received letters indicating that "Junior" Dickey and Les Anderson, the county judge of Sharp County, are organizing the citizens of Cave City "to place another advertisement in the newspapers all around Cave City about how the Sharp Citizen ought to be run out of business." The article states that the two men will have to find a scribe to handle the paper work, because they cannot read or write. The article goes on to say: "Then, too, they will have to consider the cost of all those ads. The price would be greater than Junior Dickey

could lay his hands on, even if he ran his still (the one he inherited from his father) every night for a month." The article contains several other paragraphs, but we have given what we regard as the pertinent assertions.

The ownership or possession of an illicit still is a felony, punishable by confinement for not less than one year nor more than three years. Ark. Stat. Ann. §§ 48-936.1 and 48-936.2 (Supp. 1971 and Repl. 1964).

The statute now in question, which is said to be unconstitutionally vague, was adopted as part of the Revised Statutes of 1838 and reads as follows:

> A libel is a malicious defamation, expressed either by writing, printing, or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, veracity, virtue or reputation, or to publish the natural defects, of one who is living, and thereby expose him to public hatred, contempt and ridicule. [Section 41-2401.]

Weston does not argue, and the Supreme Court of the United States has not held, that the guaranties of the First Amendment preclude the State from declaring the publication of a libel to be a criminal offense. Rather to the contrary, both the appellant and the appellee quote from and rely upon Professor Leflar's article, Legal Liability for the Exercise of Free Speech, 10 Ark. L. Rev. 155 (1956), where the need for restrictions upon completely unfettered speech is recognized:

> No responsible citizen can intelligently argue that the individual's right to free speech could be absolute, in an ordered society made up of human beings . . . No society yet organized by mankind has been willing to permit the completely free and untrammeled communication of every possible idea that might emerge through the lips or pens of those who seek for one reason or another to affect their fellows by the use of words.
>
> * * * *

> We are long accustomed to rules of law under which a man is legally liable for his harmful acts. . . . That words can be as harmful as physical acts nobody will deny. The fact of course is that words are acts, as much the voluntary product of a deliberate plan to engage in a course of conduct as is the swinging of a fist or the exertion of pressure on the gas pedal of a motor car.

Thus the narrow question is whether our statute, on its face, is so lacking in precision as to fall fatally short of defining the conduct that is being prohibited. We are unwilling to strike down the statute upon that ground. Libel, both civil and criminal, is notoriously difficult of exact definition. The definitions of libel in publications that seek the greatest possible precision do not differ materially from our statutory definition. Webster's New International Dictionary (2d ed., 1934); Bouvier's Law Dictionary (3d rev., 1914); Restatement of Torts, § 559 (1938). A number of other states have adopted statutes similar to ours. We have found no case holding such a definition to be unconstitutionally vague.

Counsel for the appellee do not suggest in their brief any definition of libel that would, in their opinion, withstand an attack based upon the First Amendment. The formulation of such a definition could hardly give effect to the intention of the legislature. That is, the more precise and inflexible the definition becomes, as by making it a libel to falsely charge another with being a liar or a thief, the more likely it is that the statutory language would fail to encompass many, many instances of slightly different language that the legislature would also make punishable if it were practical to do so. Thus the alternative to the general language now contained in the statute would be an enactment so specific that it would necessarily discriminate between utterances so similar as to be equally culpable.

The appellee devotes much of his brief to a discussion of the line of recent Supreme Court decisions that began with *New York Times Co.* v. *Sullivan,* 376 U.S. 254 (1964). (For an analysis of those cases see Note, 47

Notre Dame Lawyer 153 [1971].) Those decisions are not now pertinent to the case at hand, which comes to us upon demurrer to the information. There the court's emphasis was upon the plaintiff's burden of proving actual malice and upon the public status of the complaining party or the public interest in the subject matter of the asserted defamation. Here the existence and effect of actual malice are elements to be developed by the proof rather than to be set out in the information. Similarly, whether the asserted ownership or possession of a still is a matter of pressing public interest cannot be determined upon demurrer to the charges.

The trial court was in error in sustaining the demurrer. Inasmuch as the appellee has not yet been placed in jeopardy, *State* v. *Gill,* 33 Ark. 129 (1878), the judgment is reversed and the cause remanded for further proceedings.

MARY L. ROBINSON ET AL *v.* ISIAH CLINE

73-70 501 S.W. 2d 244

Opinion delivered November 26, 1973

Dickey, Dickey & Drake, Ltd., for appellants.

Reinberger, Eilbott, Smith & Staten, for appellee.

LYLE BROWN, Justice. Appellants, ten in number, are the sole heirs of Wm. Middleton, who died intestate. Appellants sought to cancel a rental and option to purchase agreement executed between Wm. Middleton and appellee, Isiah Cline. The trial court denied appellants relief and ordered them to carry out the option to purchase agreement as requested by appellee in his cross-complaint. It was appellants' contention that appellee was in arrears on his rental payments which they say resulted in a forfeiture of the agreement. On that critical point the trial court held the testimony to be completely opposite, which we take to mean evenly balanced; but the court held that any default in late payments had been waived by appellants.

The contract was executed between Middleton and Cline on April 15, 1966. By its terms Middleton rented to appellee, Cline, forty acres of land for a period of five years. The contract provided for a rental of $25.00 per month, beginning May 1, 1966, "and each month thereafter". During the five year period, appellee had the option of purchasing the property for $11,886.81. It was provided that if all rental payments were made and the option taken, Middleton would convey good title to appellee. There was no provision for forfeiture; nor was there a "time is of the essence" clause in the contract.

The principal witness for appellants was Mary L. Robinson, a daughter of the deceased Wm. J. Middle-

ton. She was an administratrix of the estate and was responsible for rent collections from appellee. She said monthly payments were made to her and she executed receipts. According to her records, appellee failed to timely make payments in July, October, and November, 1968; in March, August, and October of 1969; and in February and May of 1970. However, she conceded that during those years her records showed that appellee made three "double payments". According to her, that left six monthly payments not made. On cross-examination she was presented with a cancelled check for $25.00 for which she had no record of receiving. Taking that check into consideration, that left, according to her testimony, five unpaid monthly payments.

As to appellee's attempt to exercise the option to purchase, Mrs. Robinson testified in substance: Appellee informed her in late 1970 or early 1971 that he desired to exercise the option; she did not tell him some monthly payments were in default; she said the heirs were opposed to the option to purchase because, in their opinion, their father had been overreached in executing the agreement. She conceded she continued to accept rental payments until 1971. Then she stopped cashing the checks, accumulating ten checks which she retained but did not cash.

Appellee testified he talked with Mrs. Robinson about exercising his option; that she put him off; that thereafter and on April 26, 1971, he had his attorney write a letter notifying Mrs. Robinson that he was ready and able to exercise the option; that as of that date he was current with his monthly payments; that he was unable, however, to find cancelled checks for July and October 1968; and that he recalled making some payments in cash and believed it was in 1968. He said after he verbally told Mrs. Robinson of his intent to exercise the option, he continued to make his rental payments until he wrote the letter in April 1971.

Appellee's wife testified she acted as bookkeeper for the family; that she normally made the payments by check or by cash. She insisted they were current in their

payments and that Mrs. Robinson never claimed they were behind until making the allegation in the lawsuit. She said she was unable to find some of the cancelled checks, that they could in fact have been lost.

Appellants' first contention for reversal is that the trial court erred in not finding that appellee was delinquent in some of his monthly payments. The court found that "the testimony is diametrical on both sides as to whether there was an arrearage in the rentals to be paid". An examination of the testimony hereinbefore abstracted leaves us in a position of being unable to say that the chancellor's conclusion was in error. Appellants strenuously argue that the failure of appellee to produce checks or receipts for all payments conclusively sustains this point. On the other side of the coin, appellee and his wife insisted that they were current in their payments; that they sometimes paid in cash; and that some of their papers, accumulated over the period of some five years, could have been lost. It may have also been significant to the chancellor that appellants never claimed delinquency until the lawsuit was filed. Additionally, if appellee was delinquent, that fact would not of itself cause a forfeiture.

The second point for reversal is that the court was wrong in holding that appellants waived a right to forfeiture by accepting late payments and by failing to notify defendant of the breach. In connection with this point, there are four facts of significance which must be kept in mind. One, appellants accepted late payments in three different years and without protest. Two, appellants never notified appellee of any delinquency and intent to cancel. Third, there was no provision in the lease for forfeiture for failure to make payments on time. Fourth, there was no "time is of the essence" provision in the lease. In view of those facts and in light of our pronouncements in two cases, we think the trial court was correct. One of those cases is *Duncan* v. *Malcomb,* 234 Ark. 146, 351 S.W. 2d 419 (1961). The lease in that case was for ten years with an option to renew for another ten years. The lease provided for forfeiture by appellee upon failure to pay the rent when

due. Appellee made late payments of rent for the first two years and in the third year appellant demanded possession at a time when the rent was two months in arrears. No demand was made for the delinquent rent. The trial court held that appellant, lessor, had waived the requirement for prompt rental payments. We held that in the circumstances (receiving late payments without protest), appellant could not declare a forfeiture without first giving reasonable notice of intent to cancel. Undoubtedly the notice required would be for the purpose of giving the lessee the opportunity of bringing his payments up to date and to be aware that in the future, no delinquent payments would be accepted. Quoting from *Duncan,* we also said: "Of course it is elementary that equity abhors forfeitures".

The other case in point is that of *Pierce* v. *Kennedy,* 205 Ark. 419, 168 S.W. 2d 1115 (1943). Pierce rented lands to Kennedy for five years, the rent being $25.00 per month payable in advance. The lease contained an option whereby Kennedy could purchase the lands at any time within the five year period. The lease provided for termination of the option to purchase if there was any default in the payment of the rentals. Rents had been accepted which were not paid when due. This court refused to declare a forfeiture and quoting from a prior case said: "Where there has been a breach of a contract sufficient to cause a forfeiture, and the party entitled thereto, either expressly or by his conduct, waives it, equity will relieve the defaulting party from a forfeiture unless the violation of the contract was the result of gross negligence, or was willful or persistent". In the case at bar we find no evidence that any delay in payment was caused by gross negligence, nor was there evidence of a willful and persistent course of conduct. The *Pierce* case quotes with approval from 32 Am. Jur., § 894, Landlord and Tenant: "A court of equity, even in the absence of special circumstances of fraud, accident, or mistake, may relieve against a forfeiture incurred by the breach of a covenant to pay rent, on the payment or tender of all arrears of rent and interest by a defaulting lessee".

Finally, it is argued that a guardian should have been appointed for Wm. Middleton, Jr., a minor, one of the appellants (plaintiffs below). Appellants argue that no judgment on appellee's cross-complaint should be entered because the minor came into the case by his mother as next friend. We have a statute, Ark. Stat. Ann. § 27-825 (Repl. 1962), which requires the defense of an infant to be made by a guardian. From best we can tell by the record, the objection to the absence of a guardian was advanced in apt time. That fact distinguishes this case from *Cannon* v. *Price,* 202 Ark. 464, 150 S.W. 2d 755 (1941), which at first blush may seem to be out of harmony with our holding in the case at bar.

We hold that the case should be affirmed with respect to all parties except as to the minor; as to the latter, the cause is reversed.

Affirmed in part; reversed in part.

HARRIS, C. J., not participating.

HOGGARD & SONS ENTERPRISES, INC. ET AL *v.* RUSSELL BURIAL ASSOCIATION OF PIGGOTT, IRBY BURIAL ASSOCIATION OF RECTOR

73-97 501 S.W. 2d 613

Opinion delivered November 26, 1973

Gus R. Camp, for appellants.

C. Joseph Calvin, for Irby Burial Association of Rector.

John R. Lingle, for Russell Burial Association of Piggott.

Amicus Curiae by *Jim Guy Tucker,* Atty. Gen., by: *Milton Lueken,* Asst. Atty. Gen.

JOHN A. FOGLEMAN, Justice. Appellant Hoggard & Sons Enterprises, Inc., operator of a funeral home in Piggott, brought one action against appellee Russell Burial Association, also of Piggott, and another against appellee Irby Burial Association of Rector, seeking to recover the face value of burial contracts or membership certificates issued by the two burial associations. Insofar as the case now stands, the first suit involves a certificate covering W.C. Maude Edwards and the second one cover-

ing George Lewis Clark. Personal representatives of the two estates later joined Hoggard & Sons as parties plaintiff, after each of the defendants demurred, alleging a defect of parties, and are appellants here.

It is alleged in the complaints that Hoggard & Sons furnished services and materials for funerals for Edwards and Clark, but that the two Burial Associations have refused to pay Hoggard & Sons the face amount of the contracts. After each of the respective personal representatives had become a party plaintiff, each of the defendants filed a demurrer. Russell Burial Association asserted the complaint and amended complaint showed that the court had no jurisdiction of the subject of the action and that there was a defect of parties plaintiff, and prayed that the complaint be dismissed. Irby Burial Association asserted the complaint did not state facts that show the court had jurisdiction and that there was a defect of parties plaintiff in that Hoggard & Sons was not a proper party plaintiff, asking that the complaint be dismissed for these reasons. Plaintiffs in each case filed a response to the demurrers. The two cases were consolidated for hearing on these demurrers. The trial court's order on the demurrers recites that they were submitted upon the briefs in support of the demurrers, the responses to the demurrers and briefs in support thereof and evidence introduced into the record. It also recites that the defendants, as a part of their demurrers, had pleaded that the plaintiffs had not exhausted their administrative remedies before the Arkansas Burial Insurance Board.

The record also reveals that the plaintiffs introduced into the record of this hearing answers by the defendants to interrogatories propounded by plaintiffs and the exhibits to these answers, and the defendants introduced plaintiffs' answers to interrogatories propounded by the respective defendants. Upon this record the court sustained both demurrers on the ground that the plaintiffs had not exhausted their administrative remedies.

This record certainly made the appellees' pleadings speaking demurrers and extended the court's consideration

far beyond a review of the face of the pleadings. A demurrer which sets up a ground dehors the record or which, to be sustained, requires reference to facts not appearing upon the face of the pleading is a speaking demurrer. *Rider* v. *McElroy,* 194 Ark. 1106, 110 S.W. 2d 492. A demurrer is proper when a defect appears upon the face of a complaint. Ark. Stat. Ann. § 27-1115 (Repl. 1962). Otherwise, such defects ordinarily are to be raised by answer. Ark. Stat. Ann. § 27-1119 (Repl. 1962). See *Isgrig* v. *City of Little Rock,* 225 Ark. 297, 280 S.W. 2d 891. Speaking demurrers are not to be considered, and it is erroneous for a trial court in passing upon a demurrer to decide a disputed question of fact or determine a mixed question of law and fact, since a demurrer properly raises only questions of law. *Isgrig* v. *City of Little Rock,* supra; *Dodson* v. *Abercrombie,* 218 Ark. 50, 234 S.W. 2d 30; *Lawhon* v. *American Cyanamid & Chemical Co.,* 216 Ark. 23, 223 S.W. 2d 806. However, we have recognized motions to dismiss a complaint for want of jurisdiction when the lack thereof does not appear upon the face of the complaint. See, e.g., *Arkansas Land & Cattle Co.* v. *Anderson-Tully Co.,* 248 Ark. 495, 452 S.W. 2d 632; *Running* v. *Southwest Freight Lines, Inc.,* 227 Ark. 839, 303 S.W. 2d 578; *May* v. *May,* 221 Ark. 585, 254 S.W. 2d 95[illegible].

The trial court sustained the demurrers but did not specifically dismiss either complaint. We have been perplexed about the question of appealability of the court's order. Ordinarily, the sustaining of a demurrer to a complaint is not an appealable order, but a subsequent judgment dismissing the complaint, if the plaintiff elects to stand thereon, is appealable. *Rider* v. *McElroy,* supra. But, in reversing the action of a circuit court, we have held that a demurrer alleging that the court did not have jurisdiction because of the pendency of a prior chancery court action, wherein the same parties and the same subject matter were involved, should have been treated as a motion to dismiss, when viewed in the light of the evidence introduced in support of the pleading. *Askew* v. *Murdock Acceptance Corporation,* 225 Ark. 68, 279 S.W. 2d 557. We said that the character and sufficiency of a pleading is to be determined, not by what it is called by

the pleader but, by the facts which it sets up.[1] The circuit judge must have heeded this admonition. His finding that the circuit court had no jurisdiction because plaintiffs had not exhausted their administrative remedies was tantamount to a dismissal. This result seems inevitable when we view the Administrative Procedures Act. Ark. Stat. Ann. §§ 5-701—714 (Supp. 1971). The parties could have judicial review, after the Arkansas Burial Association Board has acted, by filing a new petition which might be in Pulaski County rather than Clay County. Ark. Stat. Ann. § 5-705. For these reasons we deem the order appealable, as it would effectively terminate the present action in the Circuit Court of Clay County.

In answering interrogatories, Gardner McNabb, Secretary-Treasurer of Russell Burial Association, stated that the certificate issued by the association named no beneficiary, but provided for payment for merchandise and services furnished by a mortician chosen by the Secretary-Treasurer of the Association for the benefit of the deceased member covered. The sample certificate exhibited contained the following clause:

> The failure of those in charge to comply with the rules and by laws as herein set forth shall forfeit the deceased member's right to the benefits of the association.

According to McNabb, the by-laws appeared on the certificate itself. The certificate also revealed that the association would deliver a casket and conduct a funeral at a distance up to 50 miles from Piggott without extra charge, but if the member died at a place over 50 miles from Piggott an extra fee would be charged or a casket would be sent by express. There was also a provision on the face of the certificate that a deceased member's right to benefits would be forfeited upon failure of "those in charge" to notify the Secretary-Treasurer or Russell Mortuary of a

[1]A superficial reading of the opinions in *Askew* and in *Isgrig* might lead to a conclusion that there is an inconsistency in these holdings. This is resolved by the fact that in *Askew* the evidence offered was an important factor in changing the character of the pleading, while in *Isgrig* the demurring party actually relied upon its pleading as a classic demurrer, and there is no indication that any evidence was offered in its support.

member's death, until after his burial. The same persons constitute all the officers of both the association and the mortuary. McNabb stated that benefits under the certificate are usually paid to Russell Mortuary, unless the burial was outside the association's service area, in which event, they are paid to the "contracting" funeral home. The service area is determined by the Arkansas Burial Association Board, according to McNabb. He said the only request for payment on account of the Edwards funeral was made by Hoggard & Sons Enterprises, Inc., after her burial.

According to plaintiff Hoggard's answers to interrogatories, Lester Edwards contracted with it for Mrs. Edwards' funeral, but the Hoggard funeral home was not designated by any officer of Russell Burial Association as the "contracting" funeral home. The total bill submitted to the Edwards family was for $1,053.70, with credit of $500 for "Russell Burial Association" allowance, pursuant to agreement with Lester Edwards. The Hoggard company advertises that it will honor all burial certificates.

The answers of Dan McBride, Secretary-Treasurer of Irby Burial Association, are of a similar tenor. They differed with respect to notice of death. McBride said he received notice from a member of the Clark family that a representative of plaintiff Hoggard was en route to Memphis to obtain the body of Clark and return it to Rector for burial, and was informed by an agent of plaintiff Hoggard that it would handle the burial services. He said he advised Hoggard that Irby Funeral Home was ready, willing and able to perform the service and offered to furnish the merchandise for use in the burial. Plaintiff Hoggard's answers to Irby Funeral Home's interrogatories were similar to those given in the other case, except that it was admitted that Hoggard & Sons Enterprises, Inc., proceeded to bury Clark after having been advised that Irby Funeral Home was the "designated" funeral home.

Appellants' response to the Russell demurrer alleged, among other things, that the Arkansas Burial Association Board had "affirmed" the action taken in this case

by the Russell Burial Association, and that § 66-1823 of Arkansas Statutes is illegal and unconstitutional.

There is no question about the status of the Arkansas Burial Assocition Board as an administrative agency under Ark. Stat. Ann. §§ 66-1801—1824 (Repl. 1956), or that its duly authorized rules and regulations have the force and effect of statutes. Ark. Stat. Ann. § 66-1823. Appellees' attack upon the court's jurisdiction was mounted upon the provisions of Ark. Stat. Ann. § 66-1824, and that section apparently afforded the basis of the circuit court's ruling. That section empowers the board to determine issues between different burial associations and between burial associations and their respective members and to render binding decisions, subject to appeal.

We need not reach appellants' arguments that this section of the act is unconstitutional because we agree with appellants' argument that the trial court did have jurisdiction. Hoggard & Sons Enterprises, Inc., is not a burial association. The issues between it and the two burial associations are not "issues between different Burial Associations." The respective personal representatives are not, at least in their representative capacities, members of either association, so there is no issue "between Burial Associations and their respective members" involved in the present litigation. Any construction which placed jurisdiction of all assertions of accrued liability on burial insurance certificates in the exclusive original jurisdiction of the board would extend the act far beyond the intent apparent from a reading of the act and would require careful evaluation of its constitutionality. It is appropriate that an administrative agency regulate this business and pass judgment upon internal disputes as well as disputes between two organizations engaged in that business. For example, the reasonableness of rules, by-laws and regulations of an association and of any changes made in them is certainly a proper field for the utilization of special competence of the board. Elections of officers will sometimes produce internal conflict. These are examples of the issues we feel were contemplated by the passage of this section. We find no intention on the part of the General Assembly, however, to substitute this

board for the courts in determining contractual liabilities, such as are asserted here. The principal technical questions involved here are questions of law, the determination of which is more appropriately addressed to the courts rather than to any administrative agency.

Since the issues are not within the jurisdiction of the Arkansas Burial Association Board, the order of the circuit court is reversed and the cause remanded.

GEAN LEWIS *v.* J. C. LEWIS

73-117 502 S.W. 2d 505

Opinion delivered November 26, 1973
[Rehearing denied January 14, 1974.]

G. E. Snuggs, for appellant.

Nolan, Alderson & Jones, for appellee.

JOHN A. FOGLEMAN, Justice. The marital difficulties of these parties were before this court in *Lewis* v. *Lewis,* 248 Ark. 621, 453 S.W. 2d 22. Appellant Gean Lewis was also appellant on that occasion, when we reversed a decree of divorce on the ground of indignities to the

person granted on a counterclaim filed by appellee J. C. Lewis in appellant's suit for separate maintenance. Our reversal was based upon the doctrine of recrimination because we found that the record showed the parties to be equally at fault. We remanded the case for further proceedings not inconsistent with the opinion rendered. It appears that the chancery court later awarded appellant temporary support and maintenance and attorney's fees and the right to occupy the dwelling house in which the parties lived before separation.

In September, 1970, appellee filed another suit for divorce, alleging indignities to the person and adultery, stated as conclusions only. Appellant denied these allegations and counterclaimed for separate maintenance and support of a minor child. This case was dismissed on January 4, 1972, for want of prosecution. The present action was filed by appellee September 28, 1972. In this complaint, he alleged three years' separation without cohabitation as grounds for divorce. Appellant admitted in her answer that the parties had lived apart but alleged that they had sexual relations since their separation, specifically in March, 1971, upon appellee's promise to return to their home and conjugal relations, and that this action was recriminatory. The chancery court granted a divorce to appellee, denied alimony to appellant and denied her any property except for furnishings and appliances in the home occupied by her.

For reversal, appellant contends the court erred by granting a divorce on the uncorroborated testimony of appellee, by finding that appellant's testimony about sexual relations between the parties was not corroborated and that this failure of proof justified appellee's failure to produce corroborating evidence, by denying appellant homestead and dower rights and by denying her any support and maintenance by appellee.

Of course, corroborating testimony is as essential to the granting of a divorce on the ground of three years' separation as it is in any other case. But, as in any other case, where it is plain that the divorce action is not collusive, the corroboration may be comparatively slight. *Owen* v. *Owen,* 208 Ark. 23, 184 S.W. 2d 808;

Allen v. *Allen,* 211 Ark. 335, 200 S.W. 2d 324. The acrimony emanating from this record dispels any thought of collusion between these parties. Still, to constitute corroborating evidence there must be testimony relating some substantial fact or circumstance independent of the plaintiff's testimony which would lead an impartial and reasonable mind to believe that material testimony of the plaintiff is true. *Welch* v. *Welch,* 254 Ark. 84, 491 S.W. 2d 598.

Appellant's major argument on this point is based upon the inability of appellee's corroborating witnesses to account for every moment of his time, particularly in view of appellant's positive testimony that the two met on numerous occasions and, on at least one of them, kept an all-night rendezvous for the agreed and accomplished purpose of copulation. If her testimony was accepted as true, of course there was not a three-year separation without cohabitation because this court has defined the word "cohabitation" in the divorce statutes to mean "sexual intercourse." *Ross* v. *Ross,* 213 Ark. 742, 213 S.W. 2d 360. The chancellor seems to have rejected appellee's version as incredible, because he stated in his findings upon which the decree was based that he did not believe, in view of the history developed in the course of the litigation before him, that appellee would defeat his cause of action for divorce by engaging in sexual intercourse with appellant on a single occasion. In arriving at this conclusion, as a fact finder, he drew the permissible inference that appellant's failure to produce the witnesses (her niece and nephew) she had stated would corroborate her testimony in this regard was indicative of their inability to do so, particularly when appellant had been given time to produce the witnesses, after which her attorney expressed doubt that the testimony of some of them would have any probative value. See *Arkansas State Highway Commission* v. *Phillips,* 252 Ark. 206, 478 S.W. 2d 27. Of course, we seldom reverse a chancellor's findings as to credibility, particularly where, as here, the witnesses appeared before him. *Marine Mart* v. *Pearce,* 252 Ark. 601, 480 S.W. 2d 133 *Massey* v. *Price,* 252 Ark. 617, 480 S.W. 2d 337; *Dodds* v. *Dodds,* 246 Ark. 313, 438 S.W. 2d 54. We cannot

do so here upon a cold, written record. It should be noted that appellee flatly denied that the incident upon which appellant relies ever occurred.

This leaves the case turning upon the adequacy of the corroboration of appellee, insofar as this point is concerned. His corroborating evidence cannot be called conclusive because the parties had lived in the same city, El Dorado, and admittedly had seen one another on many occasions. Appellee had lived with his sister, Mabel Adams, and her invalid husband, since August 10, 1969, the alleged beginning date of the three-year separation. Mabel Adams testified that Lewis had spent not more than six nights away from her home in more than three years next preceding her testimony. She included in these nights occasions when he accompanied her and her husband in going to Texarkana. Even most of these occasions, she said, he would eat supper at her house before leaving, and she fixed breakfast for him every morning before he went to work at 7:00 to 7:30. She said her brother had never been out late at night, but admitted that she did not know where he went whenever he left her house after supper, as he did on numerous occasions.

Johnny Ray Lee said that he had worked with Lewis in the employ of Hampton Construction Company off and on for 20 years, and that he saw Lewis every day when they worked on the same job. He testified that, during the preceding three years, Lewis had spent four or five nights with him when the two were going fishing early the following mornings. James Crain testified that his father-in-law owned the Hampton-Crain Construction Company, to which Crain had come in 1960 and by which Lewis had been employed for 15 years. Crain said that he had seen Lewis on the job several times every day, but had not seen Lewis with appellant in two or three years. He said appellant often came by the job where Lewis was working, but would just sit in the car for several hours at a time without speaking to anyone. He stated that Lewis attended church regularly, going Sunday mornings and nights, Wednesday nights and any other time there was a church function. John Hampton testified that Lewis was a dependable car-

penter and had been employed by his company for more than 15 years. He corroborated Crain's testimony about Lewis' church attendance.

Lewis testified he had talked to appellant five or six times over the three-year period, had only seen her at night in passing uptown, and had spent only three, four or five nights away from the Adams home. He said that any other nights spent away from that house had been spent with the family at Texarkana on occasions such as holidays. He said that during the period he had spent the night with Johnny Lee when they wanted to get an early morning start on a fishing trip. We agree with the learned chancellor that it would have been virtually impossible for appellee to have produced witnesses, other than himself, who, singly or collectively, could account for his whereabouts every hour during the three-year period. Certainly, it was not intended that one seeking to establish this ground for divorce should have to produce corroborating evidence which would show the lack of cohabitation as convincingly as might be required to show nonaccess in paternity cases. The corroboration here is admittedly slight, yet it seems that Lewis called as witnesses those who would be most likely to know his whereabouts most of the time during the three-year period. We are unwilling to say the chancellor erred in finding the testimony of these witnesses was sufficient, in this bitterly contested case, to lead an impartial and reasonable mind to believe that the material testimony of Lewis was true.

The denial to appellant of property rights and support also presents a difficult problem. The chancellor's findings of fault are only implicit in his denial of alimony and his holding that she was not entitled to any of appellee's property or interest threin, except for the furnishings and appliances located in the home at 1225 Rock Island Street. Appellant gives us little aid on these points. The complete argument of appellant on them reads:

> The Chancery Court was in error, of course, in returning to Gean Lewis the property she brought to 1225 Rock Island Street at the request of her hus-

band, in full settlement of the property rights of the wife, and the wife's right of support and maintenance by her husband. *Rose* v. *Rose,* 254 Ark. 607, 495 S.W. 2d 524; *McCormick* v. *McCormick,* 246 Ark. at p. 344, 438 S.W. 2d 341.

In *Rose* v. *Rose,* 254 Ark. 605, 495 S.W. 2d 524, we said that the chancellor should render a ruling as to which party is at fault if the wife seeks alimony or a property division, and a divorce is granted upon the ground of three years' separation. In *McCormick* v. *McCormick,* 246 Ark. 348, 438 S.W. 2d 23, we said when a divorce is granted on this ground, the question as to who is the injured spouse is then considered in the settlement of property rights and the question of alimony.

It has been suggested that these issues should not be considered by us because the failure to argue them constitutes a waiver. See *Commercial Standard Insurance Co.* v. *Coffman,* 245 Ark. 1005, 436 S.W. 2d 83. It has been implied that we will pass upon such assignments of error as are called to our attention in appellant's brief and argument. *Fitzhugh* v. *Leonard,* 179 Ark. 816, 19 S.W. 2d 1010. Appellant had stated these points as follows:

> Error of the Chancery Court in its finding and judgment that the wife, Gean Lewis, is not entitled to homestead and dower rights in the properties of her deserting husband.
>
> Error of the Chancery Court in its finding and judgment that the wife, Gean Lewis, is not entitled to support and maintenance by her deserting husband, J. C. Lewis.

The rule of waiver should not be as strictly applied in an equitable proceeding as in one at law, because an appeal in chancery opens the whole case for review as to all points raised in the court below and the law and facts are examined the same as if there had been no decision at nisi prius and a decree rendered upon such record. *Woodruff* v. *Core,* 23 Ark. 341; *Arkansas Bankers' Association* v. *Ligon,* 174 Ark. 234, 295 S.W. 4; *Grayson* v. *Bowie,* 197 Ark. 128, 122 S.W. 2d 536. This

does not mean the record is thrown open for a search for error or that a mere statement of a point requires review. It does mean, however, that appellant's argument, scant as it is, must be taken to be sufficient to raise the issues. It is significant that appellee has taken it to be so without any suggestion that these points have been waived.

The finding of the chancellor in this regard seems to have been made without any actual determination of fault or finding as to who was the injured party. He said:

> Here the Defendant does not seek alimony or a division of property because she denies Plaintiff's grounds for divorce. She does, however, seek separate maintenance and possession of the home which the Court assumes requires it to determine the question of alimony and division of property. The "injured party" as used above means the party not at fault or the party at less fault. In Lewis v. Lewis, supra, the Court denied the Plaintiff herein a divorce under the doctrine of recrimination. The Court stated "However, the rule in Arkansas is that recrimination is applied only where the parties are equally at fault."
>
> The parties lived together as husband and wife a little over three years. Plaintiff has furnished the Defendant a home to live in since they separated in August of 1969 and has paid her $20.00 per week support since June of 1970. The Court is of the opinion that the Defendant is not entitled to alimony or any of the Plaintiff's property or interest therein except for the household furnishings and appliances located in the home at 1225 Rock Island Street, which should be awarded the Defendant.

When we consider that, on the previous appeal from a decree on September 16, 1969, the parties were found by us to be equally at fault, a determination that appellant was not entitled to a property division or alimony must be based, to a great extent, upon evidence before the court in this case. Yet, this evidence was devoted almost exclusively to the question relating to the

extent of the period of separation without cohabitation. We have held that where there is fault on both sides, alimony should be awarded. *Clarke* v. *Clarke,* 201 Ark. 10, 143 S.W. 2d 540. In that case, we overruled the chancellor's denial of alimony and awarded $30 per month until the decree became final and $15 per month thereafter. We have also held that, even though the wife was principally at fault in the separation, she should receive an allowance for support where the evidence does not warrant the conclusion she was altogether to blame or that the husband was not partially responsible for the separation. *Grytbak* v. *Grytbak,* 216 Ark. 674, 227 S.W. 2d 633. Again we modified a decree denying relief to the wife by awarding alimony. In neither case was there any evidence that there was any substantial amount of property involved. It does appear that in this case there is a dwelling house which constituted the marital abode and in which appellant has lived since the separation. Ordinarily, where the wife is less at fault, or where she is the injured party, she would be entitled to the statutory award of an interest in the husband's property, but her wealth and income are to be considered in determining whether she receives the full amount. *Alexander* v. *Alexander,* 227 Ark. 938, 302 S.W. 2d 781.

The holding of this court as to fault on the appeal in the previous case is not res judicata of appellant's property and alimony rights because of our finding that the parties were equally at fault, according to *Narisi* v. *Narisi,* 233 Ark. 525, 345 S.W. 2d 620. However, we have said it would be res judicata of the issue of fault at that time. *Carty* v. *Carty,* 222 Ark. 183, 258 S.W. 2d 43. The statute does leave the court a wide latitude in considering matters and events beyond the usual scope of inquiry. In determining who is the injured party, any material and relevant evidence pertaining to matters and events both preceding and following the separation may be admitted. *Narisi* v. *Narisi,* supra; *Alexander* v. *Alexander,* supra.

The trial court in the first instance and this court, on appeal, are vested with broad powers and a wide latitude of discretion in determining the proper award

of dower and alimony when a divorce is granted on this ground. *Narisi* v. *Narisi,* supra; *Martin* v. *Martin,* 225 Ark. 677, 284 S.W. 2d 647. However, it is clear that there should be a determination of fault or of who is the injured party as a basis for the exercise of that power.

The general rule in equity cases is that, with the evidence fully developed, we should decide the case here without remanding it to the chancery court. *Narisi* v. *Narisi,* supra. We have, however, exercised our power to remand any case in equity for further proceedings when it is clear to us that the chancery court's decision has been based upon an erroneous theory, where we cannot determine from the record before us the rights and equitites of the parties and where the chancellor is in a better position to pass upon the issues because of his familiarity with the circumstances and considerations surrounding the issue. *Wilson* v. *Rodgers* (on rehearing) 250 Ark. 335, 468 S.W. 2d 739, 750.

This is a case coming clearly within the exception to the general rule. A compelling factor in our determination to remand is the peculiar situation which obtains with reference to the records of prior litigation between the parties. Appellant, at the incepton of the trial in this case, asked to be heard on her motion for disqualification of the chancellor, even though her attorney acknowledged that he was aware of a previous order denying that motion. The attorney then offered the entire records in the two preceding cases in support of the motion for disqualification. The court reversed a ruling on this offer and proceeded to hear evidence. After the trial had been completed, the court entered an order denying the request for admission of these records. We find no other attempt to introduce these records into evidence in the present case, even though they or part of them, might be material and relevant on the question of alimony and property allowances. To say the least, it would seem likely that there would be much more evidence in those cases about the nature and extent of the property and income of the parties than appears in the record of this case, as abstracted. Courts cannot take judicial notice of their own records in other causes therein, even between

the same parties. *Murphy* v. *Citizens Bank of Junction City,* 82 Ark. 131, 100 S.W. 894; *Yarbro* v. *Gentry,* 245 Ark. 602, 433 S.W. 2d 381.

Appellant has filed a motion for judgment in this court pursuant to a motion for accounting filed in the case previously appealed to this court and for attorney's fees on both appeals. This motion is not sufficient to confer jurisdiction on this court as to the accounting. Apparently, appellant is laboring under the misapprehension that the present case and the previous one are the same case, but they are not. The present appeal is from the chancery court's decree in appellee's action for divorce on the ground of three years' separation, filed more than two years after our decision on the appeal in the previous case. That case was remanded for further proceedings not inconsistent with our opinion. *Lewis* v. *Lewis,* 248 Ark. 621, 453 S.W. 2d 22. If appellant's motion has been acted upon in the trial court, no appeal has been docketed in this court and our jurisdiction in the matter was terminated by the issuance of our mandate. Consequently, we cannot act on that portion of the motion. Appellant's request for an allowance of attorney's fees on the prior appeal is belated, to say the least, and we decline to act upon it after the lapse of more than two years. Our refusal to act is without prejudice to appellant's seeking an allowance for attorney's fee on that appeal in the trial court in any consideration given by that court to the overall question of allowance of such fees in that case, if the case is still pending and the question of liability for attorney's fees has not been finally disposed of therein. In view of our remand of the case presently on appeal, it seems that the better procedure would be for the chancery court to consider the appropriate amount to be allowed appellant for attorney's fees for services in that court and this one when further proceedings are concluded. It is so ordered.

We affirm the decree insofar as it awards a divorce to appellee, but we remand the case for further consideration of the issues relating to settlement of property rights and the questions of alimony and attorney's fees.

BYRD, J., dissents as to the reversal.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF PINE BLUFF *v.* PINE BLUFF NATIONAL BANK ET AL

73-142 501 S.W. 2d 226

Opinion delivered November 26, 1973

Coleman, Gantt, Ramsay & Cox, for appellant.

Jones, Matthews & Tolson, for appellees.

J. FRED JONES, Justice. This is an appeal by First Federal Savings and Loan Association of Pine Bluff from a trial court order overruling its motion to set aside a judgment rendered against it under a mandate from this court pursuant to an opinion we delivered on February 12, 1973, wherein Pine Bluff National Bank was the appellant, Billy E. Parker was the appellee, and First Federal Savings and Loan Association of Pine Bluff was a garnishee. See *Pine Bluff Nat'l Bank* v. *Parker,* 253 Ark. 966, 490 S.W. 2d 457. The single point relied on by First Federal on this appeal is stated as follows:

> "The trial court erred in failing to reverse its prior judgment in favor of Frank Parker as directed by the opinion and mandate of this court."

According to the record in *Pine Bluff Nat'l Bank* v. *Parker, supra,* Pine Bluff National sued Billy Parker for a debt past due and sued out a writ of garnishment

against First Federal. First Federal, as garnishee, answered on April 4, 1969, that it held funds deposited to the account of Billy Parker in the amount of $13,231. Pine Bluff National and Billy Parker then worked out a compromise agreement whereby Parker paid a lump sum on the debt to Pine Bluff National and a consent judgment was entered for the balance of the debt in the amount of $24,600. Under the agreement, recited in the consent judgment, Billy Parker executed three installment notes for the $24,600 balance, and Pine Bluff National released approximately $20,000 worth of its security interest in certain automobiles which Billy Parker had pledged as security for the original debt. The consent judgment recited that First Federal, the garnishee, would hold the savings account above referred to for a period of 61 days and if by that time Billy Parker was in default on his installment notes, the court would enter an order directing First Federal to pay over the $11,231 to Pine Bluff National. Such default occurred, and on April 17, 1970, judgment was entered by the trial court finding Billy Parker in default, and ordering First Federal to pay the $11,231 to Pine Bluff National.

On July 2, 1970, First Federal filed a motion to set aside the judgment against it as garnishee. It alleged that it had erred in answering that Billy Parker had $11,231 on deposit with it, and alleged that the mistake had not been discovered until the entry of the judgment against it for the $11,231. It alleged that the savings account was actually a joint account in the names of Frank Parker or Billy Parker and it prayed permission to file an amended answer to the original interrogatories. The trial court granted First Federal's motion and entered an order setting aside the judgment against the garnishee and permitting it to file an amended answer. Pine Bluff National appealed to this court from that order and we held that the trial court had a right to set aside its orders in term time and refused to pass upon Pine Bluff National's claim to the funds because that issue had not been resolved by the trial court and we dismissed the appeal. *Pine Bluff Nat'l Bank* v. *First Fed. S & L,* 250 Ark. 600, 466 S.W. 2d 249. First Federal did amend its answer setting out the joint account, and Frank Parker

filed an intervention claiming to be the sole owner of the funds in the joint account. The trial of the case then continued before the court, sitting as a jury, and the trial court rendered judgment with findings and conclusion as follows:

> "1. That the Court had authority to set aside the Judgment entered on April 17, 1970 and permit the Garnishee to Amend its Answer, thus placing all parties in the same position with regard to their legal rights that they had prior to the filing of the Answer by Garnishee.
>
> 2. That a joint account is garnishable only to the extent of ownership of the debtor.
>
> 3. The savings account in question is solely owned by Frank Parker and that First Federal Savings & Loan Association of Pine Bluff should be directed to release the savings account to Frank Parker individually. In the event a Supersedeas bond in the sum of $11,231.00 is filed by the plaintiff within thirty (30) days, then said amount is to be held by the garnishee.
>
> IT IS, THEREFORE, by the Court, considered, ordered, adjudged and decreed that the savings account in question be and is hereby found to be owned by Frank Parker and that First Federal Savings & Loan Association of Pine Bluff be and it is hereby ordered and directed to release the savings account to Frank Parker, individually. In the event a Supersedeas bond in the amount of $11,231.00 is filed by the plaintiff within thirty (30) days then said amount is to be held by the garnishee."

Only Pine Bluff National appealed from that judgment and we said:

> "The bank does not appeal from the court's findings as to the respective rights between Frank Parker and First Federal Savings. The court committed no error in permitting Frank Parker to intervene because the court had that right by virtue of our holding in the

> first appeal. Furthermore, Frank Parker had a right to establish his actual ownership of the account because that was a garnishment proceeding. *Hayden* v. *Gardner,* 238 Ark. 351, 381 S.W. 2d 752 (1964). Pine Bluff National contends that the court erred in refusing to grant it a judgment against First Federal because, acting in reliance on the first judgment, the bank released certain automobiles which Billy Parker had pledged as security for the original debt. That contention is meritorious."

We conclude it would be a waste of judicial effort to quote further from our opinion of February 12, because we consider the language clear and the conclusion we reached supported by the case law cited. The first sentence in the above quote from our opinion disposed of the issue on appeal pertaining to the *savings account* as such. We found merit in Pine Bluff National's contention as above set out and we reversed and remanded with the following directions:

> "The trial court is directed to enter judgment in favor of Pine Bluff National and against First Federal in the amount of the garnishment together with interest."

As pointed out in our original opinion, no appeal was perfected from the trial court's finding that the funds in the hands of First Federal belong to Frank Parker, and the correctness of that holding has never been before us.

First Federal argues on this appeal that the trial court erred in complying with the mandate of this court, in that it only entered judgment against First Federal in favor of Pine Bluff National as specifically directed by this court, but failed to set aside its prior judgment in favor of Frank Parker as was also intended and directed by this court when we employed the word "reversed." First Federal argues that had we intended the judgment in favor of Frank Parker to remain unaffected, we would have so indicated by employing the usual phrase—"affirmed in part and reversed in part." The answer to this

argument is that if the trial court's findings that the funds in the hands of the garnishee actually belong to Frank Parker and its order to pay same over to Frank Parker amounted to a judgment in favor of Frank Parker against First Federal, there was no appeal by First Federal from such judgment. Certainly Pine Bluff National had no interest in Frank Parker's account with First Federal. It simply relied, to its detriment, on the verified answers to interrogatories propounded by it to First Federal as garnishee in a suit it filed against Billy Parker. The trial court correctly complied with the mandate of this court and the judgment is affirmed.

Affirmed.

HARRIS, C.J., not participating.

ARKANSAS STATE HIGHWAY COMMISSION
v. O. A. ALLEN, ET UX

73-149 501 S.W. 2d 243

Opinion delivered November 26, 1973

Thomas B. Keys and *Philip N. Gowan,* for appellant.

Joe T. Gunter and *Hugh L. Brown,* for appellees.

CONLEY BYRD, Justice. This is the second appearance of this eminent domain action. In *Arkansas State Highway Commission* v. *Allen,* 253 Ark. 46, 484 S.W. 2d 331 (1972), we reversed a $27,000 judgment upon a jury verdict. On retrial the jury awarded damages in the amount of $23,750. For reversal of the judgment entered thereon the Commission raises the two points hereinafter discussed.

POINT No. 1. The Commission here contends that the trial court erred in refusing to rule as to the admissibility of alleged comparable sales testified to by the landowner and his expert witness. We find no merit in the contention. The record shows that both the landowner and his expert used some comparable sales, but the record does not demonstrate that such sales were not comparable. Neither can we find any merit in the suggestion that the trial court committed error in refusing to rule on the comparability of such sales before the witness had testified relative to the sales.

POINT NO. 2. The landowner's expert testified that the highest and best use of the subject property was for commercial and residential uses. The Commission now contends that the Patton to Fisher comparable sale used by the expert should have been struck because it was subsequently used for a commercial or industrial use. We find no merit in the contention.

Affirmed.

PHILLIP H. HENSON, A/K/A ROBERT V. SCHEICK
v. STATE OF ARKANSAS

CR 73-114 501 S.W. 2d 619

Opinion delivered November 26, 1973

Williams & Gardner, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Philip M. Wilson,* Asst. Atty. Gen., for appellee.

FRANK HOLT, Justice. Appellant was convicted of the crime of rape in 1964 and his punishment was fixed at life imprisonment. We reversed in *Henson* v. *State,* 239 Ark. 727, 393 S.W.2d 856 (1965). Upon a change of venue and a retrial in 1966, a jury again found appellant guilty

of rape and assessed his punishment at life imprisonment. From a judgment on that verdict comes this belated appeal permitted by our per curiam order dated January 29, 1973. Present counsel was appointed for appeal purposes.

Appellant first contends for reversal "the court erred in allowing the testimony of Dr. Walter P. Harris to be admitted because his opinion was formed by using information obtained through a doctor-patient relationship which is privileged." Dr. Harris examined appellant on two occasions during the time he was awaiting trial and incarcerated. The first examination was at the behest of appellant's wife that he be examined by the state hospital authorities as to his mental condition. The court ordered two local doctors, including Dr. Harris, to conduct the requested mental examination. Before the petition was withdrawn, Dr. Harris examined the appellant and diagnosed him as a sexual psychopath and not insane. In the former appeal, *Henson* v. *State, supra,* we held that Dr. Harris' examination as to appellant's mental condition was not violative of the doctor-patient relationship. In the case at bar it clearly appears that Dr. Harris did not rely in any manner whatsoever upon the second examination, based upon a physical complaint by appellant, in forming his opinion concerning appellant's mental state. We perceive no violation of the doctor-patient relationship.

Appellant next contends "the court further erred in allowing Dr. Harris to testify as to the defendant's sanity as he was not qualified to render such opinion and because such testimony, since there was no plea of insanity, served only to prejudice and inflame the senses of the jury." We first observe that it appears the doctor's qualifications as a physician were admitted by the appellant's trial counsel on two occasions. Further, there was no objection as to his qualifications raised at the trial. We cannot consider an issue raised the first time on appeal. *Nash* v. *State,* 248 Ark. 323, 451 S.W.2d 869 (1970). When the doctor testified as to appellant's psychopathic mental condition, an objection was made stating "***if we are talking about generally.

This defendant is who we are trying. We are here on a specific case for a specific defendant." The court answered "[W]ith reference to the specific offense it will be sustained. Lay the proper foundation." The doctor then proceeded to give his opinion as to appellant's mental condition and no objection was renewed. Thereafter, appellant's counsel proceeded to cross-examine the doctor with reference to the mental examination. We cannot say in the absence of proper objections that reversible error occurred.

Appellant next contends for reversal that the "court erred in failing to grant a mistrial of the case after each of several highly prejudicial remarks were made by witnesses for the prosecution." The prosecuting witness testified that after raping her appellant assaulted her again a short time thereafter. The court sustained appellant's objection and admonished the jury to disregard the prosecutrix's statement that "[H]e attacked me again." The sheriff testified that upon arresting the appellant he told him "he was under arrest for the rape of this girl, and there was two girls—one living over here and one—." He was interrupted by an objection from appellant's counsel. The trial court sustained the objection and, as requested, admonished the jury to disregard this testimony. Appellant also complains that the testimony of an aunt of the prosecutrix was prejudicial when she testified that her niece (prosecutrix) was "[C]rying, screaming she was scared to death. *** I went to the phone and called the sheriff's office. And she said, 'If you do that, he will come and kill us every one.' " The court again sustained the objection of appellant's counsel and, as requested, admonished the jury to disregard the prosecution's statement that "he will come out here and kill us every one." In each of these enumerated three instances, the asserted error was corrected by the cautionary instructions given by the court. *Stepps* v. *State,* 242 Ark. 587, 414 S.W.2d 620 (1967).

Nor do we find any prejudicial error in the state trooper's testimony that the defendant, when arrested, stated that "I won't go with the son of a bitch [another

officer], but I will go with you." We cannot perceive how this remark by the witness was prejudicial as to appellant's guilt or innocence of the alleged offense.

Appellant further contends that the "court erred in failing to strike and strongly admonish the jury not to consider testimony of Cora Williams when she related the statement of her niece as told to her by her daughter." The prosecutrix went to Mrs. Williams' house immediately following her ordeal with appellant. The prosecutrix went in the bathroom with her sister and Mrs. Williams' daughter. It appears that the aunt overheard their conversation. Mrs. Williams testified "[S]he told my daughter, that she had been attacked and when I told them to come out, if they didn't I would tear the door off the hinges, and when they come out, Wanda was crying." Appellant's attorney objected saying "[T]hat is not a spontaneous statement—that is too remote." Thereupon, the trial court sustained the objection. It does not appear that appellant requested a cautionary instruction or that the prosecutor continued interrogating the witness further as to the asserted hearsay testimony. Also, let it be remembered the prosecutrix had previously testified that she had been attacked by appellant. We perceive no prejudicial or reversible error.

Affirmed.

GULF OIL CORPORATION *v.* RICHARD R. HEATH, DIRECTOR OF THE DEPARTMENT OF FINANCE AND ADMINISTRATION

73-126 501 S.W. 2d 787

Opinion delivered December 3, 1973

Cockrill, Laser, McGehee, Sharp & Boswell, John E. Bailey and *William G. Duck,* for appellant.

Walter Skelton, Karl Daley Glass Jr., John F. Gautney Jr., Alexander W. Nisbet, Dewey Moore Jr., and *J. R. Nash,* for appellee.

CARLETON HARRIS, Chief Justice. This appeal relates to a suit for refund of franchise tax assessments totaling $46,129.74, which appellant, Gulf Oil Corporation (hereinafter called Gulf) paid under protest for the years 1970, 1971, and 1972. In 1968, appellant amended its Articles of Incorporation so as to provide for a two for one stock split by reclassifying and changing its outstanding shares of stock from par value of $8.33 1/3 per share to no-par $4.16 2/3 per share stated value. In 1969, Gulf duly filed its franchise tax reports and paid taxes in the total amount of $12,349.62 for those years. This amount was computed by Gulf on the basis that the

reclassification of its stock from par value to no-par stated value did not change the amount of capital of the corporation represented by its no-par stated value shares of stock. Appellee refused to accept these payments on the basis that Ark. Stat. Ann. § 84-1837 (Repl. 1960) required that the value of no-par stock be computed at $25.00 per share and an additional payment from Gulf was demanded in the amount of $61,708.12 covering the aforementioned period. This amount was paid under protest. The commissioner[1] was requested to conduct an informal hearing for the purpose of determining the proper basis for the computation of the amount of taxes due, and at such hearing, Gulf contended that under the statute, the commissioner possessed discretionary authority to disregard the presumed statutory value of $25.00 per share and to compute the tax on the basis of the aforementioned stated value of the no-par value stock. The commissioner disagreed, holding that he was required under the aforementioned statute to compute Gulf's franchise taxes on the no-par value stock on a basis of $25.00 per share. Suit was instituted by appellant in the Pulaski County Chancery Court wherein judgment was sought for the asserted overpayment, and Gulf also sought a restraining order restraining appellee from assigning for franchise tax purposes an arbitrary value of $25.00 per share on the no-par stated value stock. Appellee demurred to the complaint, which demurrer was sustained by the trial court, and appellant, electing to stand upon the complaint, same was dismissed for want of equity. From the decree so entered, appellant brings this appeal. For reversal, three points are asserted which we proceed to discuss.

It is first contended that the Corporate Franchise Tax Act, Act 304 of 1953 (Ark. Stat. Ann. § 84-1833—84-1842 [Repl. 1960]), made decisive changes in the substance and administration of the Corporate Franchise Tax Act then in existence, Act 367 of 1923, by creating

[1]The original suit was brought against A. B. Hervey, Jr., Acting Director of the Department of Finance and Administration, but was revived in the name of Richard R. Heath, Director of such department as the successor in office to Hervey.

only a rebuttable presumption as to the value of no-par value stock and by granting appellee discretionary authority to compute the amount of franchise tax on the basis of the stated value of said no-par stock. This argument is based on the fact that the present statute, heretofore cited, uses the phrase "such shares of no-par value shall be *deemed* [our emphasis] to be of the par value of Twenty-five Dollars ($25.00) per share", while Act 367 of 1923 used the language "such shares shall *be taken* [our emphasis] to be of the par value of Twenty-five Dollars ($25.00) each."

In *State* v. *Margay Oil Corporation,* 167 Ark. 614, 269 S.W. 63, this court held that the 1923 act was valid; that the state may make reasonable classifications of corporations for taxing purposes if all corporations of the same class are treated alike, and further held that the $25.00 per share figure given no-par value stock was reasonable. There was apparently no contention on the part of Margay that the words "be taken" created anything other than a conclusive presumption. In *Gilliland Oil Co.* v. *State, ex rel Attorney General,* 171 Ark. 415, 285 S.W. 16, we said:

> "The question of the validity of the act of 1923, supra, fixing the taxable value of nonpar value stock, and the question of the application of that statute to foreign corporations, must be treated as foreclosed by the decision of this court in *State* v. *Margay Oil Corporation,* 167 Ark. 614."

On appeal to the United States Supreme Court, that court, in a short *Per Curiam,* affirmed *Margay* on the authority of *Roberts & Schaefer Co.* v. *Emmerson,* 271 U. S. 50. In the cited case, the court said:

> "The only question with which we need be concerned is whether there are such differences between the two privileges to issue the two classes of stock, as to constitute a proper basis for classification for purposes of taxation, so that the amount of the tax in the one case may be based on the issue price of the stock, and in the other upon the maximum

price at which it may be issued, regardless of the price at which it actually is issued."

The court held there was such a basis.

Accordingly, our statute which used the words "be taken" has been held valid, and the court has said that a state has the right to make reasonable classifications; this, of course, included our own classification wherein the value of no-par stock was set at $25.00 per share.

Though admitting that under the 1923 act, there was a conclusive presumption that no-par value stock was to be taxed at the value of $25.00, the commissioner having no discretion to find otherwise, appellant contends the use of the word "deemed" in the present statute only creates a rebuttable presumption and the commissioner is free to follow or reject the $25.00 figure.

It is asserted that Section 6 of Act 304 (Ark. Stat. Ann. § 84-1838), when read in conjunction with Section 5 (Ark. Stat. Ann. § 84-1837) of the act, supports this construction. We do not accept this argument for we agree with appellee that Section 6 refers back to Section 4 (Ark. Stat. Ann. § 84-1836).[2]

[2]Pertinent provisions of those sections read as follows:

"Section 4. ***Each corporation, the tax for which is fixed in lump sums by this act, which shall fail or refuse to file its report or shall fail or refuse to furnish the information necessary to the proper determination of the tax hereunder on or before June 20th of the reporting year, shall pay the maximum tax herein provided for corporations of this particular classification, and each other corporation which shall fail or refuse to file its report or shall fail or refuse to furnish the information necessary to the proper determination of the tax due hereunder on or before June 20th of the reporting year, shall pay a tax at the rate herein provided based on its entire outstanding capital stock whether or not all or only a part of its capital is employed in Arkansas, and the Commissioner shall accordingly, on the basis of information available to him from whatever source, including prior reports, charge and collect such tax. ***

"Section 5. In any case in which the par value of the shares of a corporation is required to be stated in any report required under the provisions of this act, if such shares are without par value, the number of such shares shall be stated, and, for the purpose of computing the franchise tax by this act pres-

We do not attach the importance to the change from "be taken" to "deemed" that is argued by appellant. In the first place, we do not have a situation where only one word was changed; rather, the entire section has been re-written and there have been numerous changes in words used. In the next place, practically all judicial construction of the word "deemed" is contrary to the argument of appellant. Only one case is cited holding with appellant, viz., the North Dakota case of *Kleppe* v. *Odin Township,* 169 N.W. 313, where the district court construed the word "deemed" to be a disputable presumption. In *Harder* v. *Irwin,* 285 F. 402, the District Court for the Northern District of New York, said:

> "The word 'deemed' has been judicially defined. In *Leonard* v. *Grant* (C. C.) 5 Fed. 11, 16, it is stated that:
>
> ' "Deemed" is the equivalent of "considered" or "adjudged," and therefore whatever an act requires to be "deemed" or "taken" as true of any person or thing, must, in law, be considered as having been duly adjudged or established concerning such person or thing, and have force and effect accordingly.'
>
> "In *U.S.* v. *Doherty,* (D. C.) 27 Fed. 730, 734, it was thus defined:
>
> ' "Deem" means "judge;" "determine on consideration." The primary meaning of the word is to form a judgment; to conclude on consideration.' Words and Phrases, First Series, 'Deem.'
>
> "There are several other judicial expressions of the word 'deemed,' among them being in *Walton* v. *Cavin,* 16 Q.B. 48, 81, where it was stated that where a person was 'deemed' to be a soldier it must be

cribed, such shares of no par value shall be deemed to be of the par value of Twenty-five Dollars ($25.00) per share.

"Section 6. The Commissioner, from the facts reported and from any other facts coming to his knowledge bearing upon the subject, shall compute the amount of the tax by each of said corporations at the applicable rate or rates hereinbefore provided, ***".

understood to mean that he was thereafter to be taken in that capacity. Also, in *Cardinel* v. *Smith,* 5 Fed. Cas. 45, 47 No. 2, 395, the statute provided that dealers in canned goods under certain circumstances shall be deemed to be manufacturers and the court stated that they were to be held liable as manufacturers, notwithstanding that they were not such in fact. Other cases to the same effect are *Lawrence & Co.* v. *Seyburn,* 202 Fed. 913, 121 C.C.A. 271; *Michel* v. *Nunn* (C.C.) 101 Fed. 423, 424."

In *H.P. Coffee Company* v. *Reconstruction Finance Corp.,* 215 F. 2d 818, the question of the meaning of the word "deemed" arose and the court stated:

"It is said that the word must be construed as raising only a rebuttable presumption that the subsidy has been paid on all coffee which an importer has in his terminal inventory, and that this presumption disappears on proof by an importer that, in fact, he has received no subsidy payments thereon. This contention flies directly into the teeth of the generally accepted definitive import of the word 'deemed' and almost unanimous judicial determination that the word, when employed in statutory law, creates a conclusive presumption. E.g., *United States* v. *Davis,* 1 Cir., 50 F.2d 903; *Harder* v. *Irwin,* D.C., 285 F. 402; *Intagliata* v. *Shipowners & Merchants Towboat Co.,* Cal. App., 151 P. 2d 133, subsequent opinion 26 Cal. 2d 365, 159 P. 2d 1; *King* v. *McElroy,* 37 N.M. 238, 21 P. 2d 80; *Commonwealth* v. *Pratt,* 132 Mass. 246. See 11 Words and Phrases, Deem, pp. 478 - 482. Absent qualifying language, or ambiguity, we must give to the word 'deemed', as employed in the emphasized language of paragraph 1 (f) (iii), its natural import."

We cannot agree that there is significance in the use of the word "deemed" rather than "taken", and accordingly find no merit in this contention, holding that the language of the act creates a conclusive presumption as to the value of the corporation's no-par stock.

It is next asserted that if the tax act in question created a conclusive and irrebuttable presumption, Amendment Fourteen to the United States Constitution is violated, and the act is unconstitutional. Appellant calls attention to the cases of *Schlesinger* v. *Wisconsin,* 270 U. S. 230 (1926), *Heiner* v. *Donnan,* 285 U. S. 312 (1932), and *Mourning* v. *Family Publication Service,* 411 U. S. 356. In *Schlesinger,* the court held that a conclusive statutory presumption that all gifts of a material part of a decedent's estate made by him within six years of his death were made in contemplation of death, created an arbitrary classification and conflicted with the Fourteenth Amendment. In *Heiner,* the court held a congressional act violative of the Fifth Amendment, said act creating a conclusive presumption that gifts made within two years prior to the death of the donor were made in contemplation of death, and we cannot see that *Mourning* (which dealt with the Truth in Lending Act) adds anything to the holdings in those cases. Of course, none of these cases dealt with a franchise tax and the most recent case cited by appellant, *Vlandis* v. *Kline, et al.,* 412 U. S. 441, decided by the United States Supreme Court on June 11, 1973, deals with the residency of students attending state supported institutions in Connecticut. In fact, we find no recent case involving a franchise tax. Both appellant and appellee agree that in *Shanahan* v. *United States,* 447 F. 2d 1082, the Circuit Court of Appeals for the Tenth Circuit, in construing the internal revenue statute, stated that a conclusive presumption will be upheld so long as it is reasonable. Appellant recognizes that there are statutes in other jurisdictions applying a value to shares of no-par stock, but asserts that this fact is not persuasive.[3]

Let it be remembered that appellant voluntarily

[3]From appellant's brief:

"We are also familiar with statutes from other states which apply a presumed value to each share of no-par stock which said statutes are completely irrelevant to a correct interpretation of Ark. Stats. 84-1837. We are not challenging the constitutionality or reasonableness of those statutes. Such statutes are not persuasive in this case unless appellee can prove the constitutionality and reasonableness of each of those statutes, as applied to the facts and law involved herein."

brought itself within the statute at issue, having full knowledge of the law as it had existed since 1953, it having paid the tax on par value stock until 1969. In *H. P. Coffee Company* v. *Reconstruction Finance Corp., supra,* the complainant contended that if the term "deemed" was construed as a conclusive presumption, such construction would conflict with the due process clause of the constitution. Though this case dealt with a contract between the parties, we think the observation of the court, in holding contrary to this contention, was interesting. The Court said:

> "Having brought itself within the terms of the provisions by its own voluntary act, complainant cannot say that the logical result offends against the due process clause."

Actually, the question here at issue was decided adversely to the present appellant when we disagreed with its argument relative to there being a difference between the meaning of the words "deemed" and "be taken", and accordingly held that "deemed" creates a conclusive presumption. Such construction leaves the holding in *Margay* controlling.

Finally, it is contended that if a conclusive and irrebuttable presumption as to the value of no-par stock was created by the statute, then said franchise tax as applied to corporations with no-par stock is unconstitutional since it creates a discriminatory classification between tax assessment at par as opposed to no-par stock because no practical or legal differences exist between the two classes of stock. The view taken by appellant is contrary to *Roberts & Schaefer Co.* v. *Emmerson, supra,* and *New York* v. *Latrobe,* 279 U.S. 421. We have already quoted from *Emmerson,* and in the last mentioned case, the court said:

> "It is said that the tax computed on the number of non-par shares at a flat rate may bear little relation to the property and business of the corporation within the state and consequently corporations having like property and business within the state,

> but with a different non-par capitalization, may be required to pay a different tax. But this is equally true of corporations having par value stock, even though full value be paid in on its issue. Par value and actual value of issued stock are not synonymous and there is often a wide disparity between them. Par value has long been a familiar basis of computing a franchise tax upon foreign corporations, and when otherwise unobjectionable has been repeatedly upheld by this Court.***
>
> "The kind and number of shares with which a foreign corporation is permitted to carry on its business within the state is a part of the privilege which the state extends to it and is a proper element to be taken into account in fixing a tax on the privilege. It may be assumed that if the doing of business with a greater number of non-par shares is not deemed by the taxpayer to be a valuable privilege, it will reduce the number of shares as the statute permits. ***
>
> "Nor is such a tax to be deemed a denial of equal protection because a different measure or method of computing the tax is applied to corporations having non-par stock from that applied to corporations having stock of par value."

Here, too, if appellant, as stated in its point for reversal, feels that there is no difference between the two classes of stock, it is, of course, free to return to the par value stock. And, if there is no difference, the question immediately arises as to what potential benefits necessitated the change. Without going into detail, suffice it to say that we do not agree that there are no longer any differences between the two types of stock; while the differences may not be as distinct or as easily ascertainable as at the time of *Roberts & Schaefer Co.* v. *Emmerson, supra,* and *State* v. *Margay Oil Corporation, supra,* nonetheless, differences do remain. For instance, one of the vital differences between par value and no-par value stock lies in the method of fixing the consideration to be paid by the subscriber to the capital of the corporation,

i.e., a main difference is that par stock must be issued for at least its par value, while no-par stock may be sold for any consideration fixed by the directors. At any rate, we do not detect such changes as would vitiate the Supreme Court decisions in *Emmerson* and *Margay;* if, however, we are incorrect in this conclusion, the proper place for nullification of the rulings there rendered is the United States Supreme Court—not this court.

Affirmed.

FOGLEMAN J., concurs.

JOHN A. FOGLEMAN, Justice. concurring. I concur because Act 304 of 1953 was a comprehensive new act governing franchise taxes and not simply an amendment or, for that matter, even a re-enactment of Act 367 of 1923, which was somewhat more limited in scope. Otherwise, since the word "deemed" is not necessarily completely synonymous with the word "taken," I would attach great significance to the change of words.

BILL DYER SUPPLY COMPANY, INC. *v.* STATE OF ARKANSAS

CR 73-90 502 S.W. 2d 496

Opinion delivered December 3, 1973
[Rehearing denied January 14, 1974.]

Kent J. Rubens and *Oscar Fendler,* for appellant.

Jim Guy Tucker, Atty. Gen., by: *James W. Atkins,* Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. The appellant, the operator of a discount store near Blytheville, was fined $50 for having sold certain articles on Sunday in violation of our Sunday closing laws. Ark. Stat. Ann. §§ 41-3812 *et seq.* (Supp. 1971). The only issue raised on appeal is the constitutionality of the statutes.

Such statutes have been sustained so frequently by this court and by the Supreme Court of the United States that an extended discussion is unnecessary. In fact, the appellant concedes that most of its available contentions have already been rejected and are therefore not reargued. Under our practice the appellant waives any contention that is not argued. *Sarkco, Inc.* v. *Edwards,* 252 Ark. 1082, 482 S.W. 2d 623 (1972).

The trial in the court below was perfunctory, the parties merely stipulating to facts showing that the defendant had sold articles on Sunday in violation of the statutes. It is now insisted that our Sunday closing laws are not sufficiently comprehensive to achieve the legislative purpose of creating a uniform day of rest. That argument was rejected in *Two Guys From Harrison-Allenton* v. *McGinley,* 366 U.S. 582 (1961), where the court held in substance that the legislature might confine its explicit prohibition to those businesses that were "particularly disrupting the intended atmosphere" of the day of rest. In the same vein it is argued that our statutes are arbitrary and discriminatory in permitting the sale of some commodities while prohibiting the sale of others. On its face the act is not arbitrary. For instance, the enumerated prohibitions avoid such necessaries as food and drugs. Since we cannot say that the legislative classification could not be sustained upon any conceivable state of facts, the appellant's attack upon the statute must fail for want of proof that arbitrary classification is involved. *Green Star Supermarket* v. *Stacy,* 242 Ark. 54, 411 S.W. 2d 871 (1967); *Taylor* v. *City of Pine Bluff,* 226 Ark. 309, 289 S.W. 2d 679 (1956), cert. den. 352 U.S. 894 (1956).

Affirmed.

SOUTHERN CREDIT CORPORATION *v.* J. CLARY ATKINSON, SHERIFF OF DALLAS COUNTY

73-130 502 S.W. 2d 497

Opinion delivered December 3, 1973
[Rehearing denied January 14, 1974.]

James R. Howard, for appellant.

Lawson E. Glover and *David M. Glover,* for appellee.

LYLE BROWN, Justice. By this suit appellant sought judgment against appellee for failure to make and file a return on an execution issued out of the Hot Spring County Circuit Court. The execution was directed to the sheriff of Dallas County because the judgment debtor resided in that county. Appellant filed a motion for summary judgment, which was denied. Then at the trial of the case appellant moved for a directed verdict, which was likewise denied. The jury returned a verdict for appellee and appellant here contends the trial court erred

(1) in not granting the motion for summary judgment, and (2) in denying its motion for a directed verdict.

The court was correct in denying the motion for summary judgment. Counter affidavits were filed by appellee in which it was sworn that the execution was actually served, a return made thereon, and mailed to appellant's attorney. That allegation, as we shall later discuss in more detail, raised a justiciable issue for the jury.

An abridgment of the brief testimony is necessary to an understanding of our holding on appellant's other point, namely, that it was entitled to an instructed verdict. The circuit clerk's record was introduced to show that a judgment was entered in the case of Southern Credit Corp. v. Bobby Erwin, that an execution thereon was issued and was never returned. Appellee, the sheriff, was called by appellant. He testified that the execution was sent to him by appellant's attorney; that he received two copies; that he made his return on one copy and mailed it to the attorney who sent it to him. The first witness for appellee was Dan Buford, a deputy sheriff in Dallas County. He said he accompanied the sheriff to the home of Bobby Erwin in Fordyce; that they found nothing on which to levy; that they returned to the sheriff's office; that Buford made out a bill for the cost of levying the execution; that the sheriff made out the return; and that the bill and the execution document were placed in an envelope and dropped in the mail basket in the sheriff's office. Bobby Erwin testified that the sheriff and his deputy came to his home with the execution, serving a copy thereof on him, but that he had no property on which to levy. Sheriff Atkinson testified he received the execution in the mail from attorney Howard from Little Rock and within a few days went to the home of Erwin, along with his deputy, and served the execution; that he found no property on which to levy; that he made a return on one of the copies and mailed it along with Deputy Buford's bill to attorney Howard. "I mailed it back to him because I received it from him. I usually do that. Most lawyers like to see what is on the return. I usually go ahead and serve the papers and then bill

the attorney for it. I was paid for the service of this execution." In other words appellee was saying he mailed the execution and the bill for services in the same envelope and attorney Howard responded by sending back a check for the service.

At the close of appellant's (plaintiff's) case, plaintiff made a motion which is usually made by defendant—motion for a directed verdict. In the first place, the sheriff, as appellant's witness, testified that he mailed the execution to appellant's attorney, from whom the sheriff received the execution. That testimony, absent explanation, could have caused the jury to conclude that the failure to file the execution with the clerk was caused by appellant's attorney. In the second place, "a directed verdict for the plaintiff is a rarity". *Hales & Hunter Co.* v. *Wyatt,* 239 Ark. 19, 386 S.W. 2d, 704 (1965). "A directed verdict at the close of the plaintiff's evidence should be sparingly granted". *Jeanes* v. *Milner,* 428 F. 2d 598 (1970); *Spink* v. *Mourton,* 235 Ark. 919, 362 S.W. 2d 665 (1962).

Appellant's final argument is that it should have been granted a directed verdict at the close of all the evidence. That is based on the theory that the failure of the sheriff to return the execution to the clerk within the time required by statute, is not excusable in the law. Ark. Stat. Ann. § 30-431 (Repl. 1962) says: "All executions shall be returnable sixty days from their date". Ark. Stat. Ann. § 29-208 (Repl. 1962) says judgment shall be rendered for the plaintiff against a sheriff for failure to return an execution. Many of our early cases literally interpreted and strictly enforced the quoted statutes. For example, see *Herr & Co.* v. *Atkinson,* 40 Ark. 377 (1882); *Jett* v. *Shinn,* 47 Ark. 373, 1 S.W. 693 (1885). In cases subsequent to those cited, our court has somewhat receded from its original "hard line" attitude. One of the leading examples is the case of *Bickham* v. *Kosminsky,* 74 Ark. 413, 86 S.W. 292 (1905). Kosminsky sued Sheriff Bickham and his sureties for failure of the sheriff to return an execution within the statutory period. The defendants answered that the attorney for the plaintiffs in connection with the judgment had insisted that the sheriff hold the execution beyond

the statutory period. The court sustained a demurrer to the answer. This court reversed, holding that the answer presented a good defense. This court said:

> Those who propose to invoke against officers the severe penalties of the statute upon which this motion is based must be careful to do nothing which directly or indirectly contributes to the omission of duty complained of. *Simms* v. *Quinn* 58 Miss. 221. This statement may reach further than was contemplated in *Jett* v. *Shinn,* but it well illustrates the application of the rule announced in *Jett* v. *Shinn,* that the act or instructions of the party in interest in preventing the return is a defense to the officer.
>
> The plaintiff in execution has a right to control the execution by himself or attorney, and, having such right, the officer must follow his instructions.
>
> This authority of the plaintiff must not be exercised to cause the sheriff to omit a statutory duty; but if it does cause him to do it, the plaintiff cannot take advantage of it.

In a somewhat similar state of facts, the trial court held that the failure of the sheriff to return the execution was due to the instructions of the plaintiff. *Wilkerson* v. *Mobley,* 152 Ark. 124, 237 S.W. 726 (1922). This court affirmed and said:

> The statute in question is highly penal, and a party invoking it must bring himself within both the letter and spirit of it. Therefore, he can do nothing which directly or indirectly contributes to the omission of the duty complained of and still hold the sheriff answerable under the statute.

The latest pronouncement on the question which has come to our attention is *Hamilton* v. *Pan American Southern Corp.,* 238 Ark. 38, 378 S.W. 2d 652 (1964). There we said: "In dealing with a statute of this kind it is well established by our decisions that it 'must be strictly construed in favor of those upon whom the burden is sought to be imposed'".

We summarize the undisputed evidence which we think made a justiciable issue of fact. Sheriff Atkinson testified that he received the execution from attorney Howard, not from the clerk; there was a cover letter which instructed the sheriff to mail his bill to the attorney; he mailed the execution and the bill to the attorney in the same envelope and there was a prompt return of a check for services; he mailed it to the attorney because he received it from the attorney (this fact is of considerable significance to us); and further, that was his custom in his nine terms in office because the lawyers wanted to see what was on the return. From the unchallenged facts it could have been reasonably deduced that the execution could have been lost in the attorney's office. Additionally, when the process was sent to the sheriff, not by the clerk, but by the attorney, the latter may have contributed, indirectly at least, to the sheriff's returning the execution to the attorney. This is not to say that the attorney is subject to criticism because it is common knowledge that sheriffs ofttimes send their returns to counsel. And, of course, it goes without saying, we are not concluding that is what did in fact happen; we are only saying that the trier of facts could reasonably make such conclusions.

Affirmed.

EUGENE E. MANN *v.* DELBERT HUGHES ET UX

73-151 502 S.W. 2d 465

Opinion delivered December 3, 1973
[Rehearing denied January 14, 1974.]

Gus R. Camp, for appellant.

Lee Ward, for appellees.

LYLE BROWN, Justice. Appellant and appellees are the owners of adjoining tracts of land near the city of Piggott. The tracts are on the north side of the street and this case grows out of a dispute as to the boundary line between the two pieces of property. The difference between the parties concerns, roughly, some eighteen feet. Appellant bases his claim on a surveyed line; appellees contend that the true line is one established by common consent and acquiescence of the adjoining owners for some ten years. The main contention for reversal is that the chancellor erred in finding from a preponderance of the evidence that the boundary had been fixed by common consent and acquiescence.

At one time the parents of appellant owned both parcels of land. Appellant received his deed from his father in 1961. The elder Mr. Mann conveyed the Hughes (appellees) tract to Ezra Hardin and wife in 1958; the Hardins conveyed to appellees in October 1967. Evidently no survey was made by either of the parties to this case at the time of their acquisition.

Mrs. Hardin testified that she and her husband (now deceased) acquired title in 1958 and moved on the plot of ground in 1962. She said there was an old fence between the Hughes and Mann tracts, and described the old fence as being in close proximity to the boundary line which the court later fixed. She said she told appellant "maybe

the fence angled down through there" and told him that if so, he could set it back, but that was never done and "we just always counted the fence the line".

Appellee Delbert Hughes testified that at the time he bought the property there was a fence, wooden and woven wire running northerly between the properties and that this fence was pointed out by Mr. Hardin as being the boundary. He said there were shrubs and flowers, and a garden which he regularly planted, within the disputed strip; that appellant never attempted to use the disputed strip for any purpose; that in 1969 appellant approached the witness for permission to cause to be constructed a sewer line through the disputed strip, and that permission was granted but the line was never installed.

Witness Walter Riddle testified for appellees. He said he had been familiar with the property for the last twelve years. In times past he had hauled livestock to the slaughterhouse which was operated on appellant's property. He said that during those years there was a fence between the properties of the parties hereto and his description of the location also coincided with the line later fixed by the chancellor. He said "there was shrubbery, flowers, rose bushes and everything set on the inside on either side".

Appellant testified he had been familiar with the property since the time his father owned it. He said in years past there had been an old north and south fence between the properties which was located between the survey line and the line testified to by appellee Hughes and his witnesses. He said the fence upon which appellee relies for a consent boundary was not in existence in March 1963. He testified that the first part of that fence was started by him in 1963 and completed by working spare time at different intervals. He said part of the fence north of the slaughterhouse was built by him to trap animals. He testified the south part of the fence was built "to keep people from the east side from seeing how big a mess I had over there". He insisted the fence was partly burned and the rest of it was taken down, all in 1969. He denied that the Hardins occupied the disputed area when

they owned the tract. He said at the time the Hardins lived there he had no use for the disputed area and gave Mr. Hardin permission to use it as a garden.

Appellant's wife substantiated most of her husband's testimony. She added that appellee Hughes was agreeable to a survey and quoted him as saying: "What's a few feet this or that?" She said Hughes declined to pay any part of the cost of survey and also objected when her husband started erecting the fence on the surveyed line.

There was other testimony on both sides and we have given consideration to all of it. No useful purpose would be served by abstracting the testimony of each and all the witnesses. The location of the fence upon which appellee relies as the boundary by acquiescence is certainly not one-sided; in fact the testimony created a close question of fact. "When the evidence is conflicting or evenly poised, or nearly so, the judgment of the chancellor on the question of where the preponderance of the evidence lies is considered as persuasive." *Clark* v. *Mathis,* 253 Ark. 416 486 S.W. 2d 77 (1972).

Appellant contends that the line established by the court is not straight or properly described. We do not agree. The line fixed by the court first runs "northerly" to a point 4 1/2 feet east of a concrete slab and then runs due north the rest of the way. That description was very nearly in line with the description of the location of the old fence relied upon by appellees.

Appellant insists that the court erred in admitting into proof appellees' exhibit six. That was a picture introduced by appellees which was not mentioned in the interrogatories submitted to appellees. We find no prejudicial error or element of surprise. The picture is very similar to another picture introduced in evidence as exhibit five.

The court erred, says appellant, in permitting appellee Hughes to testify as to what his grantor (since deceased) told appellee about the location of the line. In the first place the testimony was invited by a question on

cross-examination. In the second place it was admissible as an exception to the hearsay rule. *Thacker* v. *Hicks,* 215 Ark. 898, 224 S.W. 2d 1 (1949); *Texas and N.O. Ry. Co.* v. *Broom,* 53 Tex. Civ. App. 78, 114 S.W. 655 (1908); *Knight* v. *Knight,* 178 Ill. 553, 53 N.E. 306 (1899).

Affirmed.

GRIFFITH LUMBER COMPANY, AN ARKANSAS CORPORATION *v.* B. F. CONNOR

73-124 502 S.W. 2d 500

Opinion delivered December 3, 1973
[Rehearing denied January 14, 1974.]

Butler and Hicky, for appellant.

Rieves & Rieves, for appellee.

JOHN A. FOGLEMAN, Justice. Appellant Griffith Lumber Company contends that a judgment, awarding appellee Connor $3,000 as damages on Connor's suit alleging breach of contract for construction of a summer home for Connor on Horseshoe Lake in Crittenden County, is erroneous. Its points for reversal assert insufficiency of the evidence to support the verdict and error on the part of the trial court in instructing the jury. We find no reversible error.

It is undisputed that Connor entered into a contract in February, 1969, with Griffith Lumber Company, acting through the manager of its Hughes office, W. D. Lunsford, to erect the house, according to plans and specifications prepared by an architect, who did not make any specifications as to air conditioning. Connor contended that, under the contract, the lumber company was to design and install adequate heating and air conditioning. He alleged that appellant breached the contract by failing to substantially complete the building, by not following the plans and specifications and through defective workmanship. He also alleged that Griffith Lumber Company had acknowledged by a letter dated December 16, 1969, that the air-conditioning system was defective. Appellant's defense was, to a great extent, bottomed upon the contention that Connor had accepted the work, except for the air conditioning, and that the air-conditioning system

was adequate for the area it was intended to serve. By an amended complaint, Connor alleged damages totalling $5,236 of which $3,150 was for purchasing and installing a new air-conditioning system, $483 for repairing a fireplace, installing an exhaust fan in a bathroom and finishing a runway in an attic; $1,000 for installing a pocket door and reworking and repairing inside construction to conform to the plans and specifications; $28 for installing insulation for ducts according to the plans and specifications; and $575 for repair to windows to make them watertight, installing base and base shoe and repairing water damage.

The jury returned its verdict for Connor for $3,000. The evidence was in sharp contradiction on many points. Appellant states its point for reversal for insufficiency of the evidence thus: "The verdict of the jury was contrary to the law and the weight of the evidence." Of course, we cannot consider the weight of the evidence and must affirm if there is any substantial evidence to support the verdict. *Horn* v. *Shirley,* 246 Ark. 1134, 441 S.W. 2d 468; *Wasson* v. *Warren,* 245 Ark. 719, 434 S.W. 2d 51; *Dunaway* v. *Troutt,* 232 Ark. 615, 339 S.W. 2d 613. We find substantial evidence to support a verdict in the amount for which it was rendered.

Appellant first contends there was no evidence to show that there were any latent defects in the work. The alleged latent defects of which Connor complained, other than the air conditioning, consisted largely of the items for which he claimed damages. Connor told of having occupied the house for about two weeks in late June or early July, 1969, while appellant's employees were still doing some work there, and, after an absence of four or five days, having returned and found that water had run down through the ceiling in two bedrooms and a hallway. He said he found later that a pocket door was useless because it had been improperly located and installed, that cold air was coming into the bathroom because of the lack of a set of louvers on a suction fan in the attic, that brick falling in the fireplace caused it to disintegrate when the first fire was built, that water was coming through windows in the porch (or playroom), that linoleum flooring had curled up because of appellant's failure to install

quarter round or base shoe and that plywood flooring had not been installed in the attic as called for by the plans. Except for the pocket door, Connor maintained he did not discover these defects until after December 16, 1969, the date of the final payment of the contract price by him, and the delivery of a letter by Lunsford, acknowledging problems with the air conditioning and the responsibility of appellant to see that the unit operated satisfactorily and to replace it if it did not.

Connor said he complained to Lunsford, who promised to correct the defects, but Lunsford died before he could do so. Connor admitted that some corrections had been made, but testified that, after Lunsford's death, he talked to Mr. Griffith, the president of appellant, who promised to take additional corrective measures, but failed to do so. Herschel Manning, a licensed Arkansas contractor engaged in commercial and residential building in the area and a Carrier Air Conditioning dealer, testified that the reasonable cost of replacing the three-ton air-conditioning unit with a five-ton was $3,150. His estimates of costs for repairing other defects and for supplying deficiencies in the work generally support the amounts claimed by appellee.

Appellant contends, however, that Connor waived any claim for all these alleged defects and omissions, except for the air conditioning, by taking possession of the property in June of 1969 and making final payment on the contract price on December 16, 1969. We cannot agree that there was a waiver here as a matter of law. Most of the authorities relied upon by appellant on this subject are based upon the assumption that the owner accepted the work with knowledge that it had not been done according to contract, or under circumstances from which such knowledge would necessarily be imputed, or upon contract provisions different from those here. Some of them clearly recognize that the general rule as to waiver of defects by acceptance does not apply to latent defects. See, e.g., 13 Am. Jur. 2d 59, Building and Construction Contracts, § 55; *Guschl* v. *Schmidt,* 266 Wis. 410, 63 N.W. 2d 759 (1954). In the case of latent defects, according to these authorities, before there can be a waiver, the defect must

be known by the owner or discoverable by him by reasonable inspection, or there must have been a reasonable time and opportunity for discovery by due diligence. Others recognize the owner's right to recoupment, set-off or recovery of damages on account of the defective character of the work due to material noncompliance with the contract when timely objection was made, even though, because of use and occupancy, he may not be heard to deny the contractor's right to recover the contract price. See *Bush* v. *Finucane,* 8 Colo. 192, 6 P. 514 (1885); *Katz* v. *Bedford,* 77 Cal. 319, 19 P. 523 (1888); *Guschl* v. *Schmidt,* supra. Some of these authorities clearly recognize the existence of questions of fact as to whether the defects complained of were latent, and whether timely objections were made by the owner. This seems to be consistent with our holdings in similar situations. *Dutton* v. *Million,* 114 Ark. 330, 169 S.W. 1183.

In one of the few cases on the subject in Arkansas, it was held that when work contracted for has been done substantially in accordance with the terms of the contract, or where there has been an acceptance of the work by the owner, the contractor may, notwithstanding defects therein, recover the contract price, less the cost of correcting such defects. *Fitzgerald* v. *LaPorte,* 64 Ark. 34, 40 S.W. 261. In that case, it was said that continued use of the building did not necessarily constitute an acceptance of the work.

If Connor's testimony was found worthy of belief, there was a question of fact involved. It is true that the contract provided for payment of $2,500 when the house was turned over to Connor and accepted, but it also provided that a balance of $1,500 "be held" for 120 days after Connor received the house. This was a clear provision for possible deficiencies and omissions in performance of the contract. This payment was not made until December 16, 1969, and was made then, according to Connor, because Lunsford said he needed the money. Connor said that, at the time, he was unaware of any of the defects he discovered except for the air conditioning and the pocket door, and that Lunsford had made a number of repairs to the house between June and December. It is logical to believe that some of the matters of which Con-

nor complained would not have been discovered until winter weather caused them to be revealed. Connor also claimed that when he moved into the house, Griffith had retained and still had a key to the house.

In *Ray Dodge, Inc.* v. *Moore,* 251 Ark. 1036, 479 S.W. 2d 518, in treating the matter of waiver, we had this to say:

> Waiver is the voluntary abandonment or surrender by a capable person of a right known by him to exist, with the intent that he shall forever be deprived of its benefits. It may occur when one, with full knowledge of the material facts, does something which is inconsistent with the right or his intention to rely upon it. Sirmon v. Roberts, 209 Ark. 586, 191 S.W. 2d 824. In the cited case, we said that conduct amounting to waiver should be carefully inspected and all evidence upon the subject impartially scrutinized.

We readily agree that there was substantial evidence tending to show that Connor had accepted the work and had waived appellant's noncompliance with the contract, if any, except as to air conditioning. But there was definitely a fact question on the score, which was resolved against appellant by the jury.

Appellant's argument relating to evidence about the inadequacy of the air-conditioning system is based for the most part upon its contention that the only witness who testified that the air conditioner to be supplied by appellant was to be a unit with a five-ton capacity was Connor and that his testimony was sharply contradicted by Delton Cummings and Marion Bobby Latham, that the initial plans called for a place on a glass-enclosed porch or playroom for the two-ton unit, admittedly installed by Connor, that the three-ton unit installed by appellant was quite adequate for the rest of the house and that a five-ton air conditioner in addition to the two-ton unit would have been far in excess of Connor's needs and would have increased his contract price. Appellant points out that the lips of Lunsford, its manager, have been sealed by death, but argues that Connor's testimony is outweighed by the fact that the building plans called for the separate window air conditioner on the porch, together

with the testimony of Latham that, at the request and upon the instruction of Lunsford, he figured the air-conditioning load for the house exclusive of the porch and that the three-ton unit was more than adequate for that purpose.

But we cannot reject the testimony of Connor or find it insubstantial solely because we might think that it is outweighed by other evidence or on the basis of credibility. The determination of credibility was totally within the province of the jury. *Bradberry* v. *Gower,* 247 Ark. 700, 447 S.W. 2d 124; *St. Louis-Southwestern Ry. Co.* v. *Holwerk,* 204 Ark. 587, 163 S.W. 2d 175; *Lewis* v. *Shackleford,* 203 Ark. 500, 157 S.W. 2d 509; *Lloyd* v. *James,* 198 Ark. 255, 128 S.W. 2d 1019. We could only reverse the jury verdict upon the conflicting evidence presented if we could say there was *no* reasonable probability that the facts could be as related by Connor and as the jury found, even though we might think that his version was highly improbable. *Green* v. *Harrington,* 253 Ark. 496, 487 S.W. 2d 612; *Beard* v. *Coggins,* 249 Ark. 518, 459 S.W. 2d 791; *Blissett* v. *Frisby,* 249 Ark. 235, 458 S.W. 2d 735; *Fields* v. *Sugar,* 251 Ark. 1062, 476 S.W. 2d 814; *Rhodes* v. *Bernard,* 248 Ark. 869, 454 S.W. 2d 318, 47 A.L.R. 3d 961. So long as a party's testimony relates to matters that might or might not have existed, and his right to recover is dependent upon the truth or falsity of his testimony, it is evidence of a substantial character and, if believed by the jury, is sufficient basis for a recovery by him. *Independent Stave Company* v. *Fulton,* 251 Ark. 1086, 476 S.W. 2d 792.

Connor testified that:

> He had no experience in heating or air conditioning. He had an architect in Memphis, Tennessee, where Connor lived, draw up plans and specifications for the house, which covered everything with the exception of air conditioning. He negotiated the contract with Lunsford, gave him a set of blueprints and told him that it was up to the contractor to furnish a set of prints showing heating and air conditioning, but that, in no event should there be less than five tons of air conditioning, after which Connor told Lunsford that he was marking his own set of plans

accordingly and Lunsford said, "I'm marking mine." Lunsford "reached over" and, Connor assumed, did mark the print which Lunsford worked from and had in his possession until he ended the job. The set of plans in Connor's possession bore the notation "no less than five ton air conditioning" in Connor's handwriting but he did not put it on any other set, even the extra set which he furnished his attorney and which was exhibited to appellant's attorney when Connor's discovery deposition was taken.

The contract dated February 27, 1969, which Connor testified was drawn by Lunsford, provided for the house to be built according to plans and specifications for $19,000, with everything furnished except floor covering. Connor stated he did not know that the air-conditioning unit appellant installed had a three-ton capacity rather than a five-ton capacity until Delton Cummings, a Carrier Air Conditioning dealer, was sent by the distributors to calculate the load at the house long after the house construction was completed and after Lunsford's death. He also testified he installed a second unit on the porch as an auxiliary unit at his own expense and Lunsford understood this. It was for the jury to decide whether to believe this witness. Since they apparently chose to do so on this point, we are bound by their decision.

Appellant's complaint about jury instructions falls upon the basis of what we have said heretofore. Its requested instruction number one is premised upon the assumption that Connor was barred from any recovery except for any breach of the contract relating to air conditioning and for that reason would not have been a correct instruction. Appellant's objection to instructions given at the request of appellee is not well taken because it is based entirely on the same premise. Appellant's argument on both points is based upon its contention that there was a waiver of any defects as a matter of law. It appears to us that the issues were properly submitted to the jury.

Since we find no error, the judgment is affirmed.

SAMUEL J. WATSON *v.* STATE OF ARKANSAS

CR 73-131 501 S.W. 2d 609

Opinion delivered December 3, 1973

[redacted]

Sam Gibson, for appellant.

Jim Guy Tucker, Atty. Gen., by: *O. H. Hargraves,* Dep. Atty. Gen., for appellee.

JOHN A. FOGLEMAN, Justice. Appellant contends we should reverse his conviction of robbery, asserting that there was error in the admission into evidence of his purported confession, and in the court's refusal to give his requested jury instruction relating to the voluntariness of his confession, and that the evidence was insufficient to support the verdict. We find reversible error in the admission of the alleged confession.

We have for some time been committed to an independent determination of the voluntariness of a confession based upon an examination of the entire record, whenever an attack is made upon federal constitutional grounds. *Harris* v. *State,* 244 Ark. 314, 425 S.W. 2d 293; *Mosley* v. *State,* 246 Ark. 358, 438 S.W. 2d 311; *Scott* v. *State,* 251 Ark. 918, 475 S.W. 2d 699. The question of voluntariness must be determined by looking to the whole situation and surroundings of the accused. *Dewein* v. *State,* 114 Ark. 472, 170 S.W. 582; *Boyd and Byrd* v. *State,* 230 Ark. 991, 328 S.W. 2d 122; *Mitchell* v. *Bishop,* 248 Ark. 427, 452 S.W. 2d 340. Upon our examination, the findings of the trial court are not shunned but are given considerable weight in resolving evidentiary conflicts and respectful consideration on the crucial issue. Our examination of the record leads us to the inescapable conclusion that, when the totality of the circumstances surrounding Watson at the time is viewed, the state failed to meet its burden of showing his statement was made freely and understandingly without hope of reward or fear of punishment, as we have always required for the admission into evidence of a statement made by one in custody. *Mitchell* v. *Bishop,* supra; *Boyd and Byrd* v. *State,* supra.

Among the factors to be considered in determining this issue are: the age and the intellectual strength or

weakness of the defendant, the manner in which he is questioned, the presence or absence of threats of harm or inducements in the form of promises or favor (*Dewein* v. *State,* supra; *Williams* v. *State,* 69 Ark. 599, 65 S.W. 103; *Barnes* v. *State,* 217 Ark. 244, 229 S.W. 2d 484), and the delay between the advice of constitutional rights required by *Miranda* and the giving of the confession. *Summerville* v. *State,* 253 Ark. 16, 484 S.W. 2d 85; *Scott* v. *State,* 251 Ark. 918, 475 S.W. 2d 699. Where threats of harm or promises of favor or benefit are used to wrest a confession, it may be attributed to those influences. *Brown* v. *State,* 198 Ark. 920, 132 S.W. 2d 15. In order to be admissible, a confession must be free from official inducement proceeding either from hope of gain or the torture of fear. *Bullen* v. *State,* 156 Ark. 148, 245 S.W. 493. Holding out to a simple person that she would be awarded a very light punishment, if she confessed having stolen money, has been held sufficient inducement to make her confession involuntary and its admission into evidence reversible error. *Porter* v. *State,* 206 Ark. 758, 177 S.W. 2d 408.

Viewing the testimony in the light most favorable to the state, as we must in order to give the circuit judge's holding appropriate weight, examination of the entire record discloses that:

> Appellant, known as Joe Joe, was 17 years of age. His parents, who now live at Fort Smith, realized when he was in the third grade that he had a problem arising from his inability to learn. He was then sent to a Child Guidance Center for a long period of time, and was assigned to "special education" all along. He had been referred to the Arkansas Rehabilitation Services for vocational evaluation by the training school. Intelligence tests administered to young Watson revealed that he was "dull normal" and had achieved a level of third grade in spelling, 3.9 in reading and 5.7 in arithmetic. Such a person can make a living, handle money and live a semblance of a normal life. When arrested on January 4, 1973, he was attending the State Rehabilitation Center at Hot Springs. He was arrested by Hot Springs police detective Abernathy, who testified he advised Joe Joe of

his constitutional rights. He was transported from Hot Springs to Malvern by Hot Spring County deputy sheriff Lloyd Smith, who conducted most of the interrogation of appellant. He did not see either of his parents until after he had signed the confession, and he did not want to call his uncle or his grandmother, with whom he lived in Malvern.

Abernathy testified he used a standard printed form utilized by the Hot Springs Police Department in advising Watson of his rights. When asked specifically to state the rights of which he advised Watson, Abernathy replied he told Watson of his right to remain silent and that any statement made by him would be used against him in court. Abernathy then said he read the form to Watson, and as he read each item and after asking appellant if he understood, placed a check mark in a box provided on the form for that purpose, and then handed the form to Watson to read. Thereafter, he said, Watson signed the form and the officer signed a certification on the form. This form was handed to Smith when he picked up Joe Joe at the Hot Springs Police Department and Smith received an affirmative answer to his inquiry of the prisoner as to whether he had signed this form. Although Smith said he asked Joe Joe twice thereafter whether he knew his rights, there was no evidence that anyone other than Abernathy had attempted to advise Joe Joe of any of the rights not stated on the form. According to Smith, he took Joe Joe into the sheriff's office upon their arrival in Malvern, and, after asking if Watson knew his rights, said, "I don't want you to tell me no story. Tell me the truth, and we will get things over with." When Joe Joe asked "How long will I have to stay here?" Smith replied "Maybe a day or maybe two weeks. I don't know, until we are thoroughly convinced that you are guilty or not guilty." The next day Smith read the form to Watson again, and after Watson again confirmed the fact that he had signed the form, Smith asked "You want to talk to us about it or go the hard way?" and added "We are going to find out before I let you go." When Joe Joe accused Smith of trying to "pressure" him,

the officer said he replied "Come on. You are going back upstairs until you quiet down." They were on their way upstairs when Joe Joe told Smith he wanted to talk to the sheriff, saying "I want to get this over with. I want to tell him about it." Smith read the rights form to Watson again before the confession was signed. Watson's mother testified that Smith had admitted to her that he had promised to talk to the judge, with whom he had good connections, about imposing a light sentence and suspending it so Joe Joe could go back to the rehabilitation center, if Joe Joe should sign the statement. This testimony was not contradicted.

Our review of the record discloses that, in view of appellant's mentality and the statements made to him by the deputy sheriff, the advice to Watson about his constitutional rights may not have been given with sufficient clarity to enable him to understand that, if he desired, and was unable to employ a lawyer, a lawyer would be appointed before he was questioned. The form employed to advise appellant of his rights sets them out as follows:

1. Anything you say may be used against you in a court of law.

2. You have the right to use a telephone.

3. You have the right to remain silent.

4. You have the right to request a lawyer of your own choice.

5. You have the right to have your lawyer with you during questioning.

6. If you cannot afford a lawyer and want one, a lawyer will be provided for you in a court of law.

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

In *Miranda* v. *Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), the United States Supreme Court said:

> The circumstances surrounding in-custody interrogation can operate very quickly to overbear the will of one merely made aware of his privilege by his interrogators. Therefore, the right to have counsel present at the interrogation is indispensable to the protection of the Fifth Amendment privilege under the system we delineate today. Our aim is to assure that the individual's right to choose between silence and speech remains unfettered throughout the interrogation process.
>
> * * *
>
> This does not mean, as some have suggested, that each police station must have a "station house lawyer" present at all times to advise prisoners. It does mean, however, that if police propose to interrogate a person they must make known to him that he is entitled to a lawyer and that if he cannot afford one, a lawyer will be provided for him prior to any interrogation.

The opinion also points out that the burden is clearly on the state to establish a waiver of rights.

Appellant was advised that he had a right to have a lawyer provided in a court of law, if he could not afford one and that, if he decided to answer questions without a lawyer present, he would have the right to stop answering at any time until he did talk to a lawyer. This can easily be construed to mean that he could stop the questioning until a lawyer had been appointed. It has been held that advice that an attorney would be appointed "at the proper time," even though a slight deviation from the *Miranda* prescription, will not negate the overall effectiveness of the warning. *Tasby* v. *U.S.,* 451 F. 2d 394 (8th Cir. 1971), certiorari denied, *Feggett* v. *U.S.,* 92 S. Ct. 1273, 405 U.S. 992, 31 L. Ed. 2d 459.

This warning is not as defective as that condemned in *Moore* v. *State,* 251 Ark. 436, 472 S.W. 2d 940, where the form relied upon contained the statement "We have no way of giving you a lawyer, but one will be appointed for you, if you wish, when and if you go to court." There the implication that a lawyer could not be appointed before the accused's case came up in a court is clear. It is not clear that the provision of an attorney in a court of law would be postponed beyond "a proper time" in this case. This situation is also quite different from that in *Reed* v. *State,* 255 Ark. 63 498 S.W. 2d 877, where it was admitted that it was only indicated to the accused that, if he did not have an attorney before he went to trial, the court could appoint one for him. Still, it remains doubtful that young Watson, with his intellectual weakness, would have understood, either before or after the coercive and inducive language used by the officer, that he had the right to ask that a lawyer be appointed for him before interrogation.

All doubts about the voluntariness of a confession must be resolved in favor of individual rights and constitutional safeguards. *Smith* v. *State,* 240 Ark. 726, 401 S.W. 2d 749. In view of Watson's limited mentality, the coercive nature of Smith's interrogation and the lack of clarity in the only advice given to Watson as to his constitutional rights, when we resolve all doubts in his favor, we are compelled to hold that the confession was involuntary, because it was obtained through duress, threats of harm, and a promise of favor or reward, condemned in such cases as *Dewein* v. *State,* supra,[1] without adequate warnings as to his constitutional rights. In so doing, we have given respectful consideration to the holding of the trial court and resolved any conflicts in the evidence in favor of that ruling.

We need not discuss appellant's other points extensively. The question of voluntariness of the statement is unlikely to arise on retrial, but it appears to us that the circuit judge's instructions, given without objection, adequately covered the matter of the consideration to be

[1]As explained in *Needham* v. *State,* 215 Ark. 935, 224 S.W. 2d 785, 790.

given the confession by the jury, particularly in view of the fact that no specific instruction was requested.

In view of the positive identification of Watson by the victim of the "purse-snatching" of which appellant was accused, the evidence without the confession was legally sufficient, but admission of an involuntary confession must be taken to be prejudicial and reversible error.

For the error indicated, the judgment must be reversed and the cause remanded. It is so ordered.

PATRICK ANTHONY KEATING *v.* STATE OF ARKANSAS

CR 73-126 501 S.W. 2d 607

Opinion delivered December 3, 1973

Elbert S. Johnson, for appellant.

Jim Guy Tucker, Atty. Gen., by: *James W. Atkins,* Asst. Atty. Gen., for appellee.

J. FRED JONES, Justice. This is an appeal by Patrick Anthony Keating from a circuit court order denying

post-conviction relief under our Criminal Procedure Rule 1. Keating was charged, on informations filed by the prosecuting attorney, with two separate counts of burglary and grand larceny committed on May 30, 1970, and on June 4, 1970. He was apprehended in the state of Missouri and, after waiving extradition, was returned to Arkansas on June 8, 1970, at which time the informations were filed against him. His case was set for jury trial on November 9, 1970, at which time Keating, with the assistance of counsel, entered pleas of guilty to both counts and sentencing was deferred at the request of his counsel until November 13, 1970. On that date the trial court entered judgment sentencing Keating to ten years in the penitentiary on one of the counts with that sentence suspended. Keating was sentenced to five years in the penitentiary on the other count with that sentence to be served. Keating did not appeal from his judgments of conviction but on May 31, 1973, he filed his own handwritten petition for post-conviction relief on the grounds that he was not given a preliminary hearing and that he should have been charged or released within 72 hours following his arrest.

The record before us indicates that the pleas of guilty and penalties assessed were the result of plea bargaining; that the prosecuting attorney recommended the suspended sentence on the one charge and the five years to be served on the other charge and that Keating and his attorney acquiesced in the recommendations. The trial court announced that he would follow the recommendations made by the prosecuting attorney and then pronounced the sentences on Keating as above stated.

In his brief on this appeal Keating recognizes that under Ark. Stat. Ann. § 43-806 (Repl. 1964) the prosecuting attorney may file information direct and a preliminary hearing is not required. No evidentiary hearing was had on the petition for post-conviction relief but the trial court denied the petition on the basis of the petition and the original record preserved at the time the pleas of guilty were entered and sentences imposed.

Paragraph (C) of our Criminal Procedure Rule 1 provides as follows:

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

The trial court did, in its final order denying the petition, set out its findings from the record that Keating was arrested in the state of Missouri on June 4, 1970; that he waived extradition and was returned to the state of Arkansas on June 8 and was properly informed against directly on June 8, 1970; that bond was set on that day; that Keating failed to make bond and on November 13, 1970, in person and with his attorney, Keating entered pleas of guilty and the sentences were imposed.

Keating now argues on this appeal that the sentence of five years to be served, was too severe for the crime involved. Of course, where a sentence is in excess of the maximum authorized by law, a prisoner would be entitled to relief under Section (A) (c) of our Criminal Procedure Rule 1, but that is not the situation in the case at bar. The record before the trial court revealed that at the trial on November 9, 1970, the court asked the following questions and received the following answers from Keating:

> "COURT: You have talked to your Court appointed counsel about each of these crimes of Burglary and Grand Larceny?
>
> DEFENDANT: I did.
>
> COURT: You understand the punishment for them?
>
> DEFENDANT: Yes, sir."

The trial court in pronouncing the sentences inquired directly from Mr. Keating whether he understood what

good behavior meant and Keating replied that he did. The court then inquired whether Keating understood the sentences and Mr. Keating replied that he did.

The statutory penalty for burglary is fixed at not less than two nor more than 21 years. Ark. Stat. Ann § 41-1003 (Repl. 1964). The statutory penalty for grand larceny is fixed at not less than one nor more than 21 years. Ark. Stat. Ann. § 41-3907 (Repl. 1964). The penalties fixed by the court in the case at bar were well within the statute and are not subject to attack under our Rule 1, *Credit* v. *State,* 247 Ark. 424, 445 S.W.2d 718, especially when it is raised for the first time on appeal. *Bailey* v. *State,* 254 Ark. 628, 495 S.W. 2d 150.

The judgment is affirmed.

FOGLEMAN, J., not participating.

WALTER SMITH AND B. J. McADAMS, INC. *v.* RALPH NELSON

73-162 501 S.W. 2d 769

Opinion delivered December 3, 1973

Smith, Williams, Friday, Eldredge & Clark, by: *Frederick S. Ursery,* for appellants.

Howell, Price, Howell & Barron, for appellee.

FRANK HOLT, Justice. A jury awarded appellee $2,000 for compensatory damages in a cause of action based upon malicious prosecution and abuse of process. The sole contention on appeal is that the abuse of process instruction was not warranted by the evidence.

In determining if the evidence is sufficient to submit a cause or issue to the jury, we review the evidence most favorable to the appellee. *Baldwin* v. *Wingfield,* 191 Ark. 129, 85 S.W. 2d 689 (1935). Appellee Nelson was hired by appellant McAdams as an assistant driver to Harold Starnes in the operation of one of McAdams' fleet of tractor trailer rigs. During several out of state deliveries, the truck was dispatched to Los Angeles, California, where Starnes and Nelson arrived on Monday, June 29, 1970. The load was delivered and the two drivers checked into a motel. Tuesday morning Starnes called McAdams' dispatcher for further instructions and requested additional expense money. Company policy required a call each day from them. The dispatcher informed Starnes that no loads were available and that additional living expense money had been wired to Jerry's Richfield Truck Stop. Starnes and Nelson proceeded to the truck stop but found no money for them. Starnes again called the dispatcher and was reassured that this expense money had been sent there. The two drivers again ascertained that no funds were there and also checked with the local Western Union where they found no money for them. Both were broke and appellee had to borrow funds. A call was made every day requesting financial relief and hauling instructions until appellee's arrest on Sunday, July 5. It appears that upon Nelson's call on July 5 unpleasant words were exchanged between him and the dispatcher, resulting in Nelson's refusal to tell the dispatcher the whereabouts of the truck other than it was in the vicinity. Nelson, however, furnished his address and telephone number and the local police arrived soon thereafter with a warrant for Nelson and Starnes' arrest. During the week the

warrant had been sworn out by appellant Smith at the direction of appellant McAdams. The warrant charged Nelson and Starnes with larceny by bailee. Ark. Stat. Ann. § 41-3929 (Repl. 1964). Upon his arrest Nelson took the deputies to the nearby truck. Appellant McAdams immediately sent a driver to Los Angeles to pick up his truck. Appellee Nelson and Starnes waived extradition and were returned to Little Rock where the alleged offense was dismissed by the local municipal court.

At trial McAdams adduced evidence that for several days he could not locate appellee Nelson and Starnes or the whereabouts of his property and his purpose in procuring the warrant was the return of his truck. He further testified that he did not intend to have the men arrested and neither knew nor cared whether the two drivers were tried on the charges.

The requirements giving rise to a cause of action for abuse of process are found in Prosser, Law of Torts, § 121 (4th Ed. 1971), and are:

> (1) a legal procedure set in motion in proper form, even with probable cause, and even with ultimate success, but,
>
> (2) perverted to accomplish an ulterior purpose for which it was not designed, and
>
> (3) a wilful act in the use of process not proper in the regular conduct of the proceeding.

See also Harper and James, I The Law of Torts, § 4.9 (1956), and generally 72 C.J.S. 1189, and 1 Am. Jur. 2d 250. A paucity of cases involving this type of a tort have reached the appellate level in this jurisdiction. The leading case dealing with the cause of action is *Lewis* v. *Burdine,* 240 Ark. 821, 402 S.W. 2d 398 (1966), where a wife was sued by a collection agency for her husband's debt to a doctor. In the same suit a writ of garnishment was issued before judgment and the wife's salary impounded resulting in her loss of employment. The wife was found not liable on the debt. The writ of garnish-

ment was held to have been a misuse or abuse of process. See also *Baxley* v. *Laster,* 82 Ark. 236, 101 S.W. 755 (1907), dealing with abuse of process and writs of garnishment issued for the purpose of harassment.

The crux of the misuse or abuse of process is the improper use of it *after* issuance. In other words, abuse of process constitutes a form of extortion or coercion. Prosser, *supra.* The test of process abuse is not whether the process was originally issued with malice and without probable cause. The remedy in that situation would be an action for malicious prosecution which was asserted in the case at bar. Here we have no abuse or coercive act subsequent to the issuance of the warrant. Although it be said that McAdams' testimony confirmed an ulterior purpose in procuring the warrant, no coercive act followed such as existed by the writ of garnishment in *Lewis* v. *Burdine, supra.* Without the coercive distinction every action for malicious prosecution would include the tort of abuse of process. Certainly it cannot be said that the reclaiming of one's own property, as in the case at bar, should be characterized as a subsequent act that constituted a perverted use of the warrant. We hold that the facts, when viewed most favorably to appellee, do not support a submissible issue on abuse of process.

Reversed and remanded.

C. S. GAINER JR. AND EDNA GAINER *v.* LORENA K. TUCKER, ADMINISTRATRIX OF THE ESTATE OF JIM TUCKER

73-122 502 S.W. 2d 636

Opinion delivered December 10, 1973

Davis, Reed & Douglas, for appellants.

Coffelt, Burrows & Sawyer, for appellee.

CARLETON HARRIS, Chief Justice. Jim Tucker, a licensed real estate broker in Arkansas, instituted suit in the Benton County Circuit Court against C. S. Gainer, Jr. and Edna Gainer to enforce a $30,260 commission for the sale of 712 acres in Benton County. On April 11, 1967, an offer and acceptance contract was entered into between the buyer (Charles Seaney) obtained by Tucker, and C. S. Gainer, Jr. and Edna J. Gainer, appellants herein. The total purchase price for the property was $302,600, and the Gainers agree in the same offer and acceptance to pay Tucker $30,260 as his commission in obtaining the offer. The agreement provided that Seaney was to pay $35,000 in cash and the balance of $267,600 as follows: "$26,760 annually including 6% interest, first payment to be made twelve months from closing date of this agreement. Buyer reserves the right to pay more or all at any time and without penalty." This offer and acceptance was made an

exhibit to the complaint filed by Tucker. In the suit, it was admitted that $10,000 of the commission had been paid, leaving a balance due of $25,260. Also attached to the complaint was plaintiff's Exhibit B, a letter dated June 9, 1967 as follows:

> "Mr. Jim Tucker
> 205 West Walnut
> Rogers, Arkansas 72756
>
> Dear Mr. Tucker:
>
> This letter will serve to acknowledge and set forth our agreement concerning the payment of a real estate commission due you for the sale of land owned by me to Mr. Charles Seaney.
>
> The total commission is $30,260.00, of which you have received $10,000.00, leaving a balance due of $20,260.00 which is to be paid to you in three installments of $6,753.33 each, the first installment being due June 15, 1968, and a like installment due June 15, 1969 with the final installment of $6,753.34 being due on June 15, 1970.
>
> Yours truly,
>
> /s/ C. S. Gainer, Jr.
> C. S. Gainer, Jr.
>
> ACCEPTED:
>
> /s/ Jim Tucker
> Jim Tucker"

Appellants answered, asserting that except for certain fraudulent representations made by Tucker, the contract would never have been entered into by and between the parties. It was alleged *inter alia* that Tucker agreed to accept his commission, percentagewise, of the monies paid to the Gainers by Seaney as those payments were made to them; further, that if the Gainers would accept the small down payment offered by Seaney, Tucker would only require the Gainers to pay to him a 6% commission due on the down payment; still further, that if the transaction was not completed, i.e., Seaney did not pay the total pur-

chase price set out previously, appellants would only owe to Tucker 6% of the monies paid to them on the purchase price. It was further alleged that Tucker received well in excess of the 6% monies due and owing him as a commission for the transaction. Appellants next asserted that Tucker guaranteed that Seaney was in substantially good financial condition, and that if payments were not made, he (Tucker) would guarantee such payments; that based upon the conditions mentioned, appellants entered into the contract. It was then asserted that Seaney became delinquent, failed and refused to make payments as they became due and that finally the property was reconveyed back to appellants by the purchaser Seaney. The prayer was that the complaint be dismissed. Subsequently, appellants filed a counter-claim, alleging an oral agreement which substantially followed the allegations set out in the answer, and asserted that Tucker had been paid $10,000, though only due $3,980, and they sought a judgment against him for $6,020.00. Thereafter, interrogatories were propounded by the Gainers to Tucker, but the answers are not particularly pertinent to the question posed before us in this litigation. On February 18, 1972, Mr. Tucker passed away and the cause was revived in the name of his wife, Lorena K. Tucker, as Administratrix of his Estate. Subsequently, the Gainers filed a petition with the court, stating that Mr. Gainer was in very bad health making it impossible for him to attend the trial of the case which had been set for December 27, 1972; that Gainer "has virtually all the knowledge in this cause of the defendants' defenses" and it was requested that the cause be continued. The court then entered an order continuing the trial until February 16, 1973, and the order further provided:

> "The defendants are to file in this cause within ten (10) days from this date an Affidavit for Continuance, and in the event the plaintiff admits that the defendants would testify to the facts in said Affidavit for Continuance by the defendants, the said cause shall be tried upon the facts presented by the plaintiff, the Affidavit of the defendants, and other testimony of the defendants on said 16th day of February, 1973.
>
> "In the event the defendants desire to take the depositions of the defendant, C. S. Gainer, Jr., he shall give notice of the time of taking said depositions to the attorney for the plaintiff of the time and place of

said depositions to be taken within five (5) days after the filing of the Affidavit for Continuance heretofore mentioned."

Subsequently, the affidavit of Mr. Gainer was filed, pertinent portions of which read as follows:

"On the evening of April 11, 1967, Jim Tucker presented to me a form offer and acceptance dated April 11, 1967, signed by Charles Seaney, which provided that Mr. Seaney would purchase certain lands of mine located in Benton County, Arkansas, for the total sum of $302,600.00, with $35,000.00 down and the balance in installment payments. This is the same offer and acceptance a copy of which is attached to the Complaint in this case with the exception that there were no provisions thereon for realtor's fees. I assumed that there would be a reasonable realtor's fee but terms and provisions would be for future discussion. Jim Tucker presented this agreement to Mrs. Edna J. Gainer, my wife, and me for signature. We refused at first to sign because of the small down payment provided, but then did sign upon the insistence of Jim Tucker and his repeated representations that Charles Seaney was financially capable, had financial connections with banks, otherwise was well able to complete purchase and development, and that Jim Tucker himself would secure background statements on Charles Seaney which would show this."

As to the June 9 letter signed by Gainer, appellant stated:

"Mr. Tucker then prevailed upon my good nature further, and took me to the law office of Clayton Little in Bentonville, Arkansas, to sign an agreement. The letter agreement dated June 9, 1967, attached to plaintiff's complaint was signed by us. It was signed by me only after Jim Tucker stated that he agreed to accept $10,000.00 and 10% total sums received on the purchase price thereafter, but I[1] might or did need such a document for credit purposes. He knew at the time that he neither agreed to nor would pay the sums therein stated at the times therein stated with the exception of the initial $10,000.00, but mis-

[1]This obviously is a typographical error in the record and properly should be "he". All parties, in the abstract and brief, treat the word as "he".

led me into signing such document on the basis of our oral agreement that I would pay 10% of sums received."

Thereafter, Requests for Admissions were submitted by appellee to Mr. Gainer, in which Gainer admitted that the letter written on June 9 was signed by him. He was also asked to admit that the balance had not been paid, to which he replied, "Admitted in form but denied as a proper balance." Thereafter, appellee moved for a summary judgment, supporting the motion by the two exhibits heretofore mentioned and the answers to the Requests for Admissions. Gainer resubmitted his affidavit in support of his opposition to the motion and after submission of briefs, the court granted the summary judgment holding that there was no genuine issue as to any material fact, and specifically finding:

"7. That the purchasers and sellers entered into an Offer and Acceptance dated April 11, 1967 in which the defendants herein agreed to pay the plaintiff the sum of $30,260.00 real estate commission.

"8. That $10,000.00 of the commission was paid leaving a balance due of $20,260.00.

"9. That subsequent to the Offer and Acceptance signed on April 11, 1967, the defendant, C. S. Gainer, Jr. and the plaintiff entered into an agreement dated June 9, 1967, which acknowledged that the total commission due in the sale was $30,260.00 and provided that the balance due of $20,260.00 was to be paid in three installments of $6,753.33 each, the first installment being due on June 15, 1968 and a like installment being due June 15, 1969 with a final installment of $6,753.34 being due June 15, 1970. That this letter agreement was admitted as being signed by the defendant, C. S. Gainer, Jr. in his Answer to Request for Admissions filed in this cause. That the defendant further admitted that the balance of $20,260.00 had not been paid. ***

"12. That the court specifically finds that even assuming the facts as testified to in the affidavit to be true for the purpose of this hearing, that the testimony would be inadmissible at the trial of this cause. That

> in view of the ruling in the case of *Bonds* v. *Littrell,* 247 Ark. 577, 446 S.W. 2d 672 (1969), the court finds that the testimony would not be prohibited by the Parole Evidence Rule. However, it is the court's ruling that the testimony contained in the affidavit filed in this cause would be testimony by a party against an administratrix and would therefore be prohibited by the 'Dead Man's Statute', Arkansas Constitution, Schedule, Paragraph 2."

Summary judgment was accordingly entered for appellee, and from such judgment, appellants bring this appeal. For reversal, it is asserted that material issues of fact existed and appellee was not entitled to judgment as a matter of law.

Of course, summary judgment is only proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Wilson, et al* v. *McDaniel, et al,* 247 Ark. 1036, 449 S.W. 2d 944. The finding of the court that Gainer admitted the balance of $20,260 had not been paid is attacked by appellants as incorrect, it being pointed out that the answer actually given by Gainer was "Admitted in form but denied as to proper balance." We find no merit in this argument for, like the trial court, we take this simply to have reference to the same contention made by Gainer in his affidavit, viz., that though he had signed the instrument reflecting that amount of indebtedness, the oral agreement between the parties prevented the amount from being correct.

The principal argument advanced by appellants is that the court erred in holding that the matters set out by Gainer in his affidavit as a defense would be prohibited by the "Dead Man's Statute", it being asserted that, in using the answers to the requests for admissions, appellee has waived the right to assert the contention of incompetency under the constitutional provision. In other words, having used to his own advantage certain statements made by Gainer, he cannot refuse the right to Gainer to use other portions. Cases are offered in support of this contention, but we need not discuss it under our view in this litigation.

The trial court held that parol evidence was admissible to show that the agreement was other than set out in the instrument—and this is normally true where fraud is alleged. In *Hamburg Bank* v. *Jones,* 202 Ark. 622, 151 S.W. 2d 990, we said:

> "As to the alleged violation of the parole evidence rule, appellee testified very positively that appellant's president called upon him at his office in Little Rock and secured his signature thereto by telling him that the bank would not look to him for payment, but to the collateral, consisting of preferred stock in the Jones Motor Company of Hamburg, and by writing him a letter to this effect, which letter was misplaced and not introduced. These were fraudulent misrepresentations, if made, and the jury by its verdict evidently believed they were. Were they admissible? We have many times held them to be competent where the issue of fraud in the procurement of the instrument is relied on. In *St. L., I.M. & S. Ry. Co.* v. *Hambright,* 87 Ark. 614, 113 S.W. 803, it was said: 'The rule of evidence forbidding the addition, alteration or contradiction of a written instrument by parol testimony of antecedent and contemporaneous negotiations does not apply where there is an issue of fraud in the procurement of the writing.' "

See also *Commercial Credit Company* v. *Childs,* 199 Ark. 1073, 137 S.W. 2d 260. Numerous other decisions hold likewise. However, Gainer is not in a position to assert fraud, for under his own statement, he was a participant. In the early case of *Evans* v. *Dravo,* 24 Pa. 62, the Supreme Court of Pennsylvania held that a person cannot recover where it is necessary that he establish fraud to recover and such fraud includes partly his own actions. In the case cited, Evans desired to sell property to Gilpin for $500.00 though Evans valued the lot at $2,500. However, Evans wanted to sell to Gilpin because the lot would be used as a site for a rolling-mill which Evans felt would increase the value of adjoining property which he owned. The wife of Evans was not willing to sell for that price and Evans entered into an agreement whereby Dravo and three other persons executed a note to pay Evans $2,000. This was done purely as a matter of Evans having something to show his wife to leave the impression that he was going to receive a total of $2,500, for which amount

she was willing to sell. Subsequently, Evans sued the four note-makers and their defense was that they were never supposed to pay the note, and, in their answer, alleged the fraud, but the court would not consider this evidence since they were parties to the fraud. Evans was allowed to recover, though he had acted fraudulently, because *his recovery was not dependent upon his fraud,* but rather established by the executed note that he held from defendants. The court, in explaining its logic, pointed out that one cannot be permitted to take advantage of his own wrong and that Dravo and the other note-signers were participating in a fraud on the wife. The court then said:

> "But it is insisted that the plaintiff was in *pari delicto,* and that the maxims apply to him and his action as well as to the defendant. That he was party to the fraud practised on his wife is not to be doubted, since the verdict has established it; but if he needs no assistance from the fraud to make out his case, if he have a perfect cause of action without it, it is apprehended these maxims do not apply to him. *** 'If the plaintiff cannot open his case without showing that he has broken the law, the Court will not assist him, whatever his claim in justice may be upon the defendant.' But we have seen that this plaintiff could not only open but prove his case without showing any infraction of law."

Evans thus recovered, unaffected by the fraud, though he was a party to it—unaffected, because the suit was brought on the instrument.

The reasoning of the cited case is in accord with the Restatement of Restitution, § 140 (1937), p. 562, where it is stated that "a person may be prevented from obtaining restitution for a benefit because of his criminal or other wrongful conduct in connection with the transaction on which his claim is based." It is pointed out in the comment that if equity would refuse to grant relief because of such conduct, a law court in which an action for restitution is brought, would also refuse to grant relief, since the action is equitable in nature.

Here, Gainer says that the letter he signed acknow-

ledging that the total commission to Tucker was $30,260, that $10,000 had been paid, and that $20,260 was still to be paid, was not the actual agreement at all, but was only given because Tucker needed "such a document for credit purposes." In other words, the letter, or more properly a note, was only for the purpose of enabling Tucker to enhance his credit, or perhaps borrow money from some lending institution that would thus be permitted to rely on an instrument, executed by Gainer, which was untrue and meant absolutely nothing. In our own case of *Marshall* v. *Marshall,* 227 Ark. 582, 300 S.W. 2d 933, Hubert Marshall contended that a deed, as to him, was actually a mortgage, but as to his creditors, was a valid deed. In determining that the instrument was a valid deed, this court said:

> "In effect, he says that the instrument was a valid deed in so far as it affected his wife and creditors but as to him it was only a mortgage. Obviously, he was agreeable to perpetrating a fraud on both his wife and outside creditors. The instrument could not be part deed and part mortgage, it was either one or the other.
>
> "Having concluded, as indicated, that the instrument in question was, in fact, in the circumstances a valid deed and not a mortgage, and that the 'clean hands doctrine' precludes appellee from claiming otherwise, the decree is reversed and the cause remanded for further proceedings consistent with this opinion."

Likewise, in *Anthony* v. *First National Bank,* 244 Ark. 1015, 431 S.W. 2d 267, Anthony contended that a certain note which he had executed, but on which he asserted protection from liability by secret agreement, constituted a fraud. This court, rejecting the argument, said:

> "Appellants also argue that replacing the overdraft of Garland Anthony Lumber Company with Garland Anthony's note on which he was protected from liability by a secret agreement constituted a fraud, bringing into play the 'clean hands' maxim in his favor. If this constituted a fraud, appellants were not the ones defrauded, and Garland Anthony was a party to

> the fraud. It is also well settled that one guilty of fraud in a transaction may not invoke the maxim as that would violate the clean hands principle. *Sliman* v. *Moore,* 198 Ark. 734, 131 S.W. 2d 1. Even if deception of bank examiners had been the only purpose of the note in question, this was as well known to Anthony as it was to Blewster, and the 'clean hands' defense would not be available to him."

We have endeavored, from what has been said, to point out that Gainer's defense to the execution of the note is not a valid one because to establish this defense, he must at the same time establish that he committed a wrongful and inequitable act. The fraud issue was raised by Gainer—not Tucker. The latter's cause of action is not dependent upon a secret agreement that could cause injury to innocent persons. His cause is dependent simply upon the written instrument. Accordingly, conceding, without deciding, that the use of the answers to the requests for admissions by appellee waived the "Dead Man's Statute" and Gainer's affidavit should accordingly have been considered, this appellant still cannot prevail because of the reasons heretofore set out.

Finally, it is argued that no summary judgment should have been granted against Mrs. Gainer, and we agree with this contention. The affidavit of Mr. Gainer was signed only by him; likewise, Mrs. Gainer did not sign the letter (or note) of June 9, 1967 admitting the indebtedness to Tucker. In addition, the Requests for Admissions were only directed to Mr. Gainer, and Mrs. Gainer admitted nothing. Appellee devotes very little time to this point in his brief, stating only that Mrs. Gainer had executed the original Offer and Acceptance of April 11, 1967[2] and further:

> "While it is admitted that Edna J. Gainer did not sign the letter agreement of June 9, 1967, it is apparent from his affidavit that Mr. Gainer handled all of the dealings for his wife in this transaction and acted

[2]According to Gainer's affidavit, although both Gainer and his wife signed the original agreement on April 11, the figure of the realtor's fee was not inserted into that document until June 9, when Gainer also signed the letter acknowledging his indebtedness.

accordingly as her agent throughout the entire transaction."

Of course, Mrs. Gainer is not bound by the affidavit of Mr. Gainer, and there is nothing in the record from Mrs. Gainer to establish that her husband acted as her agent; as stated, there is no admission by appellant Edna Gainer that she executed any paper or document. The proof, as to her, was insufficient upon which to grant a summary judgment.

In accordance with what has been said, the judgment is affirmed as to Mr. Gainer, reversed as to Mrs. Gainer, and remanded to the Benton County Circuit Court with directions to proceed in a manner not inconsistent with this opinion.

ERNEST R. SULLINS *v.* THRIFT PLAN, INC.

73-160 501 S.W. 2d 781

Opinion delivered December 10, 1973

Hodges, Hodges & Hodges, for appellant.

Erwin, Bowie & Boyce, for appellee.

CARLETON HARRIS, Chief Justice. Ernest R. Sullins (appellant herein), prior to October 9, 1969, lived in the small community of LaHarpe, Illinois, being employed by Fred Gibb Chevrolet, Inc. On the aforementioned date, pursuant to a written purchase money security agreement, Sullins purchased a new 1970 Chevrolet Impala from his

employer, appellant having knowledge that the contract was assigned without recourse on the same day to Thrift Plan, Inc., appellee herein. Sullins made no down payment, the contract providing that the entire purchase price, including interest and amounting to $4,188.22, would be due and payable one year later, October 9, 1970. The agreement provided *inter alia* that the buyer would not sell, transfer, abandon, or encumber the vehicle, and that should the holder of the paper deem itself or said vehicle insecure, the full balance should become immediately due and payable without notice or demand and Thrift Plan, Inc. would be entitled to take possession of the automobile wherever found. Sullins operated the car from that date until the middle of March, 1970, at which time he terminated his employment and came to Arkansas, leaving the automobile with another Gibb Chevrolet salesman, Herb Fox, with certain instructions, hereinafter discussed. Subsequently, appellee learned that the automobile had been left with Fox, and it was repossessed by it, notice being given to appellant by certified mail on September 11, 1970 of the repossession and advising that the car would be sold pursuant to the Uniform Commercial Code unless Sullins paid for the automobile within ten days. No payment being made, appellee advertised the public sale in a Burlington, Iowa newspaper, but being unable to sell the automobile at said sale, the car was subsequently sold by private sale to the aforementioned Herb Fox for $2,500, resulting in a deficiency to the company of $1,686.62. Thrift Plan, Inc. instituted suit in the Jackson County, Arkansas Circuit Court for the deficiency, and Sullins counterclaimed for damages, totaling $9,988.22. Appellee moved for a summary judgment on this counter-claim in its favor, which was granted, and Thrift Plan, Inc. then dismissed its cause of action against Sullins, who has appealed the granting of the summary judgment on his counter-claim. Though three points are asserted by appellant, all relate to whether the granting of the summary judgment was proper under the facts, hereinafter related.

After the joining of the issues, interrogatories were submitted by Sullins to the company seeking the names of those to testify and a narrative summary of the testimony to be given by these witnesses at the trial of the

cause. The names were listed in the response, together with their purported testimony, reflecting that Robert W. Berry, manager of the company store at West Burlington, Iowa, would testify that in Mid-March of 1970, Fox had advised Berry that the automobile purchased by Sullins had been left at the Gibb Chevrolet Company with instructions that it be sold, and Sullins had further told Fox that he would be willing to take a loss in order to get rid of the automobile; since the contract prohibited the sale of the car by Sullins, Berry took the automobile into possession so that it could be sold by appellee; no suitable buyer was found, i.e., one that would make a bid approaching the amount of the indebtedness. On September 11, the company notified Sullins that it was going to sell the car and not hearing from him, it did make the sale to Fox on September 24, 1970 after taking three bids, and determining that $2,500 was the highest, leaving a balance due on the automobile of $1,686.62.

Further answering, appellee stated that Bruce Eckerman, a resident of Des Moines, Iowa, would testify that sometime during the summer of 1970, Sullins went to the Thrift Plan, Inc. office in Burlington, demanding possession of the car, but refused to pay for it, and possession was accordingly denied. Answers to further interrogatories revealed that the car had been repossessed at LaHarpe on approximately May 1, 1970. The answer to the final interrogatory set out that while payment for the car was not due until October 9, 1970, the agreement calling for it to be paid for in a one lump sum payment, the company upon learning that Sullins had left his employment at Gibb Chevrolet, had left the state after leaving the car for sale, deemed itself and the car to be insecure, and it thus considered the balance to be immediately due and payable.

It is not clear whether the answers were considered by the court in granting its summary judgment, several of the replies, of course, being improper and inadmissible, viz., those that deal with what other people would testify to. In *Organized Security Life* v. *Munyon,* 247 Ark. 449, 446 S.W. 2d 233, this court said:

"It must be affirmatively shown, or appear from

statements contained in any affidavit supporting or opposing a summary judgment, that it is based upon personal knowledge of the affiant, that the facts stated therein would be admissible in evidence and that the affiant is a witness competent to state these facts in evidence."

Thereafter, appellee submitted Requests for Admissions to Sullins, some of which were admitted, and others denied. Denials which appear particularly pertinent as to whether summary judgment should be granted are as follows:

"Request (22) Admit that you instructed Fred Gibb to sell said automobile for you.

RESPONSE: Denied in the form of the request since I left the automobile with Fred Gibbs[1] under the instruction to obtain an offer in a sufficient amount to pay off the contract to Thrift Plan, Inc., but not to violate any of the terms of the contract.

Request (23) Admit that you instructed Fred Gibbs to sell said automobile, if necessary, for a loss.

RESPONSE: Denied.

Request (24) Admit that you gave no notice to plaintiff of your intention to leave LaHarpe, Illinois.

RESPONSE: Denied in the form of the request. ***

Request (40) Admit that the plaintiff used commerciable reasonableness in the aforesaid sale of said automobile.

RESPONSE: Denied."

Thereafter, appellee moved for summary judgment, chiefly relying upon the answers given to the Requests for Admissions. In his response to the motion, Sullins asserted that nowhere in his response did he admit a vio-

[1]The names "Gibb" and "Gibbs" are both used in the record and abstract.

lation of the terms of the contract; that he never sold, abandoned, transferred or encumbered the vehicle, and he specifically denied that he left the vehicle with Herb Fox with instructions to sell and dispose of same as reflected by his answer to Request (22). This response was supported by his own affidavit wherein he stated that he had left the Chevrolet with Herb Fox with instructions to obtain an offer or purchase in a sufficient amount to pay off the contract at Thrift Plan, Inc., "not to sell and dispose of vehicle." He stated that he contacted Fox Frequently and inquired regarding offers concerning the vehicle; further, that he returned to LaHarpe with intentions to obtain the automobile and keep it, and discovered that it had been taken by the manager of Thrift Plan, Inc. The affidavit closed with the following paragraph:

> "When I left said automobile, Bob Berry, Manager of Thrift Plan, Inc., had full knowledge of the facts that the car was left with Herb Fox so that he might obtain offers to purchase. Bob Berry never voiced any objections whatsoever to these arrangements."

Subsequently, appellant served Requests for Admissions[2] of facts on appellee, these not being answered, and

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[2]From the record:

"(1) Admit that Robert W. Berry, agent and branch manager of Thrift Plan, Inc. obtained possession of the 1970 Chevrolet owned by Ernest R. Sullins from Fred Gibb Chevrolet Company within two weeks after it was left in the possession of Fred Gibb Chevrolet Company by Ernest R. Sullins.

(2) Admit that Robert W. Berry drove said Chevrolet to Denver, Colorado, while he was on vacation after obtaining possession of said automobile.

(3) Admit that Robert W. Berry loaned said Chevrolet to Carl Ward, Denmark, Iowa while Robert W. Berry used Carl Ward's pick-up truck during July, 1970.

(4) Admit that at the time said Chevrolet was loaned to Carl Ward, there was more than 11,000 miles on said car.

(5) Admit that Robert W. Berry used said Chevrolet for personal use during the day and night.

(6) Admit that Robert W. Berry was having marital difficulties during this period of time, and that he used said Chevrolet while dating and going to nightclubs.

(7) Admit that Wayne Lee's speed shop, Burlington, Iowa, reduced the number of miles shown on the odometer by approximately 5,000 to 8,000 miles at the direction of Robert W. Berry.

(8) Admit that all of the above incidents took place prior to notifying Ernest R. Sullins that the car had been repossessed by Robert W. Berry, agent and branch manager of Thrift Plan, Inc."

the record reflecting that an extension of time until March 15, 1973 was granted within which to respond. No response to the requests, however, was filed, and appellant asserts that they should be considered as admitted. Appellee states that since, after the summary judgment was granted, it dismissed its complaint seeking a deficiency judgment, the question becomes moot because the facts requested to be admitted, if admitted, would only go to the reduction of appellee's deficiency claim. This does not necessarily follow.

Appellee, in its argument, calls attention to the fact that the contract expressly provided that Sullins could not sell, transfer, abandon, or encumber the automobile, and that should the company consider itself or the automobile insecure, it would be entitled to take possession of the car; it thus contended that Thrift Plan, Inc. was justified in repossessing the Chevrolet under the admitted factual situation, even though the lump sum purchase price and interest were not due and payable until October 9, 1970. Further, from the brief:

> "It should be remembered that the appellant was employed by the seller, and the employment factor was obviously the reason for the liberal terms of the purchase contract since the appellant paid nothing down on the purchase price, which, together with interest, was not made due and payable until one year later. Further, the appellant drove and had the use and benefit of the automobile in excess of five months, and he has never paid one cent on the purchase price. Without any notice to the appellee, the appellant terminated his employment with Fred Gibb Chevrolet, Inc., and left the state, having left the automobile with Herb Fox, a salesman for Fred Gibb Chevrolet, Inc., with instructions for the apparent sale thereof—*even at a loss!*"

Let it be remembered, however, that this litigation involves a summary judgment and the object of the procedure in such a case is not to determine an issue, but rather to determine whether there is an issue to be tried; to dispose of litigation on motion only when facts are not disputed and the law can be applied to them. *Ashley*

v. *Eisele,* 247 Ark. 281, 445 S.W. 2d 76. Let us compare appellee's argument with appellant's responses to the Requests for Admissions. To Request (6), "Admit that prior to October 9, 1969, you informed your employer that you desired to buy a new car from it", the answer was, "Denied in the form presented in this Request." Request (7), "Admit that your employer arranged for you to purchase a new car" was answered, "Denied in the form presented in this Request." There is nothing in the record which sets out as uncontroverted that the employment factor was obviously the reason for the liberal terms of the purchase contract. The statement that appellant terminated his employment with the Gibb Chevrolet Company without notice to appellee is disputed, Sullins stating in his affidavit that Berry, Manager of Thrift Plan, Inc. had full knowledge that the car was left with Fox so that he might obtain offers to purchase, and that Berry never voiced any objections to the arrangement.

It is argued by appellee that the matters mentioned, together with the fact that the automobile had depreciated in value due to time and use, and appellant had nothing invested in the automobile, clearly gave it the right to take possession of the vehicle in order to preserve and protect its security. Ark. Stat. Ann. § 85-1-203 (Add. 1961) provides that every contract or duty within the Uniform Commercial Code imposes an obligation of good faith in its performance or enforcement. Here, therefore, for a summary judgment to be justified, it must be definite and obvious that no fact question is involved as to whether appellee acted in good faith in repossessing the automobile, i.e., acted in good faith at the time it was taken.

We cannot agree that the record makes that fact so clear that it can be said, as a matter of law, that this was established. There are several matters which, we think, indicate this to be a jury question. Let if first be remembered that the car was taken several months prior to the due date of the note from Sullins. Next, it is denied by appellant that he left the car to be sold. Additionally, in his affidavit, he stated that Berry knew that the car was left with Fox in order to obtain offers of purchase and that Berry voiced no objections to such arrangement.

The Requests for Admissions, relating to use of the automobile after repossession, were never answered, appellee obtaining an extension of time until March 15, 1973 within which to respond. The record only further reflects appellant's motion filed on March 22 asking the court that the facts stated in the Requests for Admissions be deemed admitted. No order of the court appears and the motion for summary judgment was heard the next day, and judgment subsequently filed on March 29. Appellee, in its brief, gives its reasons why these requests were not answered, but, of course, not being a part of the record, such information cannot be considered.[3]

Nor does the court's order reflect whether the Requests for Admissions were considered by the court.

At any rate, we think factual issues were raised, and the granting of the summary judgment was erroneous.

Reversed and remanded.

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[3]Another interesting fact is that in answering the interrogatories, Berry indicates in his reply to Interrogatory No. 1 that the car was repossessed in Mid-March, though in his reply to Interrogatory No. 2, he states that the car was repossessed in late April or around May 1, 1970. Berry also stated that he would testify that between May 1 and July 21, the car was kept at the office of Thrift Plan, Inc. in Burlington, Iowa, during the day and was driven home for "safekeeping" at night by Berry, and this same procedure was followed during July, August and September. This fact could well, particularly when taken in connection with the Requests for Admissions served upon Berry, raise a fact question as to whether the automobile was repossessed for security purposes, or perhaps repossessed for the personal benefit of Berry.

PAUL D. PEEVY *v.* DONALD BELL

73-161 501 S.W. 2d 767

Opinion delivered December 10, 1973

Davis, Reed & Douglas, P.A., for appellant.

Pearson & Woodruff, for appellee.

GEORGE ROSE SMITH, Justice. The appellant, in a single point for reversal, contends that the trial judge erred in admitting into evidence certain oral testimony in violation of the parol evidence rule.

In 1971 the two parties entered into a written contract by which Peevy sold to Bell, for $5,000, "the Tandy Homes Franchise" for Springdale and the surrounding area. Some five months later Bell brought this action for breach of contract. Bell asserts that under the agreement Peevv was to assign to Bell three existing contracts for the construction of Tandy homes, upon which (according to Peevy's representations) Bell would make a profit of about $2,500 each. Bell alleges a breach of contract, in that he did not receive the three contracts. The case was submitted to a jury, which awarded Bell $3,500 damages.

Opposing counsel are not really in disagreement about the law. The parol evidence rule excludes oral testimony that would contradict or vary the terms of

a written contract, but the rule does not preclude an oral explanation of an ambiguity in the agreement. *Kerby* v. *Feild,* 183 Ark. 714, 38 S.W. 2d 308 (1931). The question here is whether the parties' written contract is so ambiguous as to be open to explanation under the rule.

We have no doubt that it is. The effective language in the agreement simply recites that Peevy sells to Bell "the Tandy Homes Franchise" in the Springdale area. There is not one additional syllable in the instrument explaining either what a Tandy home is or what the franchise consists of. It was therefore necessary for the litigants to explain to the jury (without objection) that Tandy Homes are prefabricated or pre-cut structures built with materials that are sold exclusively by a Tulsa, Oklahoma, company. It was also necessary for the jury to be told that the "franchise" vests in its holder the sole right to purchase Tandy components and erect Tandy homes in the franchised area.

According to the testimony, the Tandy franchise carried with it the three existing contracts held by Peevy. Bell, the purchaser, testified that Peevy said "the franchise consisted of [the] sole right to purchase from Tandy Homes for the area and to use their advertising, and it also included all existing contracts which he had, to build Tandy Homes, and since I would be franchise dealer, there is no way anyone else could build those homes."

Peevy's testimony is actually to the same effect, as will be seen from this excerpt from his direct examination:

> Q. Did you make any agreement to let Mr. Bell have these contracts?
>
> A. Yes, I told Mr. Bell he could have them, because I couldn't use them.
>
> Q. Would you explain that?
>
> A. Well, they were no earthly good to me, really, if I couldn't buy the material from Southern Mills, which is like I say, a subsidiary of Tandy. . . .

Later in his direct examination Peevy said, in response to a leading question, that he did not offer the three contracts as an inducement to the sale. "I only sold the franchise to him. I didn't sell him any contracts."

In substance Peevy contends that the parol evidence rule allows the parties to show what a Tandy home is and to show that the holder of the franchise has the exclusive right to buy Tandy materials, but the rule does not allow oral proof of the additional and related fact that the transfer of the franchise carries with it outstanding contracts that were concededly of no further value to the transferor. The trial judge was right in rejecting that contention. In view of the testimony the meaning of the contract was a jury question. *Triska* v. *Savage,* 219 Ark. 80, 239 S.W. 2d 1018 (1951).

Affirmed.

SHERWOOD FRANK STRAUSER A/K/A HARRIS R. REED *v.* STATE OF ARKANSAS

CR 73-119 501 S.W. 2d 780

Opinion delivered December 10, 1973

J. W. Steinsiek, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Philip M. Wilson,* Asst. Atty. Gen., for appellee.

LYLE BROWN, Justice. Appellant's petition for a Rule I hearing was denied under Rule I (C), the court holding that the records of the case conclusively showed petitioner was entitled to no relief. Appellant's points for reversal are that (1) he was arrested without a warrant, that (2) he was not given the Miranda warnings prior to interrogation, that (3) he was threatened by the prosecuting attorney, and that (4) the State failed to set bond.

In disposing of the petition under Rule I (C) the court considered several items of record: information, criminal docket sheet, amendment to information, petition for dismissal of charge, testimony of appellant on motion to dismiss, testimony of officers Richardson and Causey on motion to dismiss, testimony of officer Richardson at trial, and the testimony of appellant at an in camera hearing. We shall refer to a number of those items in disposing of the points for reversal.

Appellant was accused of fraudulently obtaining lodging and services at a Blytheville motel. He was also charged with being a fourth offender. He was returned to Blytheville from West Memphis, tried, and given two years.

Point I. *Appellant was arrested without a warrant.* At the hearing on his motion to dismiss the charges, appellant conceded that he was acquainted with the charges filed against him and that he knew that fact at the time he was arrested. Officer Richardson testified that when he arrested appellant at West Memphis (the appellant there using the name of Harris R. Reed), the officer had a warrant, that he read the instrument to appellant, and told him the nature of the charges. That warrant was issued by the Blytheville Municipal Court. Officer Caus-

ey testified that when the charges were filed in circuit court, another warrant was issued and served on appellant.

Point II. *Appellant was not given the Miranda warnings prior to interrogation.* Officer Richardson testified that when appellant was arrested, appellant started talking without being questioned. "I personally advised him of his constitutional rights before he started saying anything that might incriminate him." Furthermore, no incriminating statements charged to the appellant were ever introduced.

Point III. *Appellant was threatened by the prosecuting attorney.* Appellant said he was taken to the office of the deputy prosecuting attorney and was there threatened. "[He] told me what he was going to do to me at the trial." There is not one scintilla of evidence that any such threat caused appellant to make an admission against interest, nor is there any evidence to show that any such threat caused appellant to take any other action adverse to his interest.

Point IV. *The State failed to set bail for appellant's release pending trial.* Nowhere in the record is it shown that appellant or his attorney ever mentioned bail until the pre-trial hearing, which was shortly before the trial. Appellant did not offer to show that he was able to make bail; in fact he qualified as a pauper. Additionally, the failure to set bail is no ground for reversal of the conviction. *Small* v. *City of Little Rock,* 253 Ark. 7, 484 S.W. 2d 81 (1972).

Affirmed.

FOGLEMAN, J., not participating.

RONNIE DALE WEST AND GARY LYNN WEST *v.* STATE OF ARKANSAS

CR 73-118 501 S.W. 2d 771

Opinion delivered December 10, 1973

[redacted]

McArthur & Lofton, for appellants.

Jim Guy Tucker, Atty. Gen., by: *Philip M. Wilson,* Asst. Atty. Gen., for appellee.

JOHN A. FOGLEMAN, Justice. Appellants Ronnie West and Gary West were convicted by a jury and sentenced to life imprisonment for the rape of a twenty-year-old woman. They raise the following points for reversal:

I. The trial court erred in refusing to allow appellants to pursue the source of the information gained by the Sheriff's Office leading them to suspect the appellants and in refusing to require the identity of the informant to be made known.

II. The trial court erred in ruling that the picture displays shown to the prosecuting witnesses were fair, and in ruling that there was probable cause for the arrest of appellants.

III. The trial court erred in refusing to allow a defense witness to testify as to the findings of his investigation concerning two persons in possession

of a truck identical to one described by the prosecuting witnesses and who had been suspects in this case.

IV. The trial court created prejudicial error by cross-examining a defense witness in a manner that impugned his credibility.

The prosecuting witness testified that on November 22, 1972, at approximately 11:00 p.m., while she and a male companion were in an automobile parked near a construction site, a pickup truck containing three men pulled in front of the vehicle she and her escort were occupying. She said two of the individuals, who she identified as appellants Ronnie and Gary West, got out of the truck and approached the car. She stated the two men said they were security guards for the construction company and ordered the victim and her companion to get out of their vehicle to be searched. She related that one of the men produced a knife, that her companion was knocked unconscious and that she was raped by both Gary and Ronnie West, aided by the third man.

Since we find reversible error on Point IV, we will treat it first. As their final witness at the trial, appellants called Officer Gary Stracener, Jacksonville Police Department, to testify concerning an investigation he had made to locate a pickup truck which matched the description given to sheriff's officers by the victim and her escort. On direct examination, Stracener said a pickup truck which fit this description, belonging to Kenneth Smith, had been reported by Smith as stolen on November 29, 1972. He testified the truck was later recovered in the possession of Raymond Raynard and Jerry Maxie, one of whom was related to Smith, and that charges against the two were dropped. The following colloquy then ensued:

Q All right. James, did you, did you look into James Raymond Raynard and the Maxie boy any further?

A Yes, I did.

Q What did your investigation reveal?

A I found that on June 18th, 1972, there was a warrant issued by—

THE COURT:

(Interposing) Just a minute. Does that have anything to do with this case?

MR. McARTHUR: [Defense Counsel]

It has something to do with the individuals that he's talking about, Your Honor. I think it is referable to this case.

MR. MAZZANTI [Deputy Prosecuting Attorney]

Your Honor, those individuals are not on trial here today.

MR. McARTHUR:

That's exactly my point.

THE COURT:

How many trucks like that are there in this county?

A I don't know offhand, Your Honor.

THE COURT:

How much were you paid to come up with this information?

MR. McARTHUR:

Your Honor, I object to this. I'll tell you, but I will object to it. I think the Court is interfering in the case at this point and I would ask for a mistrial.

THE COURT:

Denied.

MR. McARTHUR:

He's been paid nothing, if the Court wishes to know.

THE COURT:

Do you do this as a Jacksonville Police Officer?

A No, sir, I don't. I retired from investigating.

It is well established that the trial court may, in the interest of justice, direct questions to a witness calculated to elicit the truth concerning the subject matter being investigated, if they are carefully framed in a manner not indicative of any opinion on the merits of the controversy. *New* v. *State,* 99 Ark. 142, 137 S.W. 564. The trial court has some discretion in examining witnesses to clarify their testimony, and when no prejudice appears there is no abuse of that discretion. *Miller* v. *State,* 250 Ark. 199, 464 S.W. 2d 594; *Clubb* v. *State,* 230 Ark. 688, 326 S.W. 2d 816. However, appellants are correct in their contention that the questioning by the trial judge in this case reflected on the credibility of the witness and the weight to be given his testimony.

In a jury trial there is probably no factor that makes a more indelible impression on a juror than the attitudes, statements and opinions of the trial judge. To them, his word is the law. *McMillan* v. *State,* 229 Ark. 249, 314 S.W. 2d 483. The trial judge should always preside with impartiality and must be cautious and circumspect in his language for it is the jury that is the sole judge of the facts and the credibility of witnesses. *Fechheimer-Kiefer Co.* v. *Kempner,* 116 Ark. 482, 173 S.W. 179; *Sharp* v. *State,* 51 Ark. 147, 10 S.W. 228, 14 Am. St. Rep. 27. Because of his influence with the jury, remarks by the trial judge may tend to prejudice a litigant by destroying the weight and credibility of testimony in his behalf in the minds of the jury. Although the judge may not intend to give an undue advantage to one party, his influence may quite likely produce that result. *Fuller* v. *State,* 217 Ark. 679, 232 S.W. 2d 988; *Seale* v. *State,* 240 Ark. 466, 400 S.W. 2d 269; *McMillan* v. *State,* supra.

The prohibition in Art. 7, Sec. 23, of the Arkansas Constitution that "judges shall not charge juries with

regard to matters of fact" is as applicable to remarks going to the credibility of a witness and the weight to be given his testimony as it is to the truth or falsity of what the witness said. *St. Louis S. W. Ry. Co.* v. *Britton,* 107 Ark. 158, 154 S.W. 215; *Fuller* v. *State,* supra. Any expression of opinion by the trial judge as to the credibility of a witness would tend to deprive the parties of the full benefit of the judgment of the jury, unbiased by the opinion of judges. *Fechheimer-Kiefer Co.* v. *Kempner,* supra. We have said that a judge should not even intimate an opinion as to the credibility of a witness. *Sharp* v. *State,* supra. This stricture applies not only to what judges tell juries in formal instructions but also to what they say in colloquys in the jury's hearing. *Fuller* v. *State,* supra. Even though we are confident that the judge in this case had no intention of invading the province of the jury in its evaluation of Stracener's credibility and weighing his testimony, the question "How much were you paid to come up with this information?" could only have the effect of intimating that the trial judge believed the witness' testimony was of questionable value.

Appellant's counsel did not ask the court for an instruction admonishing the jury not to consider any remarks made by the trial judge as reflecting on whether a witness' testimony should be believed. The failure to request such an instruction is not significant in this case because such an instruction could not have cured the prejudice to appellants.

We have held that the trial judge has wide discretion in granting or denying a motion for a mistrial, and that we will not reverse a judgment because of his action on such a motion in the absence of an abuse of discretion or manifest prejudice to the complaining party. *Perez* v. *State,* 249 Ark. 1111, 463 S.W. 2d 394; *Shroeder* v. *Johnson,* 234 Ark. 443, 352 S.W. 2d 570. While we recognize that no prejudice was intended, the question could only be calculated to damage appellants' attempt to show that someone else might have committed the crime, therefore, the conviction must be reversed. The failure to grant appellants' motion for a mistrial in this case did result in manifest prejudice to appellants because of the influential position occupied by the trial judge, and the virtual

inevitability of the jury's according great weight to the strong intimation by the judge that the credibility of Stracener was questionable.

Since this case will be remanded for a new trial, we deal with appellants' other contentions, because they will probably again arise.

Appellants' Point I is without merit. The state's privilege to refuse to disclose the identity of informants, the so-called "informer's privilege," exists to further the public interest in effective law enforcement by preserving the anonymity of those citizens who provide law enforcement officials with information pertaining to criminal activity. *Roviaro* v. *United States,* 353 U.S. 53, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957). The privilege is not an absolute one, but is rather qualified by the facts and circumstances of each particular case. *Davis* v. *Kirby, Judge,* 244 Ark. 142, 424 S.W. 2d 149. In a given situation there must be a balancing of the public interest in protecting sources of information against the individual's right to adequately prepare his defense. *Roviaro* v. *United States,* supra. Among the factors to be considered in determining whether nondisclosure was erroneous are: the crime with which the defendant is charged, possible defenses, the possible significance of the informer's testimony and other relevant factors. *Rugendorf* v. *United States,* 376 U.S. 528, 84 S. Ct. 825, 11 L. Ed. 2d 887 (1964); *Roviaro* v. *United States,* supra; *Davis* v. *Kirby, Judge,* supra.

Often, determination whether disclosure is required is ultimately made upon the basis of whether the informant was present or participated in the alleged illegal act with which the defendant is charged or whether the informer merely furnished information concerning criminal activity to law enforcement officers. *Roviaro* v. *United States,* supra. See *Bennett* v. *State,* 252 Ark. 128, 477 S.W. 2d 497. This distinction, which is not always conclusive, is important because the testimony of an informant who is also a witness may well be the sole means of amplification, modification or contradiction of the testimony of prosecution witnesses and is therefore essential to the preparation of an adequate defense. Officer Reeder of the Pulaski County Sheriff's Department testified the infor-

mant in this case was not a participant or an eyewitness to the crime with which appellants are charged. The informant's tip caused sheriff's officers to have the victim and her companion view two photographic showups from which they identified appellants. There is no evidence that the informant possessed any knowledge of the crime which was vital to the preparation of appellants' defense. Appellants' failure to show the existence of any facts or circumstances which would require the identity of the person who supplied sheriff's officers with the lead connecting appellants to this crime to be disclosed is fatal to their contention here. *Rugendorf* v. *United States,* supra; *Roviaro* v. *United States,* supra; *Davis* v. *Kirby, Judge,* supra.

We find no error in the trial court's ruling challenged in Point II. Appellants do not challenge the validity of the photographic showup from which appellant Ronnie West's picture was identified. Only the procedure used in showing the group of pictures containing Gary West's photograph to the victim and her escort is challenged. Officer Reeder testified he showed pictures of twelve men to the victim's male companion and later showed the same pictures to the victim and that both identified appellant Gary West. Reeder said two pictures of four individuals, including Gary West, appeared in the group. Appellant alleges the pictures of him were in sequence and contends the fact that his picture appeared twice made the showup patently unfair. We disagree. Neither the victim nor her companion was told that Gary West's picture appeared twice. Two pictures of three other individuals appeared in the group. Thus, the showup group contained pictures of twelve men, four of whom were pictured twice. The only evidence regarding the sequence of pictures was the testimony of Officer Reeder that the pictures were not arranged in any particular manner. Furthermore, both the victim and her escort later identified Gary West in a police lineup and at the trial. When a photographic identification is followed by an eyewitness identification at trial, the conviction will be set aside only if the photographic showup was so suggestive as to create a substantial possibility of irreparable misidentification. *King* v. *State,* 253 Ark. 614, 487 S.W. 2d 596; *Simmons* v. *United States,* 390 U.S. 377, 88 S. Ct. 967, 19 L. Ed. 2d 1247 (1968). We do not find the procedure here impermissibly suggestive.

Appellants also contend there was no probable cause for the arrest of appellant Ronnie West with a warrant and for the arrest of appellant Gary West without a warrant. They allege the only probable cause was supplied by the "tip" of an unknown informer who had never before provided the sheriff's office with any leads and that therefore there was not sufficient probable cause for the arrests. Appellant Gary West was already in custody on another charge at the time this charge was filed against him. He was not arrested without a warrant. Even if it may be conceded that the filing of charges against Gary West was tantamount to arrest, his contention is untenable.

Before charges were filed against Gary West there were four factors from which probable cause for charging him might be found, and there were three factors bearing upon probable cause for the issuance of a warrant for the arrest of Ronnie West. First, the victim and her escort had provided officers with a description of the two attackers which fit the Wests; second, the officers had received a tip that the Wests were connected with the crime; third, the victim and her companion identified both the Wests from photographic showups; and fourth, Gary West was identified in a lineup by the victim and her companion. Appellants' contention that a lead coming from an informer who had never before provided officers with a tip cannot supply probable cause is without merit. Simply because the informant's reliability could not be tested on the basis of his previous aid to officers, the sheriff's office was not required to ignore any information the informant provided. *Ford* v. *State,* 249 Ark. 695, 460 S.W. 2d 749. The informant's tip together with the description given to officers and the identification of both the Wests provided adequate probable cause for their arrest.

Even if appellants could establish that an illegal arrest had occurred, they stand to gain nothing. We have ruled that even if a person were arrested illegally, he is not entitled to release if he is guilty, and there is no assertion that any evidence obtained as a result of the illegal arrest was used against him. *Cassady* v. *State,* 249 Ark. 1040, 463 S.W. 2d 96; *Perkins* v. *City of Little Rock,* 232 Ark. 739, 339 S.W. 2d 859. Appellants here have been found guilty and have raised no contention that any evidence

used against them resulted from the alleged illegal arrest, unless it was the lineup identification of Gary West, but, as we have pointed out, he was already in custody.

Appellants' Point III contention is that the trial court erred in refusing to allow Officer Stracener to testify as to findings of his investigation concerning two other possible suspects. We find no error. Stracener testified without objection that a truck which matched the description given the sheriff's officers belonged to Kenneth Smith, a relative of one of the possible suspects, that Smith had reported the truck as stolen, that the truck was later recovered in the possession of Raymond Raynard and Jerry Maxie, alleged possible suspects, and that charges against these two were later dropped because Smith said they had permission to use the truck. Thus all the evidence relating to the pickup truck was admitted.

Objections were made and sustained to further testimony by Stracener in an attempt to show that warrants had at one time been issued for Raynard and Maxie in connection with this charge and that his investigation had revealed other information about these two men. The trial court was correct in ruling that testimony relating to the warrants was not admissible, since there was no evidence that Raynard and Maxie were guilty of this crime, but only that they had been charged. *Killiam* v. *State,* 184 Ark. 239, 42 S.W. 2d 12. As to any other matters that Stracener's investigation uncovered, there was no offer to show what his testimony would have been, and, consequently, we are unable to say that prejudicial error occurred. *Hawkins* v. *State,* 223 Ark. 519, 267 S.W. 2d 1; *Wooten* v. *State,* 220 Ark. 755, 249 S.W. 2d 968; *Baldwin* v. *State,* 119 Ark. 518, 178 S.W. 409.

The cause is reversed and remanded for a new trial.

EQUIPMENT SUPPLY COMPANY *v.* CLAUD AUSTIN SMITH, D/B/A SMITH TIRE COMPANY AND McCREARY TIRE AND RUBBER COMPANY *v.* FRIEND TIRE SERVICE, INC.

73-110 502 S.W. 2d 467

Opinion delivered December 10, 1973
[Rehearing denied January 14, 1974.]

Putman, Davis & Bassett, for appellant.

Warner, Warner, Ragon & Smith and *Jones & Segers,* for appellees.

J. FRED JONES, Justice. This is an appeal by Equipment Supply Company from an adverse judgment entered on a jury verdict in a suit filed by Equipment Supply against Claud Austin Smith, d/b/a Smith Tire Company, and McCreary Tire and Rubber Company. Smith cross-complained against McCreary and made Friend Tire Service, Inc. a third party defendant.

Equipment Supply Company was a domestic corporation with headquarters in Springdale, Arkansas, and T. J. Neff was its president and general manager. Equipment Supply owned and operated several motor tractor-trailer rigs in hauling produce interstate. Claud Austin Smith did business as Smith Tire Company in Springdale, and sold truck tires including McCreary brand tires. McCreary Tire and Rubber Company was a corporation domiciled in Pennsylvania and manufactured McCreary tires at its plant in that state. It distributed its tires through wholesale outlets in the various states but had no distributor in Arkansas. Friend Tire Service was domiciled in Missouri. It distributed the McCreary tires through its store in that state and Smith purchased McCreary tires from Friend.

In October, 1969, Equipment Supply purchased ten McCreary tires from Smith and mounted two of them on the front, or steering axle, wheels of one of its trucks. On September 11, 1970, after the truck had been driven approximately 70,000 miles, the right front tire blew out causing the truck to leave the highway and resulting in considerable damage to the truck and trailer as well as to its cargo of frozen fish.

Equipment Supply filed suit against Smith and McCreary on express and implied warranties alleging that Smith had expressly warranted the tires as being suitable for over the road use on trucks and trailers, and impliedly warranted that they were of merchantable quality and fit for the ordinary purpose for which they were sold. Equipment Supply further alleged that Smith and McCreary knew the purpose for which the tires were to be used and that Equipment Supply relied upon their skill and judgment in furnishing suitable tires for the known purpose.

By answers, counterclaims, cross-complaints and answers thereto, the issues were finally joined with Equipment Supply praying damages against Smith and McCreary; with Smith praying judgment against McCreary for any amount adjudged against Smith; with McCreary praying judgment against Smith for contribution on any amount adjudged against McCreary; with Smith praying judgment against Friend for any amount adjudged

against Smith on implied warranty, and with Friend praying judgment over against McCreary for any amount adjudged against Friend in favor of Smith.

The trial court granted summary judgments for Smith and Friend as to the alleged express warranties but denied their motions for summary judgments as to implied warranties, and the case proceeded to trial on implied warranties. At the close of the plaintiff's evidence, the trial court granted motions by Smith and Friend for directed verdicts and the cause against McCreary was submitted to the jury. The jury rendered its verdict in favor of McCreary and judgment was entered thereon. On appeal to this court Equipment Supply designated the points it relies on for reversal as follows:

> "The trial court erred in directing a verdict for the defendant and cross-appellant, Claud Austin Smith, d/b/a Smith Tire Company.
>
> A. Implied Warranty of Merchantability.
> B. Implied Warranty of Fitness for a Particular Purpose.
>
> The trial court erred in limiting the proof of consequential damages pertaining to lost profits to the sum of $3,500.00.
>
> The trial court erred in submitting a special interrogatory to the jury requiring a finding that the defendant McCreary Tire and Rubber Company defectively manufactured the tire in question."

Equipment Supply's first assignment has given us the most difficulty but having resolved that point in favor of Smith, it follows that under the facts and the evidence of record, the trial court did not commit reversible error on the other two points designated. The *express* warranties alleged in the original complaint filed by Equipment Supply were disposed of on summary judgment and there is no appeal from that disposition. Implied warranties are controlled by the Uniform Commercial Code on Sales, Ark. Stat. Ann. §§ 85-2-101, et seq., and in so far as it applies to the case at bar, §§ 85-2-314—85-2-315 (Add. 1961) provides as follows:

"§ 85-2-314-(1) Unless excluded or modified . . . a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. * * *

(2) Goods to be merchantable must be at least such as
(a) pass without objection in the trade under the contract description; and
(b) in the case of fungible goods, are of fair average quality within the description; and
(c) are fit for the ordinary purposes for which such goods are used; * * *

(3) Unless excluded or modified . . . other implied warranties may arise from course of dealing or usage of trade.

§ 85-2-315 Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose."

In Smith's cross-complaint against McCreary and in McCreary's answer and counterclaim against Smith, they both alleged that if they were liable in damages, it would be caused by the defalcation or the negligence of the other.

Equipment Supply propounded to McCreary 28 interrogatories pertaining to the degree of care exercised in the manufacture of McCreary tires.

Mr. Smith was first called by Equipment Supply as an adverse witness. In regard to the tire in question, he testified that Mr. Neff called him and inquired as to what he had in 1000 x 22 tires. He said he told Mr. Neff he had some General and McCreary tires, and after he quoted the price on the two brands, Mr. Neff said he had previously used McCreary tires which had given satisfactory service and he would take the McCreary tires. He said that the tires purchased by Mr. Neff (as distinguished from lug type drive wheel tires) were designed for use on the

front end of the vehicle or wherever Neff would want to use them. He said he was familiar with Mr. Neff's operation in using his trucks on long hauls and knew, in this particular instance, that Mr. Neff intended to use the tires on the front or steering axle wheels of his trucks. He said the normal mileage one could reasonably expect from a 1000 x 22 truck tire, when used on the front or steering axle of the vehicle, would vary between drivers and with the condition of the highway and equipment, but when properly cared for, such tire should run on the steering axle wheels from 30 to 70 or 75,000 miles. He said that in the trucking industry, after tires are used on the front, or steering axle, wheels, they are usually transferred to the dual wheels on the trailer where considerably more mileage can be expected from them. Mr. Smith estimated that more than 50% of the tread had been worn from the tire when he examined it following the accident. He said that any normal tire would be subject to failure after having been driven on the steering axle 70 or 75,000 miles. Mr. Smith said he purchased the McCreary tires from Friend Tire Company and that he dealt with Friend like Neff dealt with him; that he simply asked for the tire by brand name and had no literature, pamphlets or anything else from Friend or McCreary. He said that the particular tire involved in this case was not a specifically designed tire for any particular purpose, but was simply a common highway type truck tire that could be used anywhere.

Mr. Neff, the president and general manager of Equipment Supply, next testified in support of his company's complaint. He testified that he is engaged in trucking commodities interstate and intrastate and has been involved in the trucking industry as driver, manager or lessee for a period of 24 to 25 years. He said he had been buying tires from Smith for some time and quite often, when he would need tires, he would call Smith and indicate what type of tire he needed, whether for steer axle or drive axle and Mr. Smith would tell him what he had available and what price they would be. He said that on this particular occasion when he purchased the McCreary tires, he was quite sure Mr. Smith referred to the McCreary and possibly to the General tires as the two brands he

had in stock, and that Smith told him what the prices on the two brands would be. He then said:

> "I didn't make note of what the Generals could have been at that particular time but it was my election, then, that he had these available and I had probably ten others in service. They would suit our need."

Mr. Neff testified that if a truck was driving perfectly, a tire could be used on the front or sterring axle until the tread was worn to seven or eight, thirty-seconds of tread depth. He said the tread depth on the tire involved would have been twenty-two, thirty-seconds when it was new and that when he measured the tread depth after the accident, in the only possible area left for measurement, it measured twelve, thirty-seconds. Mr. Neff testified that he would expect to get at least 150,000 miles out of a tire and on this point he testified as follows:

> "Q. Mr. Neff, what was your practice in regard to steer axle tires?
>
> A. We would pull those tires at sometime near half-worn—anywhere from eight, thirty-seconds up, depending on the condition of the tire, and move it to the trailer.
>
> Q. And then what would you do?
>
> A. The tire would run on out, then, and until it had in the area of two to four, thirty-seconds tread depth on it, and then we'd send it down and have it recapped.
>
> Q. All right, sir.
>
> A. And expect then another fifty to sixty thousand miles after recap."

Mr. Neff testified on recall that prior to the purchase of the ten tires from Mr. Smith, he had used 20 or 30 McCreary tires on his trucks. He said he simply purchased the tires from Mr. Smith and installed them on the wheels himself. He then testified that Mr. Smith had

nothing to do with the transaction other than to sell him the tires. He said the ten tires he purchased from Smith were the highway type of tires he ordered and were the type tires for the use he intended to put them. He then testified as follows:

> "Q. Now, I take it from your testimony here, as well as your counsel's, Mr. Bassett's opening statement that your position in this lawsuit is that there was a defect in this particular tire that was caused during the manufacture of the tire; is that right?
>
> A. Yes.
>
> Q. So it was nothing that Mr. Smith did or did not do in connection with the tire, as far as you know?
>
> A. That's correct."

Mr. Neff said he purchased the ten tires from Smith in October, 1969; that his inventory and records reflect he placed the specific tire involved on his truck in March, 1970, and drove the unit with the tire on the front axle some 70,000 miles plus, up until the accident which occurred in September, 1970.

Mr. H. E. Maxey, a chemist, testified as an expert for Equipment Supply. He said he examined the remainder of the tire after the accident and the pertinent portion of his testimony appears in the record as follows:

> "Q. Now, Mr. Maxey, following your inspection and investigation of this tire failure, did you arrive at an opinion as to what had happened?
>
> A. Yes, sir.
>
> Q. What is that opinion; tell the Court and jury.
>
> A. Well, it is my opinion that the tread on this tire (pointing to Plaintiff's Exhibit No. 3 to Smith) came loose in this area and as it rolled on the truck and as it flexed, . . . in the normal use of it. . . . You had friction set up between the tire, the carcass, and this

tread. . . . and it generated sufficient heat to break down the nylon and also to break down the rubber. . . . it blew out at that place.

Q. All right, sir. . . . do you have an opinion as to what caused the friction, the heat between the tread and the carcass, as you have described for the jury? . . .

A. Yes.

Q. And what is that opinion?

A. The tread came loose from the carcass because it wasn't put on the carcass properly or substantially, and the rubbing started and it disintegrated.

* * *

A. . . . Now, when this tread is put on . . . the carcass is built, the tread is put on the carcass through heat and pressure. Now, if this carcass has a little dust on it—if it has a little moisture on it, if it has any impurity on it that would interfere with the rubber on the carcass or interfere with the bonding, then you are going to have a weak spot in the bonding of the tread to the carcass, much like patching the old innertube many years ago. You had to clean the tube very well in order to get the patch to stick on it, and if the carcass has a dirty spot on it or anything to interfere, you are not going to get a good bond with the tread. In my opinion, that is probably what happened here. * * *

It's my opinion that the tread was not properly bonded or substantially bonded to the carcass at the time of manufacture."

The substance of expert testimony offered by McCreary was to the effect that the tire was properly manufactured and the blowout occurred because of wear and road damage to the tire. Mr. Lee Mason, who drove the truck approximately 7 or 8,000 miles on the last two trips immediately before the tire blew out, testified that he knew of no road damage to the tire and that he had no

prior knowledge of any defect in the tire or the steering mechanism on the truck until the tire blew out.

Instruction No. 13, given by the court, pertained to the form of verdict and was as follows:

> "The form of the verdict in this case is by Interrogatories, as follows:
> Do you find by a preponderance of the evidence that McCreary Tire and Rubber Company, Inc. defectively manufactured Tire No. KY0112 which proximately caused the damage to plaintiff.
> ———————.
>
> Answer 'yes' or 'no.'
> Sign (blank) as foreman.
>
> If your answer is 'no,' you have decided the case. If your answer is 'yes,' then answer this Interrogatory:
>
> What do you find by a preponderance of the evidence the plaintiff should recover for the following elements of damages:
> 1. Damage to Tractor $———————.
> 2. Damage to Lufkin Trailer $———————.
> 3. Damage to Fish Cargo $———————.
> 4. Loss of Profits During Period Tractor was Down Being Repaired $———————.
> 5. All Other Incidental Expense Reasonably Resulting from Collision $———————.
> Signed (blank) as foreman."

There was no objection to the form of the verdict, although there were objections to other instructions given. After all of the instructions were given, the trial court inquired as to whether there were any further objections and Equipment Supply's attorney answered in the negative.

In his argument to the jury, Equipment Supply's attorney stated:

> "I told you at the beginning that this is not a suit against the McCreary Tire and Rubber Company for negligence, whereby we have alleged fault and re-

sponsibility. This suit, Ladies and Gentlemen, is a suit for a breach of implied warranty.

* * *

Now, we have the burden of proof—proving what caused it to fail. Our testimony shows in this particular case, expert testimony and other testimony, that this tire failed because of an improper bonding at the manufacturing source. In other words, there was a defect in the manufacturing."

It is apparent from the overall evidence in the record that the implied warranties both as to merchantability and fitness for purpose were met in this case, and certainly there is no substantial evidence that they were not. The evidence is clear, both from the testimony of Mr. Neff and Mr. Smith, that the tire was purchased by Neff and sold by Smith by brand name, and that Mr. Neff relied on his own judgment and not on that of Mr. Smith or McCreary in purchasing the tire. The testimony of both Mr. Neff and Mr. Smith was to the effect that the McCreary tire involved in this case was simply an ordinary truck tire manufactured for road use either on the front or steering axle of the truck or on the truck trailer. Mr. Smith admitted that he knew Mr. Neff intended to use the tires on the front, or steering axle, wheels in this particular instance but, assuming that these tires were specifically designed and sold for use on the steering axle wheels of the truck, there is no substantial evidence in this case that the tire did not fully comply with such intended use. Both Mr. Neff and Mr. Smith testified that when approximately one-half of the tread was worn from steering axle tires, they would be subject to failure and should be switched to a dual wheel position on the trailer. It was also their testimony that a front or steer axle tire would ordinarily reach this point of wear after approximately 70,000 miles. According to Mr. Smith the tread was more than half worn from the tire and according to Mr. Neff the tire had run more than 70,000 miles and, according to his measurement of the remaining tread on the shoulder of the tire, the tread lacked only one thirty-second of being half worn away. We conclude, therefore, that there was no substantial evidence that implied warranties of merchantability or use for intended purpose were breached in this case.

In support of its assignment of error under its first point, Equipment Supply argues that if the tire was defective from *any cause,* Smith sold a defective tire and his motion for a directed verdict should not have been granted. Equipment Supply did only allege breach of warranties, but Smith's cross-complaint also alleged negligence and the case throughout was tried on the theory that McCreary failed to properly bond the tread of the tire to the carcass in manufacturing the tire. As already pointed out, the implied warranties of merchantability and fitness for a particular purpose (use on the steering axle) had been fulfilled at the time the tire failed and there was no evidence that Equipment Supply relied on the skill and judgment of Smith or McCreary in the selection or furnishing of the tire. Consequently, it would only follow that McCreary as well as Smith might have been entitled to a directed verdict on *implied warranties,* had it not been for the evidence of McCreary's failure to properly manufacture the tire. There was no suggestion in the evidence that Smith was negligent in any respect or that he had anything to do with the manufacture of the tire. The case, however, was submitted to the jury against McCreary on implied warranties as well as negligence in the manufacture of the tire, and the jury found for McCreary on both counts. We are of the opinion, therefore, that under the facts and evidence in this case, the court did not commit reversible error in directing a verdict in favor of Smith.

In *Smith* v. *Goble,* 248 Ark. 415, 452 S.W. 2d 336, an automobile driven by Goble crossed the center line of the highway and collided with one driven by Smith. Smith sued Goble on negligence and Goble interpleaded White County Motor Company as seller and Ford Motor Company as manufacturer on alleged breaches of warranties. Smith amended his pleadings also asking damages against White Motor Company and Ford. The trial court directed a verdict in favor of White Motor Company and the jury found in favor of Ford but returned a verdict for Smith against Goble. Smith appealed on the grounds, among others, that the court erred in not instructing a verdict against Ford on the existence of a breach of warranty, and in directing a verdict for White County Motor Company. The evidence was to the effect that it would require

a complete disassembly of the brake system to determine the exact cause of brake failure, and in affirming the trial court we said:

> "Any error the court may have committed in dismissing White County Motor Company is now harmless and does not constitute reversible error. The evidence, above, is not sufficient to show any negligence on the part of White County Motor Company. See 8 Am. Jur. 2d *Automobiles* § 650 and 60 C.J.S. *Motor Vehicles* § 165(5). Furthermore, since the jury has exonerated Ford Motor Company for an alleged manufacturing defect that appellant's expert witness admits was latent and could not have been discovered without a complete disassembly of the right front wheel brake, appellant is now estopped to complain against White County Motor Company on a derivative liability upon the theory of an implied warranty. See *Davis* v. *Perryman,* 225 Ark. 963, 286 S.W. 2d 944 (1956)."

Appellants cite the case of *Mack Trucks* v. *Jet Asphalt, Et Al.,* 246 Ark. 101, 437 S.W. 2d 459. In that case Jet Asphalt obtained judgment for $5,000 against Mack Trucks for breach of implied warranty of fitness on two diesel truck engines. The appeal was based on the question of venue, lack of privity and limitations on express warranties. The judgment was based on implied warranties and we affirmed. The distinction between that case and the case at bar is that in *Mack Trucks* the purchase was made on special order after the purchaser had specified the work to be performed by the trucks in the operation of a gravel and asphalt plant. Diesel engines were specifically required by the purchaser. The trucks were built and diesel engines were installed by the manufacturer after the order for them had been given by the purchaser. It was necessary for the purchaser to discard the diesel engines furnished with the trucks and have new engines installed.

The appellants rely on our decision in *DeLamar Motor Co.* v. *White,* 249 Ark. 708, 460 S.W. 2d 802. In that case White brought suit in chancery to cancel a contract under which he had purchased a Chevrolet diesel truck

from DeLamar Motor Company. White relied upon breach of warranty that the vehicle was fit for the purpose for which it was to be used. The contract was canceled by the chancellor and on appeal we affirmed. The evidence in that case was that the engine vibrated excessively and the brakes did not function properly. DeLamar contended that the defect complained of was the fault of the manufacturer and that the seller was not responsible, but we rejected this argument under the provisions of § 85-2-315, *supra.* The distinguishing facts in the *DeLamar Motor Co.* case are stated in that opinion as follows:

> "At the time of the sale White told the seller that he intended to use the truck to pull a gasoline transport and to pull a lowboy. He also stated that Mr. DeLamar 'said it would do the job, and I had no reason to doubt it.' On cross examination White admitted that when he bought the truck he thought that it would do the job he wanted it to do. That belief, however, did not negate the warranty. Any purchaser ordinarily expects the article being bought to serve its purpose, else he would not buy it. It does not follow, however, that the purchaser may not also be relying upon the seller's judgment in the matter. Here White testified that he had not previously owned a Chevrolet diesel truck."

We found from the record in that case that the chancellor was justified in finding that White did rely upon DeLamar to select a vehicle capable of doing the job White had in mind for it, and we found that the chancellor's decision was not against the weight of the evidence.

As to the appellants' second point, the trial court's limitation of proof of consequential damages in lost profits to the sum of $3,500, arose in connection with an argument between the parties pertaining to insurance Equipment Supply collected in connection with the loss, and the assigned error becomes moot in the light of the decision we have reached that the case should be affirmed.

As to the third point relied on by Equipment Supply, there was no substantial evidence that implied warranties had been violated in this case; consequently, there was

nothing left to go to the jury except the evidence on which the entire case was primarily tried; that is, whether McCreary Tire and Rubber Company defectively manufactured the tire in question. We conclude, therefore, that the trial court did not err in submitting the special interrogatories to the jury on this point. As already stated, however, Equipment Supply did not object to this action of the trial court even after the court specifically inquired whether or not there were additional objections.

The judgment is affirmed.

GEORGE D. MARR *v.* CITY OF FORT SMITH, ARKANSAS

73-210 501 S.W. 2d 777

Opinion delivered December 10, 1973

Pearce, Robinson & McCord, for appellant.

Daily, West, Core & Coffman, for appellee.

J. FRED JONES, Justice. George D. Marr, a member of the Fort Smith Fire Department, was suspended from duty for a period of fifteen days without pay for violation of chapter 10, §§ 16 and 30, paragraph J, of the fire department rules and regulations. On appeal to the Civil Service Commission the suspension was approved for violation of § 16 of the rules, and on appeal to the circuit court the decision of the Commission was affirmed. On this appeal from the circuit court judgment, Mr. Marr

contends that he did not violate the rules and regulations of the fire department and also contends that the rule he is alleged to have violated is unconstitutional as applied to his actions in violation of his First Amendment rights. We shall not discuss the substantiality of the evidence pertaining to the alleged violation because we agree with Mr. Marr as to his second contention.

Section 16 of chapter 10 of the fire department rules and regulations reads as follows:

> "Members that have any matter that pertains to the Fire Department and to be taken up with any City Official shall first submit the same to his superior officer and the matter shall be handled thereafter through the chain of responsibility."

As background for Mr. Marr's alleged rule violation, it appears that the board of directors of the City of Fort Smith had passed an ordinance pertaining to overtime pay and optional "equalization" pay in lieu of legal holidays, and it appears there was considerable difference of opinion among the firemen, as well as others, as to the method to be employed in calculating the equalization pay for firemen under the provision of the ordinance. It appears that Mr. Marr was dissatisfied with the results of the method being employed under the provisions of the ordinance and so advised two of the city directors by telephone, as well as his Congressman in Washington and the Governor of the state by letters, without first submitting the matter to his superior officer in the fire department, so that the matter could be handled thereafter through the chain of responsibility under the provisions of § 16 of chapter 10, *supra.*

None of the witnesses seemed to know what Mr. Marr said in his telephone conversations with the city directors or in his letters to the Governor and Congressman. Mr. Marr admitted that he expressed his dissatisfaction with the ordinance when interviewed on television, but there is no evidence that any city official, or anyone else except Mr. Marr, saw the interview when it was placed on the air. The only evidence as to what Mr. Marr did say is contained in a letter from Director Stocks to City Administrator Keheley, a portion of which was read into the record as follows:

" 'Dear Mr. Keheley: By telephone conversation at home, Mr. Marr advised me that he was a member of the Fort Smith Fire Department and inquired if I was familiar with the Memorandum sent to the Fire Department personnel concerning the recent action of the Board of Directors in authorizing equalization pay for firemen, pursuant to State Law and advice of counsel. He stated that he had written letters to his Congressman and to his Governor and that he is completely dissatisfied with the fact that the result is only one-half time for overtime pay and presumes that the matter will have to be presented to the voters in view of our recent action in increasing the firemen's pay of 10% and authorizing an additional increase as a result of the written demand for the attorney representing seventy-six firemen. I now request the full self study of the Fire Department, including the basis and the need for the number of firemen employed, the Fire Underwriters requirements, and further request that I be advised of the number of Fort Smith firemen who are gainfully employed elsewhere. The study should also include the number of hours that each fireman averages working during the year, the number of days off, the number of fire calls and the number of fires actually covered, the result which are —.' "

It is obviously apparent that § 16 of chapter 10 of the rules, *supra,* is vague and indefinite as to what constitutes the "matter" it refers to, but we are of the opinion that it could have no application to personal complaints made to city directors concerning municipal legislation pertaining to firemen's pay or vacation rights. It is evident from the testimony in the record that Mr. Marr's superiors in the "chain of responsibility" would have been first, his Captain, Sherman Ross; then next the Assistant Fire Chief, Petway; and finally Superior Fire Chief Bevel. The record is not clear as to the nature of the matters, or as to method of handling them, through "the chain of responsibility" after the same has been submitted to a superior officer under the rule. It is not clear from the record whether Mr. Marr's grievances, complaints or opinions were to have been conveyed to the intended city official through the chain of responsibility after being submitted to his captain, or whether the rule simply re-

quired him to first obtain permission from his superiors before discussing the matters he did discuss with Directors Stocks and Crompton. The phrase "shall be handled thereafter" would indicate that the entire "matter" would be heard, considered and determined, or disposed of, within or through, the "chain of responsibility."

It would appear that § 16 of chapter 10, *supra,* might have been designed or intended for such matters as interdepartmental rules, orders and regulations promulgated by the officers of the fire department, but as § 16 is now written, we are of the opinion it is unconstitutional as applied to Mr. Marr's actions as reflected by the record in this case.

Because of the vagueness of the term "matter" referred to in the rule, we have encountered difficulty in finding precedent one way or the other on the subject. In the Iowa case of *Klein* v. *Civil Service Comm'n of Cedar Rapids,* 152 N.W. 2d 195, the Supreme Court of Iowa had on appeal by certiorari, the action of the Civil Service Commission sustaining the suspension of a fireman for disobedience of orders and violation of the rules of his fire department. The specific rules, 23 and 24, in that case were set out in the opinion as follows:

> "Rule 23 provides: 'All matters pertaining to or affecting the Department proposed or contemplated by members must be submitted to the Chief for approval and action.'
>
> Rule 34 provides: 'No member of the Department shall give out any information relative to the Department, its operations, equipment and so forth unless permission by the Chief has been granted.' "

The violation in that case consisted of the fireman giving news releases without first clearing such releases with his chief. The Supreme Court of Iowa held that in the absence of proof that the releases impaired public service, the suspension was improper. The court in *Klein* then reviewed a number of decisions from other jurisdictions pertaining to the constitutionality of such rules and regulations and concluded as follows:

> ". . . the news release of August 5, 1964, by plaintiffs represented nothing more than an exercise of their constitutionally protected right of free speech regarding a labor dispute for which, in the absence of a showing of impairment of public service, they should not have been punished.
>
> To the extent rules 23 and 34 authorize such punishment they are too broad, rigid and unreasonable. Under the fact their enforcement was arbitrary and capricious and therefore illegal."
> See also *In re Gioglio,* 248 A. 2d 570.

We conclude, therefore, that § 16 of chapter 10, *supra,* as written, and as it now stands, is unconstitutional as applied to Mr. Marr's conduct as set out in the record in this case, and that the judgment of the trial court should be reversed.

The judgment is reversed.

FOGLEMAN, J., concurs.

JOHN A. FOGLEMAN, Justice, concurring. I concur. I think the regulation as written was not ambiguous and that the action taken by Marr was clearly within its purview, but I concur in the result because I think that the restraint provided in the rule effectively abridged Marr's ever personally presenting his views to anyone other than his immediate superior. For this reason, I think the regulation was an unconstitutional restraint.

SIDNEY HOWARD GIPSON *v.* STATE OF ARKANSAS

CR 73-127 501 S.W. 2d 786

Opinion delivered December 10, 1973

Robert A. Newcomb, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Alston Jennings Jr.,* Asst. Atty. Gen., for appellee.

CONLEY BYRD, Justice. Appellant Sidney Howard Gipson was convicted by a jury of being an accessory to felony murder. At his trial he was represented by employed counsel, the Honorable Bon McCourtney. No appeal was taken from that conviction. Pursuant to Criminal Procedure Rule No. 1, appellant filed a petition for post-conviction relief citing eight different reasons why he should be granted relief—among those reasons were that his attorney was inadequate and that he wanted to appeal his case but his attorney would not take the appeal because appellant did not have $2,700.

Upon appellant's allegation that he was a pauper, the trial court appointed the Honorable Sam Highsmith to represent him in the post conviction proceeding. Thereafter, the allegations of inadequacy of counsel and the failure of counsel to take an appeal were struck from the petition upon motion of appellant, and he was granted time to file an amended petition. The petition was then amended to allege only that the State suppressed evidence favorable to appellant. By stipulation and with the knowledge and approval of appellant that was the only issue before the court at the post-conviction hearing. To reverse the trial court's denial of post-conviction relief, appellant, now appearing by different counsel, contends:

"I. Appellant was denied effective assistance of counsel in presenting his Motion to Vacate Sentence Under Criminal Procedure Rule No. I as provided by the Sixth and Fourteenth Amendments to the United States Constitution.

II. Appellant did not make an intelligent waiver of the points raised in his *pro se* petition for post-conviction relief."

Since the contentions now made were not at issue in the trial court, the record obviously does not show any facts from which one could arrive at any conclusions. We have a long standing rule that we will not consider on appeal an issue not first raised in the trial court. For that reason we hold that the contentions now made are without merit.

Affirmed.

IRA Y. BICKNELL ET UX *v.* THOMAS C. BARNES ET UX

73-79 501 S.W. 2d 761

Opinion delivered December 10, 1973

Daily, West, Core & Coffman, for appellants.

Joe H. Hardegree, for appellees.

FRANK HOLT, Justice. The appellees purchased a portion of a ranch from the appellants. Subsequent to a delivery of the deed with a vendor's lien, pursuant to a written contract, the appellees successfully sought reformation as to the recited acreage and purchase price. For reversal of that decree, appellants first contend the chancellor "erred in permitting Barnes [appellee] to reopen the question of acreage eleven months after the transaction was closed" because "(A) Time was expressly made the essence of the contract" and "(B) After February 15, 1971 the contract was an executed (fully performed) contract and was not subject to rescission either wholly or partially."

The appellees purchased a portion of appellants' ranch which was estimated to consist of 156 acres for the agreed purchase price of $70,000 with $30,000 down payment and the balance to be secured by a vendor's lien payable in one year. By mutual agreement the formal description of the property was waived with the understanding that "accurate legal descriptions" were in the process of being determined, the abstract brought down to date and a survey made if necessary. "A rough copy of the plat of the land" being conveyed was made a part of the contract. Following the foregoing provisions is paragraph 2 of the contract which reads:

> If it be ascertained that the acreage is in excess of one hundred fifty-six (156) acres, the Purchasers agree to increase the purchase price by Two Hundred Fifty Dollars ($250.00) per acre; and if it be ascertained that the acreage is less than one hundred fifty-six (156) acres, the Sellers agree to reduce the price by Two Hundred Fifty Dollars ($250.00) per acre.

Subsequent paragraphs related to oil, gas and mineral rights; the appellants' right to continue in possession rent free until April 1, 1971; the proration of taxes; the parties' respective obligations as to insurance coverage; and the appellants would furnish an abstract of title reflecting a merchantable title. Thereafter follows the concluding paragraph 8 which recites:

> The Thirty Thousand Dollar ($30,000.00) down payment is also considered as a forfeiture in the event the Purchasers fail or refuse to go ahead and complete the transaction and it is specifically stipulated that time is of the essence and the entire transaction is to be closed by a Vendor's Lien transaction within ten (10) days.

The contract was dated February 2, 1971. However, by mutual agreement the transaction was closed on February 15, 1971. In doing so, the parties relied upon appellants' surveyor, a Mr. Wood, who a few days previously had ascertained that the lands being conveyed consisted of 158.35 acres. The appellees paid the appellants $587.50, which was computed at $250 for the 2.35 acres in excess of the estimated acreage. The appellees, after taking the agreed delayed possession of the property, employed a Mr. Weaver to survey the property. When time permitted him, Weaver made a survey which revealed there was actually a shortage in the conveyance of 8.61 acres.

Appellants strenuously contend that time was made the essence of the contract by express stipulation and therefore any action which either party desired to take with reference to a survey and consequent acreage determination must have been done by the closing date, or otherwise any party so failing would be forever foreclosed from so doing. In other words, appellants assert that paragraph 8, which contains the provision that time is

of the essence, is controlling as to paragraph 2. We cannot agree. It is true that according to the cases cited by appellants time can be made the essence of a contract. However, generally this provision relates to a forfeiture of the purchase price. In the case at bar, we are of the definite view that the essence of time expressed in paragraph 8 relates to and is confined solely to the forfeiture of a very substantial down payment ($30,000) on the purchase price. Appellants recognize that "[T]he contract does not specifically say when the acreage excess or deficiency will be ascertained. . . " However, appellants forcefully argue that from a construction of the entire contract the parties intended the ascertainment of the correct acreage was foreclosed upon delivery of the deed. If the parties actually desired that the correct acreage had to be ascertained before closing the transaction, then that limitation should have been so expressed in paragraph 2, which relates specifically to the right of adjustment as to acreage and price.

Although agreements respecting the sale of lands are deemed to be merged into a deed subsequently issued, this principle of law does not prevent reformation upon a showing of mutual mistake of fact, a misrepresentation or perpetration of a fraud. Otherwise there could never be a reformation. *Reynolds* v. *Davis,* 245 Ark. 255, 431 S.W. 2d 841 (1968), *Duncan* v. *McAdams,* 222 Ark. 143, 257 S.W. 2d 568 (1952), *Stack* v. *Commercial Towel & Uniform Service, Inc.,* 120 Ind. App. 783 91 N.E. 2d 790 (1950). In the case at bar, the contract was subject to reformation (the pleadings were amended to confrom to the proof) based upon a showing of mutual mistake. Furthermore, the cause of action cannot be characterized as one for rescission as suggested by appellants.

In the sale of land by acreage where the quantity of acres is essential to the contract, we have recognized the purchaser is entitled to an adjustment of the acreage and a corresponding adjustment as to the purchase price. *Glover* v. *Bullard,* 170 Ark. 58, 278 S.W. 645 (1926). In the case at bar, the parties expressly agreed in paragraph 2 as to the estimated acreage and for a reduction or increase in the purchase price upon ascertainment of the correct acreage. As stated previously, we cannot agree that by paragraph 2 the parties restricted themselves to the agreed adjustment upon the closing of the transaction.

Appellants next contend the court erred in decreeing reformation of the deed to conform to the Weaver survey (appellees). The law is well settled that reformation of a written instrument is permitted in equity to show the true intent of the parties where there is a mutual mistake. *Welch* v. *Welch,* 132 Ark. 227, 200 S.W. 139 (1918). The parties seeking reformation, however, must present evidence that clearly and convincingly warrants a finding that a mutual mistake occurred. *Glover* v. *Bullard, supra, Dent, Adm'r. v. Industrial Oil & Gas Co.,* 197 Ark. 95, 122 S.W. 2d 162 (1938). However, the proof need not be undisputed in order to achieve reformation. *Galyen* v. *Gillenwater,* 247 Ark. 701, 447 S.W. 2d 137 (1969).

In the case at bar, 158.35 acres were conveyed by the deed which was based upon the survey made by Wood, appellants' surveyor. After the conveyance, as previously indicated, the appellees' surveyor, Weaver, ascertained from his survey that the deed conveyed a shortage of 8.61 acres and so testified. It appears that Wood and Weaver were each county surveyors. Wood, as a witness, did not have the advantage of his original map since he had lost it. However, following the initial hearing, Wood was permitted to testify again after resurveying the acreage. This time he testified that the acreage actually conveyed consisted of 161.65 acres of 3.30 acres in excess of his original survey. We have held many times that when the evidence is conflicting on factual issues the chancellor is in a better position to evaluate the evidence since he observes the witnesses, hears their testimony and we, on appeal, have only the printed word and exhibits before us. *Brown* v. *LeTourneau College,* 251 Ark. 851, 475 S.W. 2d 521 (1972). The provisions of the written contract specifically give the parties the right to ascertain the correct acreage. Therefore, when we consider the initial conflicting evidence (8.61 acres disparity) between the two suveyors coupled with the admission by appellants' own surveyor at a subsequent hearing that his first survey was inaccurate by 3.30 acres (increasing the disparity to 11.91 acres), we are unable to say that the finding of the chancellor, in reconciling the factual issue, failed to adhere to the standard of clear and convincing proof.

Appellants next contend that the court erred in denying interest on the $40,000 note from June 1, 1971, to March 8, 1972. This figure represents the balance of the

purchase price which was secured by a vendor's lien. Paragraph 1 of the contract provided that this balance would be paid "just as soon as they [appellees] dispose of their place in Houston, Texas, but not later than one year thereafter." The promissory note, which was given at the time of the closing of the transaction, provided that the appellees [makers] agreed that whenever they disposed or sold "certain of their real property in Houston, Texas, before the due date" they would thereupon pay the balance and "at any rate not later than one year from the date of this note [February 15, 1971]." The note further provided that interest would be computed at the prevailing interest in the local area. Appellee Barnes testified "certain property in Houston" meant his home place. It is undisputed that his home had not been sold. Appellant Bicknell took the position that the sale by Barnes of his business on June 21, 1971, activated the interest on the note from that date. However, Bicknell himself testified on direct examination that in their discussion of pre-payment on the note, Barnes stated "just as soon as I sell the property in Houston we will pay the note." Bicknell acknowledged that only the house was mentioned as being on the market and Barnes expressed the belief he would sell it in the near future. On this subject Bicknell then testified "[W]ell, I'll take a chance and gamble, then, that you do sell it right away and won't have to ride a full year." Bicknell further testified that Barnes told him he had a very profitable business which he could sell; however, Barnes expressed no desire to sell it. In view of this testimony, we certainly cannot say the chancellor's finding on this factual issue is against the preponderance of the evidence. We have considered and find without merit any subsidiary arguments raised under this contention, as previously stated, with reference to the note and interest.

Affirmed.

WILLARD K. ROBERTSON *v.* DENNIS CEOLA

73-167 501 S.W. 2d 764

Opinion delivered December 10, 1973

Croxton & Boyer, for appellant.

Davis, Reed & Douglas, for appellee.

FRANK HOLT, Justice. Appellee sued appellant for breach of an oral contract for the purchase and installation of certain materials during the construction of appellant's

house. Appellee was awarded $5,000 by a jury. For reversal of the judgment appellant asserts the jury's award of damages was based upon speculation and conjecture. We must agree that appellee did not sufficiently prove his damages or loss of potential profits with reasonable certainty.

The proof of lost profits must be shown by evidence which makes it "reasonably certain" what the plaintiff would have made. *Farmers Cooperative Assn.* v. *Phillips,* 241 Ark. 28, 405 S.W. 2d 939 (1966), *Black* v. *Hogsett,* 145 Ark. 178, 224 S.W. 439 (1920). The plaintiff must produce a "reasonably complete set of figures, and not leave the jury to speculate as to whether there would have been any profits." *Sumlin* v. *Woodson,* 211 Ark. 214, 199 S.W. 2d 936 (1947). The proof must be sufficient to remove the question of profits from the realm of speculation and conjecture. *Reed* v. *Williams,* 247 Ark. 314, 445 S.W. 2d 90 (1969). The value of appellee's *own services* in completing the contract is a necessary element in computing the cost of performance. *Gibney* v. *Turner,* 52 Ark. 117, 12 S.W. 201 (1889). See also *Columbus Mining Co.* v. *Ross,* 218 Ky. 58, 290 S.W. 1052 (1927, and *Jowers* v. *Bysard Construction Co.,* 113 S.C. 84, 100 S.E. 892 (1919). In the case at bar, the defect in appellee's proof is his failure to offer evidence as to the value of his own services in the performance of the construction contract.

Lost profits, which are the basis for the award of damages here, are determined by the formula: contract price minus cost of performance equals profit. The profit in this case, a cost plus contract, rests upon 15% of certain materials purchased and whatever profit appellee would make on the $12 per hour labor for installation.

The actual labor cost consists of the cost of a tile setter and helper. The helper was to be paid at the rate of $2.75 per hour, leaving $9.25 per hour in labor cost. Appellee was to be the tile setter and there is no testimony as to what his hourly wage was worth. Without evidence as to the value of appellee's individual time, we have no way of ascertaining how much profit was to be made on the remaining $9.25 an hour of labor cost. Without that figure, damages are speculative.

Appellant next contends that appellee failed to prove a contract. The uncontradicted testimony of appellee (appellant did not testify) is that when he asked appellant if $12 per hour for labor plus 15% of the cost of certain materials would be satisfactory, appellant said "yes." Appellee also testified that when they completed their negotiations appellant said "[V]ery good, this is the way we will do the job." There was also an understanding as to the time and method of payment. A factual dispute as to the existence of a contract properly presents a question for the jury. *Bush* v. *Wofford,* 139 Ark. 330, 213 S.W. 751 (1919), *Honey* v. *Caldwell,* 35 Ark. 156 (1879). The evidence in the instant case was certainly sufficient to create a question of fact for the jury as to the existence of a contract.

Appellant next contends that the contract would be prohibited by the statute of frauds, Ark. Stat. Ann. § 38-101 (Repl. 1962), since it could not be performed within one year. However, there was evidence that by employing additional help, appellee could have completed the job in six months. Since the contract was capable of performance within one year, it was not prohibited by the statute of frauds. *Frieder* v. *Schleuter,* 105 Ark. 580, 151 S.W. 696 (1912).

Appellant next cites Ark. Stat. Ann. § 85-2-201 (Add. 1961) which renders unenforceable an agreement for sale of goods in excess of $500 absent some writing. The cost of the materials appellee was to furnish exceeded $15,000. § 85-2-201 deals with the "sale of goods" and is inapplicable to personal service contracts. Even though it be said that the material appellee was to purchase and furnished constitutes goods within the definition of § 85-2-105 and part of appellee's profit is to be gained on cost plus 15% on the material, nevertheless, the essence of the agreement is a service contract for appellee to install tile in appellant's home. Unless the principal object of the agreement is for sale of goods, then § 85-2-201 is inapplicable. See *Huyler Paper Stock Co.* v. *Information Supplier Corp.,* 117 N.J. Super. 353, 284 A. 2d 568 (1971).

Appellant's final contention for a directed verdict is that "the damages alleged by the appellee could not

have been in contemplation of the parties at the time the contract was made, or that such damages were the proximate result of appellant's wrongs." This contention is meritless. In the case at bar, loss of profits is naturally the proximate result of a breach of contract. Appellee's loss of profits is also the type of a foreseeable loss that would be within the reasonable contemplation of the parties at the making of the contract.

Reversed and remanded.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY *v.* CRITTENDEN ABSTRACT & TITLE COMPANY, INC.

73-168 502 S.W. 2d 100

Opinion delivered December 17, 1973

Rieves & Rieves, by: *Donald A. Forrest,* for appellant.

Spears & Sloan, for appellee.

CARLETON HARRIS, Chief Justice. On April 23, 1969, W. I. Forrester, an attorney of Memphis, Tennessee, ordered abstract from appellee, Crittenden Abstract & Title Company, Inc., for Lots 1, 1A, 2, 2A, and 3 in Block 4 of Haisch Subdivision. The abstract was completed and delivered on May 20, 1969 to the attorney for Ray-Don Bildors, who examined same and approved the title on the basis of the abstract as delivered; Ray-Don Bildors thereupon acquired the property. In the latter part of November, 1970, it developed that Carrie Arnold Crane claimed title to this property, Crittenden Abstract & Title Company, Inc. learning of this claim about December 28, 1970, and two days later, it was determined by the latter that an instrument had been omitted from the abstract. Prior thereto, appellant, St. Paul Fire and Marine Insurance Company, had issued its Errors and Omissions Policy to appellee, effective from October 23, 1968 to October 23, 1969, and this policy had been renewed for the year October 23, 1969 to October 23, 1970. At that time, appellee changed to Lloyds of London, and the latter company issued its policy effective from October 23, 1970 to October 23, 1971. Both companies denied liability, appellant's denial being based on a provision of the policy reading as follows:

> "IV. POLICY PERIOD, TERRITORY. This Policy applies to claims, suits or any other action arising during the Policy period within the United States of America, its territories or possession, resulting from negligent acts, errors or omissions of the Insured, their predecessors or any person now or heretofore employed by the Insured or any predecessor."

Lloyds of London denied liability, basing its contention on the following clause:

> "It is understood and agreed that, notwithstanding anything contained herein to the contrary, this Policy shall not indemnify the Assured in respect of any claim made against the Assured by reason of any negligent act, error or omission committed, or alleged to have been committed, prior to . . . . . OCTOBER 23, 1970."

Appellant company denied liability because the abstract company's error was not discovered during the term of its policy, but rather was discovered during the period that the Lloyds of London policy was in effect; Lloyds denied liability because the error was not committed during the term of its policy, and accordingly neither company would accept any responsibility. The lands involved consisted of 1.4 acres, but by the time the controversy arose, the acreage had been sub-divided into lots and blocks, streets had been built, sewers, water, and lights installed, and houses built, and accordingly, the total value of the lands had been greatly enhanced. Mrs. Crane had employed counsel preparatory to instituting suit, and appellee settled the claim on behalf of Ray-Don Bildors for $6,275.00 and the latter was given a deed by Mrs. Crane. Thereafter, on December 31, 1971, Crittenden Abstract & Title Company filed suit in the Crittenden Chancery Court, later transferred to Circuit Court, against appellant company and Crump London Underwriters, Inc.[1] Each company denied liability and on trial, the only witness testifying was Mrs. Margueritte Held, the owner of Crittenden Abstract & Title Company. The court found that the cause of action arose at the time of the delivery of the abstract, and that accordingly there was no liability against Lloyds and the complaint as to this defendant was dismissed. As to appellant, the court held as follows:

> "The abstract was made and delivered May 19, 1969. It appears that that was the date the cause of the action arose. At that time that was all that they [St. Paul] claimed, for their reasons for not being liable. They

[1]From the record:

"It is hereby stipulated by and between the attorneys for the plaintiff and Underwriters At Lloyd's, defendant, that the title of this action shall be amended by substituting as defendant herein, Robert Charles Sells as Lead Underwriter subscribing to Certificate of Coverage No. 30780, in the place and stead of Underwriters At Lloyd's.

"It is further stipulated that a final determination or judgment by this Court, or any Court having appellate jurisdiction herein, the right to appeal being expressly reserved, against Robert Charles Sells, a defendant herein, being one of the underwriters at Lloyd's subscribing to insurance described in Certificate of Coverage No. 30780, shall be binding upon all of the underwriters subscribing to said insurance in respect of their liability thereunder, each for his own proper proportionate part, and not jointly or one for another."

did not let the matter go any further than that, just denied at the outset that it was not[2] liable. ***

"From the evidence, it appeared, too, that had she [Margueritte Held] waited and not obtained this best settlement as she could, and at one time that settlement could have been made for $4,000.00 and it had already gone up to $6,000.00, she felt that in view of the improvements, the streets, gutters, utilities, and the residences and other improvements on the property that the suit would be much larger when the title got tied up, and looked a little more than it would be if she could settle it then for the least amount of $6,275.00.

"That was not the ground upon which the company was denying liability; it was denying liability on the ground that it did not arise during the policy period. *** The judgment will go against the St. Paul."

Twelve per cent penalty was allowed and an attorney's fee of $2,000. From the judgment so entered, appellant brings this appeal.

For reversal, it is first asserted that the judgment is erroneous because the claim did not arise during the policy period and appellant cites a Louisiana decision and New Jersey decision in support of this contention. In the Louisiana case, *J. M. Brown Construction Co.* v. *D & M Mechanical Contractors, Inc.* (First Circuit Louisiana), 222 So. 2d 93, the effective dates of the policy were March 6, 1964 through March 6, 1965 and the alleged error occurred during that period; however, demand for indemnification was not made until May 30, 1967, over two years after the error was made, though this fact would not be controlling. The policy, however, provided that the company would indemnify the assured against any claim caused by error or omission made against them during the period of coverage, there being only one exception, viz., claims of which the assured became aware, would be honored after policy expiration provided written notice was given the insurer during the policy term. In *Rotwein* v. *General Accident Group,* 247 A. 2d 370, the New Jersey

[2] The word "not" is obviously a typographical error.

case, the policy period was April 15, 1961 through April 14, 1964. In July, 1966, when General Accident no longer was the insurer, the defect in the performance of architectural services was first called to the attention of that company. The policy posed three conditions which must be met before General Accident would be liable, the third of these requiring the reporting and commencement of a claim during the policy period. The opinion recites the fact that defects came to the attention of the parties directly involved as early as 1964 while the policy was still in effect, but General Accident did not receive notice until 1966. In the case presently before us, there was no knowledge of any error until after the St. Paul coverage had expired. Be that as it may, we think the wording of the policy, as well as sound logic, requires the construction reached by the trial court in this case. The *American Heritage Dictionary of the English Language* (1969) defines "arise" as "to come into being; originate." Certainly the error came into being, i.e., originated, while the St. Paul policy was in effect. What appears to be the general rule is succinctly stated in 1 C.J.S., Abstracts of Title, § 13, p. 399, as follows:

> "The right of action against an abstracter for damages resulting from errors, defects, or omissions in an abstract of title prepared by him accrues at the time the examination is made and the abstract prepared and furnished, and not when the wrong is discovered or actual damage results therefrom ***."

Likewise, in 1 Am. Jur. 2d, Abstracts of Title, § 24, p. 245, we find:

> "It is generally held that a cause of action against an abstracter for damages caused by furnishing a defective or incorrect abstract accrues when the examination of the title is reported or the abstract delivered, and the statute of limitations begins to run from the time of the occurrence of the breach of duty, and not from the time of the discovery of the actual damages as a result of the breach. ***"

Strangely enough, it does not appear that this court has passed directly upon the question and no Arkansas

cases are cited by either side. However, in *Adams* v. *Greer,* 114 F. Supp. 770, the United States District Court for the Western District of Arkansas (Fayetteville Division), was called upon to answer the exact question of when a cause of action arose against an abstracter for incorrectly compiling an abstract because of a plea of the statute of limitations. Judge John E. Miller, in a well written opinion, thoroughly discussed this subject as follows:

> "*Russell (& Co.)* v. *Polk County Abstract Co.,* 87 Iowa 233, 54 N.W. 212, 43 Am. St. Rep. 381, was an action against an abstract company for negligence in making an abstract and damages arising on account of such negligence. It was held by the court in that case that the cause of action accrued when the abstract was delivered by the abstract company to the purchaser thereof, and that there was a breach of the contract immediately upon the delivery, and not when the injury occurred or the error was discovered. *Provident Loan Trust Co.* v. *Wolcott,* 5 Kan. App. 473, 47 P. 8, is an action against an abstractor for giving an incorrect certificate of title, and it was held that the cause of action arose at the date of the delivery of the abstract, and not at the time of the consequential damages. *Lattin* v. *Gillette,* 95 Cal. 317, 30 P. 545, 29 Am. St. Rep. 115, was an action against an abstractor for negligence in certifying that a party was the owner, when, in fact, he only had a half interest in the title to the property. It was held that the cause of action accrued at the time of the delivery of the abstract and that the statute of limitations began to run at that time, notwithstanding the fact that the purchaser of the abstract did not discover the defect or error until after the statute of limitations had run, at which time he had to surrender one-half interest in the property. The Missouri courts have reached the same conclusion in *Rankin* v. *Schaeffer,* 4 Mo. App. 108, and *Schade* v. *Gehner,* 133 Mo. 252, 34 S.W. 576. See, also, note to *Equitable Bldg. & Loan Ass'n* v. *Bank of Commerce* (118 Tenn. 678, 102 S.W. 901), 12 L.R.A., N.S., 454. ***
>
> "Since the plaintiffs' claim accrued when the amended abstract was delivered by defendant to plaintiffs

> and since this occurred more than three years prior to the filing of the suit herein, the claim of plaintiffs is barred by Section 37-206, Ark. Stats. 1947, Annotated, and the motion to dismiss should be sustained."

We hold that the claim arises when the abstract is compiled and delivered and not when the error is discovered.

It is next contended that error was committed in the rendering of the judgment because appellee did not comply with a condition precedent in the policy sued on. This argument has reference to the fact that included in the policy is a provision stating:

> "No action shall lie against the Company unless, as a condition precedent thereto, the Insured shall have fully complied with all the terms of this Policy, nor until the amount of the Insured's obligation to pay shall have been finally determined either by judgment against the Insured after actual trial or by written agreement of the Insured, the claimant and the Company."

Admittedly, no suit was ever filed against the abstract company nor judgment rendered against it, nor did St. Paul agree in writing to any settlement. Accordingly, appellant says that it is not liable. We do not agree. The record reflects that St. Paul Fire and Marine Insurance Company was first notified by letter from Mrs. Held on December 28 that Mrs. Crane was making claim to the aforementioned lands. The company was advised "that since it appears that claim will arise in this matter, I am giving you notice." On January 4, a second letter was sent by Mrs. Held, attaching a letter from the attorney for Ray-Don Bildors, Inc. advising Mrs. Held to call the matter to her insurance company's attention inasmuch as it appeared that a claim would be made by the Cranes. On February 11, 1971, inquiry was made of St. Paul by letter of Mrs. Held asking that the company please advise its intentions regarding the claim. On February 16, Mr. Elliott Slutsky, Claim Loss Representative for St. Paul, replied to Mrs. Held as follows:

"In relation to the above captioned claim, Lloyds of London would be your carrier since the discovery date is within their policy period.

Attached please find a portion of your Abstractors Liability policy with us in which I circle number IV Policy Period, Territory which best describes why Lloyds of Lond[on] would be the carrier in this claim."

On February 18, 1971, William D. Perry, an attorney of Memphis, wrote the attorney for Ray-Don Bildors on behalf of Mrs. Crane, demanding that Ray-Don Bildors execute proper deeds to restore the title back to Mrs. Crane or pay her the reasonable value of the property. Copy of this letter was sent to St. Paul on February 23. Thereafter, on March 11, 1971, Archie M. Clark, Claim Loss Manager for the insurance company, wrote Mrs. Held as follows:

"As our attitude has not changed in connection with the matter, we feel that the burden should be borne by the Lloyds of London; therefore, I would appreciate your advising the principal in this matter."

On May 27, the law firm of Spears & Sloan advised both St. Paul and Lloyds that Mrs. Crane was preparing to file an ejectment suit against the owners of houses located on the lands and, "This will develop into a full blown law suit and would require a great deal of technical proof, surveys, and various other things that would be rather expensive." The letter advised that Mrs. Crane was making claim for $8,000, but that it was believed the claim could be settled for somewhere between $4,500 and $5,000, and it was the opinion of the law firm that "it would be the better part of wisdom to settle it." On June 7, Mr. Clark of St. Paul acknowledged the letter from the law firm and stated:

"I have reviewed the above captioned along with the investigating adjuster, and we do not see how we are involved in this matter in any way. This is due to the fact that our policy expired October 23, 1970, and the date of discovery of this loss was December 23, 1970. Therefore, we have no alternative other than to stay

out of any negotiations that you may have with the Lloyd's policy."

On October 8, the company was advised that the claim had been settled through payment by Crittenden Abstract & Title Company in the amount of $6,275.00, and the matter was thus terminated. Apparently, an identical letter was sent to Lloyds, for the attorneys state:

"If either or both of you wish to reimburse Crittenden Abstract & Title Company, Inc. for the sum of $6,-275.00, you may do so and divide the payment in any manner you see fit but in default of any payment we expect to file a declaratory judgment suit against both of you."

Both companies denied liability.

It is thus apparent that appellant was kept completely informed of developments, and that it not once, but repeatedly, denied liability on the basis of the fact that the error was not discovered during the time that its policy was in effect. The correspondence could not more clearly show that appellant had no intention of doing anything at all. Accordingly, appellee was placed in the position of either settling the claim itself or defending litigation that would bring into the picture numerous additional parties, which, as stated by counsel, would develop into extensive, involved, and expensive litigation; in fact, in studying the record, we agree that there was substantial evidence to the effect that the settlement was wise. To hold with appellant would be to say that appellee, left alone, when appellant should have participated, is penalized for taking action, which in its best judgment, mitigated the damages—damages that under the contract were the responsibility of St. Paul. The general rule is found in 44 Am. Jur. 2d, § 1550, p. 432, as follows:

"An insurer cannot breach its contract by unjustifiably refusing to defend an action against the insured, upon grounds that the claim upon which the action was based was outside the coverage of the policy, and at the same time take advantage of a policy provision prohibiting the insured from settling any claim with-

out the consent of the insurer except at his own cost. Consequently, an insurer's unjustified refusal to defend relieves the insured from his contract obligation not to settle, and the insured is at liberty to make a reasonable settlement or compromise without losing his right to recover on the policy. This rule permitting settlements by the insured despite the presence of a 'no settlement' clause applies regardless of the type of liability policy involved. However, the courts have frequently stressed the fact that in order to bind the insurer the settlement must be reasonable and entered in good faith."

From what has been said, it is apparent that we agree that there is substantial evidence that the settlement was reasonable and entered into in good faith.

Finally, appellant contends that the policy sued on covers only obligations imposed by law upon the insured and appellee settled with a party to whom it had no legal liability. It is pointed out that Mrs. Crane did not contract with the plaintiff for the abstract and in no manner was in privity of contract with the abstract company, i.e., the abstract was not prepared for her use and benefit, and she was a complete stranger to the contract. The case of *Talpey* v. *Wright,* 61 Ark. 275, 32 S.W. 1072, is cited in support of the contention. The facts in *Talpey* are entirely dissimilar to those in the present case. Here, appellee prepared the abstract for Ray-Don Bildors, and it did have an obligation to prepare a correct abstract for that company. Likewise, it apparently being recognized by counsel for Ray-Don, Crane, and appellee, that Mrs. Crane's claim to the land here in question was entirely valid, the abstract company recognized liability to Ray-Don. In settling the claim, Crittenden Abstract & Title Company paid Mrs. Crane—but Mrs. Crane delivered her deed to the property in question to Ray-Don. In other words, appellee simply settled the claim on behalf of Ray-Don, and there certainly seems to be substantial evidence, as already pointed out, that this settlement was prudent and advisable.

Appellee also advances an additional argument which it is contended is applicable to Points II and III, viz., that

St. Paul has estopped itself to deny liability except under paragraph 4 of its policy. This argument relates to the fact that throughout the correspondence between appellant and appellee (heretofore set out), appellant consistently bottomed its denial of liability on the fact that coverage was not furnished under paragraph 4, and appellant never at any time until it amended its pleadings in the trial court, set up these defenses which we have listed under the second and third points. Appellee says that, in reliance upon the position taken by appellant in its letters, it paid the claim and filed its suit to recover payment. In other words, it is argued that appellant, having breached its agreement to defend against the claim, and appellee having taken steps to defend itself, was not thereafter in a position to rely on other provisions. It is true that appellant took a "hands-off" attitude when appellee was threatened with litigation, was well aware of the fact that settlement of the claim was being considered by Crittenden Abstract & Title Company, and subsequently aware that such settlement was made, and it may be that there is merit in this contention. Pertinent authorities are cited to that effect. However, inasmuch as we have found appellant's arguments on these two points to be without merit, there is no need to discuss the question further.

In accordance with what has been said, the judgment is affirmed.

Appellee requests that this court assess an additional attorney's fee against appellant, which we grant, and we are of the view that a reasonable fee for services rendered in this court is $1,500.00.

It is so ordered.

ARKANSAS STATE HIGHWAY COMMISSION *v.* TONY CHRISTELLO ET UX

73-170 502 S.W. 2d 494

Opinion delivered December 17, 1973

Thomas B. Keys and *Billy Pease,* for appellant.

Ralph Robinson, Tom Harper, and *Carl Creekmore,* for appellees.

GEORGE ROSE SMITH, Justice. This is a condemnation case. The highway department, by a declaration of taking filed on January 26, 1965, took a strip of about 12 acres across a 52-acre tract owned by the appellees, Tony Christello and his wife. The jury fixed the landowners' compensation at $20,000. In substance the appellant argues two points for reversal, both being based upon the trial court's refusal to strike testimony offered by the landowners.

The tract in question lies near the city of Alma and, according to all the abstracted testimony, is best suited to be used as a residential subdivision. T. J. Van Zandt, one of the landowners' expert witnesses, testified that the value of the tract before the taking was $125,000, "assuming all utilities except sewer were available to the property." On cross-examination the witness admitted that he did not know what it would cost to make the utilities available to the property, since he was not an engineer. It is now insisted, in view of that admission, that the condemnor's motion to strike Van Zandt's testimony should have been sustained.

Upon the record we cannot sustain that contention. Van Zandt did not assume that utility lines had been installed throughout the interior of the 52-acre tract. He merely assumed that utility services had been run "to the acreage," where they would be available to the tract. When Van Zandt so testified there was already in the record ample proof to indicate to the jury that the various utility services (except sewer lines, which the witness also excepted) were in fact available at the border of the tract on the date of the condemnation. In the light of that proof the trial court was right in refusing to strike Van Zandt's value testimony.

The appellant's second contention is that the court should have stricken the testimony of Christello and that of his two expert witnesses, because they all "used small lot sales to establish the value of a large tract of land containing raw acreage."

This contention, too, must be rejected. To begin with, the land was not raw acreage in the sense that the witnesses arrived at their estimates of value by multiplying the worth of individual lots in a fictitious subdivision that existed only upon a paper plat. That method of evaluation was disapproved in *Ark. State Highway Commn.* v. *Watkins,* 229 Ark. 27, 313 S.W. 2d 86 (1958). Here the subdivision was not imaginary. From the testimony the jury was warranted in finding that Christello, at least five months before the highway department itself knew where the proposed interstate highway would be located, began in good faith to develop the tract in question as a

subdivision. He spent $2,500 in having the area cleared, surveyed, and platted. He obtained estimates of cost with regard to gas and water pipe lines, ditching, and concrete streets. He sold two lots and options upon several others. Upon the proof it cannot be said that the proposed subdivision existed only on paper.

Moreover, the three challenged witnesses did not base their values solely upon the sale of small lots. We discuss only Christello's testimony, since he was the least qualified witness of the three. Christello had lived in Alma for 30 years and had owned land within and without the city, including all the land for at least a mile along both sides of a state highway abutting the tract now in dispute. Christello had developed and sold, lot by lot, another residential subdivision that was, at its closest point, only 200 yards from the subdivision now in issue. He testified that those lots, comprising about half an acre each, sold for from $1,000 to $1,200 each. Both he and his engineer stated that the first subdivision was situated upon low land and was therefore less desirable than the second one, which Christello described without contradiction as "the best piece of land for development that there is anywhere near Alma."

Christello's plat of his second subdivision showed a total of 27 residential lots, but he did not attempt to arrive at a value of the tract as a whole on the basis of those lots. To the contrary, at no point in his testimony did he ever assign any value to the lots as such. Instead, he testified that the 52-acre tract as a whole had a value of $107,500, which he reduced to a valuation of $2,115 an acre. His testimony that for many years there had been no sales in the vicinity of comparable large tracts is not disputed. Although he and his two expert witnesses fixed his damages at from $45,750 to $59,500, the verdict was for only $20,000. We find in the record no error that would justify our setting the verdict aside.

Affirmed.

ROY HILL *v.* STATE OF ARKANSAS

CR 73-120 502 S.W. 2d 649

Opinion delivered December 17, 1973
[Rehearing denied January 21, 1974.]

Harold L. Hall, for appellant.

Jim Guy Tucker, Atty. Gen., by: *O. H. Hargraves,* Deputy Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. Charged with first degree murder, the appellant Hill was convicted of second degree murder and was sentenced, as a habitual offender, to imprisonment for 26 years. He argues two points for reversal.

It is first contended that the trial court erred in allowing the State to introduce hearsay evidence. Hill and the decedent, Coy Daniels, had been neighbors in Dallas, Texas. In September, 1972, Hill, with his own family and three of Daniels' children, moved to North Little Rock, where Hill rented a house. A day or two later Daniels came to North Little Rock and drove to

Hill's house at about four o'clock in the morning. When Daniels was seen, someone turned off the lights inside the house; but Daniels walked in the front door and turned on a light in the living room. Within a few moments Hill shot and killed Daniels, with a shotgun. Hill's theory of the case was that he acted in self-defense.

The State called as a witness Mrs. Joel Lester, who had known the Daniels family in Dallas before she moved to North Little Rock. The court permitted Mrs. Lester to testify that at about 7:30 or 8:00 o'clock on the evening before the homicide Daniels had telephoned Mrs. Lester (apparently from Dallas) and had said that he was going to come and get his children and put them back in school.

Mrs. Lester's testimony was admissible, as tending to show that Daniels' mental state was not one of hostility toward Hill when Daniels went to Hill's house. We have admitted similar statements by the victim of a homicide as part of the *res gestae*. *Sullivan* v. *State,* 171 Ark. 768, 286 S.W. 939 (1926); *Spivey* v. *State,* 114 Ark. 267, 169 S.W. 949 (1914). It is really more accurate to say that such statements are admissible as an exception to the hearsay rule. Morgan, Statements Evidencing Mental Condition, 3 Ark. L. Rev. 182 (1949). By analogy, our rule is that when self-defense is in issue, the victim's uncommunicated threats against the defendant are admissible to show who was the aggressor. *Decker* v. *State,* 234 Ark. 518, 353 S.W. 2d 168, 98 A.L.R. 2d 1 (1962); *Wilson v. State,* 184 Ark. 252, 42 S.W. 2d 378 (1931). Since the accused may prove such uncommunicated statements to show an attitude of hostility, the State may prove uncommunicated statements, such as that made to Mrs. Lester, to indicate a peaceful intention.

We pass to the appellant's second contention. Hill, testifying in his own defense, admitted three earlier felony convictions. The State's attorney, in responding to an objection made to his cross-examination of Hill, said to the court: "Your Honor, he has testified that he has been convicted of three felonies, and I intend to show quite a few more things." The court sustain-

ed defense counsel's objection to the State's line of questioning.

Defense counsel then asked for a mistrial on the ground that the State's attorney should not have referred to "quite a few more things." In denying the motion for a mistrial the court said, apparently to the jury: "I don't [know] what the statement is that, by the Prosecutor, that he intends to show quite a few more things. You'll disregard that, because I don't know what he had in mind. There's some ambiguity there, but you'll disregard that statement because it shouldn't have been made but I don't think it's prejudicial because he doesn't say anything." When defense counsel pressed his motion for a mistrial the court again made substantially the same statement to the jury.

It is now insisted that the court should have granted a mistrial and that the error was compounded by the court's statement that "I don't think it's prejudicial because he doesn't say anything." We find no reversible error. A mistrial should not be granted unless the error is so prejudicial that justice could not be served by a continuation of the trial. *Back* v. *Duncan,* 246 Ark. 494, 438 S.W. 2d 690 (1969). This case does not fall in that category. Since the prosecutor's remark conveyed no information to the jury about the other things that counsel intended to show, we think the court's admonition that the remark be disregarded was sufficient to correct the error. The court's additional statement was of course not a comment on the evidence, since the incident involved only a statement by counsel. We consider the court's remark, that the statement was not prejudicial because he doesn't say anything, to have been an accurate summation and certainly not so detrimental to the accused as to call for a mistrial or a reversal here.

Affirmed.

HARRIS, C.J., not participating.

JACK DAVES *v.* SEARS ROEBUCK & CO. & THE COMMISSIONER OF LABOR FOR THE STATE OF ARKANSAS

73-169 502 S.W. 2d 106

Opinion delivered December 17, 1973

William M. Stocks, for appellant.

Herrn Northcutt, for appellees.

LYLE BROWN, Justice. This is an appeal from the denial of unemployment compensation benefits. The local agency for unemployment compensation at Ft. Smith denied the claim; that action was appealed to the appeals tribunal, where after a hearing by the referee the claim was again denied; the matter then went to the board of review and the referee was upheld; and the circuit court affirmed. The single finding upon which denial of compensation was based was that claimant-appellant did not make reasonable efforts to preserve his job rights. The one point for reversal is stated thusly: "The appellant relies upon the fact that had he applied for job preservation rights due to illness under the circumstances of this case, they would have been denied by the employer, that an effort to obtain employment in another department of the same store would not have relieved the circumstances resulting in the condition requiring the job change and that under

these circumstances, to require an exercise in futility is unreasonable and not required by the language of the unemployment compensation act". Succinctly stated, appellant contends that a secondary cause of his illness was the pressure of the sales work and that he was medically advised he should seek employment elsewhere.

Appellant testified that on November 3, 1971, he had an unpleasant verbal confrontation with the store manager and suffered severe chest pains; that he went to a doctor; that his condition was diagnosed as viral upper respiratory illness and hyperventilation syndrome; that he was permitted by the doctor to return to work on November 18, with the admonition that he was to return to the doctor if he had a recurrence. There was shortly a recurrence and claimant says he was advised by the doctor to change his employment because of the history of stress. On November 26, 1971, appellant went to Mrs. Shields, the personnel manager and resigned. Appellant concedes that he made no effort to preserve any job rights because he was not aware of them and also, that it would have been a vain thing to do because he would, as long as he worked in sales, be under the same pressure which contributed to his illness. He further asserted Mrs. Shields should have advised him of any benefits to which he was entitled.

On November 29, 1972, appellant filed a claim for benefits indicating the reason to be "extreme pressure". The local office of employment security determined that appellant left his work "for reasons other than good cause in connection with the work" and was therefore not entitled to any benefits. Appellant timely filed a petition for appeal to the referee and for his reason stated: "I feel that I had good cause to leave since I was under extreme pressure and my doctor advised that I get away from that job".

A hearing was conducted pursuant to the appeal on January 5, 1972. Appellant stated that he discussed his physical problems with Mrs. Shields on November 26, the day he resigned. "I did not ask for leave of absence and I did not request transfer to other work with Sears." A letter from appellant's doctor was introduced:

> Mr. Daves was seen initially by myself in the early part of November because of upper respiratory illness and some chest pain and secondary hyperventilation syndrome. He was evaluated. No serious difficulty was found. His diagnosis was a viral upper respiratory illness and hyperventilation syndrome. Part of his difficulty is secondary to pressure from his work. He returned to work on the 18th of November and had recurrence of his hyperventilation syndrome which was felt to have been due to pressure of his job. It was felt that he should make a change in his employment because of his physical reaction to the stress of his job. It has been recommended that he seek other employment.

Appellant explained that he was a floor salesman, dealing in household appliances of varied types. He attributed the pressure from his supervisors to two principal sources. First, he got a red mark if he sold more than seven percent of "leader merchandise". "If you sell over seven percent, they put you in the shoe department or move you out of the department. I mean just constantly threatening you all the time to move you to a lesser job." The other source of pressure he described as pertaining to the sale of service contracts. Of the 100% of his sales of appliances he said he had to sell 60% service contracts on those items "or you'd be threatened to move you into the grease pit or something like that or move you out someplace else where less desirable work was accomplished, compatible to the type work that I do". He related that the described pressures developed during the last year he worked. He also said the pressures were standard to all Sears' salesmen.

Appellant testified he did not ask Mrs. Shields for transfer to another job because selling was the type of work in which he had years of experience. He said he did not ask for a leave of absence because the doctor had recommended he get out of the pressured job and get into some other type selling. He reiterated he was not offered a transfer or a leave of absence.

Mrs. Shields testified for Sears. She said there were seven other salesmen in appliances who work under the

same conditions as appellant. The tenure of other salesmen ran 24, 15, and 12 years, down to less than a year. She explained that Sears tried to keep the sales up "and Jack (appellant) was the low man in sales and maintenance agreements, so I'm sure he did feel more pressure than some of the others". She stated that the company granted leaves for illness, and tried to grant permission to transfer whenever requested. She said appellant did not ask for leave at the time he resigned and as to transfer, "he stated he would not be interested working in another department". She related that appellant gave as his reason for quitting, "that the job interfered with his health, according to his doctor". She testified she subsequently went to appellant's home to get written permission from him to authorize his doctor to give Sears a statement; that appellant refused to sign such a release; and that the doctor therefore refused to release any information.

Appellant called as his witness a former appliance salesman for Sears. Mr. West generally corroborated appellant with reference to the pressure put on salesmen.

The referee made a finding that "the claimant voluntarily quit his last work with the above named employer without making reasonable efforts to preserve his job rights prior to quitting. It was not established that the claimant was under any more pressure in his work than other salesmen employed by this employer in the same department. The claimant did not make an effort to preserve his job rights with this employer by requesting transfer to other work, as he felt that the other jobs to which he might be transferred might not enable him to earn the commission he had customarily earned in the household appliance department". Then the referee cited the only section of law that is applicable to a resolution of this case, being a portion of Ark. Stat. Ann., § 81-1106 (Supp. 1971):

> For all claims filed on and after July 1, 1971, if so found by the Commissioner, an individual shall be disqualified for benefits:

(a) If he voluntarily and without good cause connected with the work, left his last work. Such disqualification shall continue until, subsequent to filing his claim, he has had at least 30 days of paid work.

Provided no individual shall be disqualified under this subsection if, after making reasonable efforts to preserve his job rights, he left his last work due to a personal emergency of such nature and compelling urgency that it would be contrary to good conscience to impose a disqualification; or, if after making reasonable efforts to preserve his job rights, he left his last work because of his illness, injury or disability.

The claimant perfected an appeal and a hearing was conducted for the board of review on February 18, 1972. At that hearing appellant appeared with his attorney and the latter examined Mrs. Shields. She was questioned at length about the policy of Sears with reference to leave of absence due to illness. In that respect she stated that Sears has a very liberal policy. It is not necessary that we discuss illness benefits because that is not a part of the unemployment compensation law. To draw unemployment compensation a worker must be able to work and be available for work. Ark. Stat. Ann. § 81-1105 (c) (Supp. 1971). Illness benefits are completely aside from the issue of unemployment benefits which are the subject of this litigation.

Another letter from appellant's doctor, dated February 15, 1972, was read to Mrs. Shields. In essence it stated that the doctor recommended claimant change jobs within the firm; that his patient felt that would be undesirable because he would be under the same pressure from the same supervisors; that the doctor therefore recommended that appellant change jobs entirely, that is, to another company. Mrs. Shields testified that had Sears been presented with the letter, it would have granted sick leave, and had appellant requested it, he would probably have been granted a different job within the firm. In fact, she stated there was an opening in home improvement sales on November 26, 1971, concerned with selling air moving equipment, such as cooling, heating and plumb-

ing, at which job appellant could have made more commission.

The board of review sustained the findings of facts and conclusions of law made by the referee. That finding was affirmed by the circuit court on appeal.

In deciding these cases we follow the substantial evidence rule. *Terry Dairy Products Co.* v. *Cash,* 224 Ark. 576, 275 S.W. 2d 12 (1955). It is undisputed that appellant made no effort to preserve any job rights, such as a request for transfer to another department. We reiterate: we are not here adjudicating any right to illness benefits because that benefit is a matter between employer and employee based on the policy of the company; it is not a right granted by the unemployment compensation act.

Affirmed.

ELOISE P. DeWEESE ET AL *v.* MILTON NEVIL WILLIAMS ET AL

73-164 502 S.W. 2d 94

Opinion delivered December 17, 1973

Haley & Claycomb, for appellants.

Lawrence Blackwell, for appellees.

J. FRED JONES, Justice. This appeal is from a chancery court decree partitioning 157 acres of Jefferson

County land among the descendants of Louisa J. Williams who died intestate in 1898. It is admitted by all concerned that Warren E. Williams was a surviving child and lawful heir of Louisa J. Williams. This case turns on the question of whether Ida V. Williams West was also a child and heir at law of Louisa J. Williams, or whether she was only a foster child reared in the Williams home. The chancellor found that Ida was also a child and lawful heir of Louisa J. Williams and shared equally with Warren in Louisa's estate.

Warren E. Williams died intestate in September, 1942, and left five children, Birdie W. Parker, Milton Nevil Williams, Mabel W. Seamans, Idell W. Bussey and Warren Edgar Williams, Jr., as his sole surviving heirs. Ida Williams West died intestate in 1953 and left one daughter, Nola W. Fetsch, as her sole surviving heir at law. Birdie W. Parker died intestate in September, 1969 and left surviving her husband, I. V. Parker, and four children, Eloise P. DeWeese, Virginia P. Calaway, Walter C. Parker and Dorothy M. Parker, as her sole surviving heirs at law. Dorothy died in 1971 leaving only her father, I. V. Parker, as her sole surviving heir.

Milton Nevil Williams has been in possssion of the property here involved for a number of years and on April 22, 1958, he was appointed guardian of the person and estate of his brother, Warren E. Williams, Jr., who was mentally incompetent. On August 11, 1970, under a probate court order authorizing a private sale, he executed a guardian's deed conveying an undivided one-tenth interest in the described real estate to his sisters, Mabel W. Seamans and Idell W. Bussey. On June 16, 1971, Mabel W. Seamans conveyed all her undivided interest in the land to Milton by warranty deed, and on February 3, 1970, Milton obtained a quitclaim deed from Nola Fetsch conveying to him all her interest in the land as the sole surviving heir of Ida Williams West and Milton now claims a three-fourths undivided interest in the property.

This action was commenced on August 4, 1971, when the above named heirs of Birdie Parker filed petition for a partition of the property naming the remaining Williams heirs as parties defendant. They

alleged that the property descended from Louisa J. Williams to her only child, Warren E. Williams, and through him to the Williams heirs including their mother, Birdie Williams Parker, in undivided one-fifth interests. They alleged that when their mother, Birdie Parker, died intestate, they inherited her one-fifth undivided interest in the property; that they each own an undivided one-fourth interest in the undivided one-fifth interest in the property owned by their mother subject to the curtesy rights of their father, I. V. Parker. The petition alleged that the parties had never been able to agree on a division of the property since the death of Birdie W. Parker, and alleged that Milton had wrongfully used and occupied the premises for his own personal use and in partnership with others since August, 1956. They alleged that they were entitled to an accounting for fair rental value, the timber harvested and government payments received. They prayed for a partition in kind or in the alternative that the property be sold and the proceeds divided according to the interests of the parties.

Milton filed an answer admitting the relationship of the parties and the death and intestacy of Birdie W. Parker as alleged in the petition. He admitted the petitioners are each entitled to one-fourth of the interest owned by Birdie W. Parker. Milton alleged, however, that Louisa J. Williams died intestate on August 4, 1898, survived by *two children,* Warren E. Williams and *Ida V. Williams West,* as her sole surviving heirs at law. He alleged that Ida V. Williams West died intestate on June 3, 1953, leaving one child, Nola Fetsch, as her sole surviving heir at law. He alleged that by inheritance and purchases he became the owner of an undivided three-fourths interest in the property described in the petition and that he acquired such interest as follows:

> "By inheritance from Warren E. Williams, an undivided 10%. By purchase from Nola West Fetsch, sole heir at law of Ida Williams West . . . an undivided 50%. By purchase from Mabel W. Seamans . . . an undivided 15%."

Milton then alleged that no demand for rents had ever been made and denied that any timber had been

harvested from the land except when damaged by fire or ice. He then alleged improvements to the land in the amount of $11,500, taxes paid in the amount of $903.10 and prayed that these expenditures be taken into consideration in the event of partition. He then alleged that he, together with Birdie Parker and Mabel Seamans, had previously conveyed their interest in other lands to Idell W. Bussey by quitclaim deed with a provision in the deed that the conveyance should be taken into consideration in determining Mrs. Bussey's interest in the lands here involved at the time of division of the estate properties of Warren E. Williams, deceased, and he prayed that this be done. The petitioners filed a reply to the affirmative allegations of Milton in which they specifically denied that Louisa J. Williams was survived by "two" children. They denied that Ida was a child or heir of Louisa J. Williams by birth or adoption and they joined issues with Milton's allegations of improvements.

As already stated, the chancellor found that Ida V. Williams West was the daughter of Louisa J. Williams and John J. Williams, and that upon the death of Louisa J. Williams the title to the property passed to Warren E. Williams and Ida V. Williams West as tenants in common, with each of them owning an undivided one-half interest in the property. The chancellor found the interests of the parties in the property to be as follows:

> "Idell W. Bussey, an undivided 15%.
> Milton N. Williams, an undivided 75%.
> Walter C. Parker, an undivided 2.5%.
> Eloise P. DeWeese, an undivided 2.5%.
> Virginia P. Calaway, an undivided 2.5%.
> I. V. Parker, an undivided 2.5%."

The chancellor then ordered a partition of the property according to the interests found, and appointed Commissioners with directions to determine whether the property is subject to division in kind or should be sold and the proceeds divided. He then reserved the other issues for determination pending the report of the Commissioners.

On their appeal to this court, the Parker heirs first contend that the chancellor committed five specific errors pertaining to the admission and exclusion of documentary evidence. They next contend the chancellor's finding that Ida V. Williams West was a daughter and surviving heir of Louisa J. Williams was against the preponderance of the evidence. We agree with the appellants on this second contention, so we consider it unnecessary to discuss the admissions and exclusions of the evidence under the appellants' first contention.

The oral testimony of all the parties and the witnesses pertaining to the relationship of Ida V. Williams West to Louisa J. Williams, was simply based on their understanding and belief favorable to their side of the issue and we consider it unnecessary to set out the testimony in detail. The Parker heirs and their witnesses testified that they had always considered, understood and believed Ida to be an unrelated foster child reared in the home of Louisa J. Williams as one of the family and that she was never an heir at law of Louisa J. Williams, either by blood or adoption. Milton and the other Williams heirs and their witnesses testified that they had always considered, understood and believed that Ida was a child and heir of Louisa J. Williams; that she was a blood sister to Warren E. Williams and shared equally with him in the estate of Louisa J. Williams. Both sides introduced ancient letters and documentary evidence in support of their respective understandings and beliefs. The appellee Williams heirs offered numerous ancient family letters, census reports, funeral attendance records, autograph books, etc. in which Ida was addressed or referred to as daughter, sister or cousin. All of this evidence indicates that Ida was considered, loved and accepted as a member of the Williams family by all parties concerned, but it falls far short as proof of legal relationship by blood or adoption to Louisa J. Williams. The Parker heirs also offered considerable documentary evidence in support of their own contentions and tending to impeach the credibility of Milton's testimony and that of his surviving sisters to the effect that they had always considered and believed Ida to be their blood aunt by birth as the daughter of Louisa J. Williams. The most cogent

evidence as to Ida's relationship, or lack of relationship, to Louisa J. Williams is contained in a letter written to Birdie Parker in Ida's own handwriting on May 9, 1943. This letter was introduced into evidence without objection and its authenticity is not questioned. Its importance to our decision, however, justifies a few words of background for the context in which it was written.

It is clear from the record that in the mid 1930's Warren E. Williams mortgaged the property here involved to Taylor & Company as security for a loan and the indebtedness had not been paid at the time of his death. The record indicates that Taylor & Company wrote several letters to Milton as well as to his sister, Birdie Parker, concerning the indebtedness. The letters brought no response from Milton but Mrs. Parker did respond and under veiled threats of foreclosure in 1943, she paid the balance due on the mortgage indebtedness. It is apparent from the record that Mrs. Parker was concerned about the possibility of losing the property through foreclosure but also questioned the wisdom of making payments for the benefit of all the heirs and she corresponded with Ida in connection with the matter. The letter from Ida to Mrs. Parker, above referred to, reads in part as follows:

> "Well, honey, I just *don't know what* to say or how to say it. Yes I think that you or someone will have to take hold of the problem, for things can't wait always. Yes, Taylor & Company can foreclose or force a sale most any time. I think they have been mighty nice as it is. I sure hope things will work out o.k. You be sure you always get receipts for things you pay & *keep* them, or dates and copies of them, if U have to give others receipts. . . .
>
> Be sure you keep in the law in it *all.* I think Christopher would be a good guide for U. Yes, I know that W.E. would say keep the old home at any cost. I say so too. I don't know weather [sic] to say this or not. But if things get messed up too much U know, *(it might be that I could come in for ½ of that. If the records show that I was adopted. It would be*

about 1877 or near that. I don't want a thing. But if need be it might help.) C. don't mention *this* to *anyone.*

Yes, I would pay the mortgage off, and hold it, and interest, till I got mine. I sure hope it don't pass into other hands.

You know that is about the best farm around there and a lot of the very best ground has been allowed to grow up in brush, along the road across the creek; it used to be in cultivation don't look like it now. Watch it & don't let anyone else get the mortgage. I hope I am not butting in . . . ." (Our emphasis in parenthesis added).

This letter from Ida contains the only direct evidence in the record as to the actual relatonship, or lack of it, between her and Louisa J. Williams.

Of course, if Ida had been born as one of the two children of Louisa J. Williams, she wuld have inherited an undivided one-half interest in the property without question, and it is reasonable to assume that the question of adoption for that purpose, would never have occurred to her. When this letter is considered in connection with the Taylor & Company demands for payment directed to Mrs. Parker over a seven year period from 1936 to 1943, it adds credence to the Parker heirs' belief that Ida was a foster daughter of their great grandmother, Louisa J. Williams, and was not a sister by blood or adoption to their grandfather, Warren E. Williams.

Ida's marrige license in evidence indicates it was issued in 1908 to G. B. West and Miss Ida Williams, then 31 years of age. But the death certificate dated July 1, 1953, recites that Mrs. Ida West died on June 30, 1953, at the age of 78 years, and recites that on information furnished by Mrs. Nola Fetsch, the name of Mrs. West's father was John Williams and the name of her mother was unknown.

In the light of the above letter from Mrs. Ida West, we are unable to overlook as careless errors some of

the transactions between the parties. On March 23, 1959, Milton Nevil Williams and two of his sisters, executed a quitclaim deed to their sister Idell W. Bussey, containing the following recitation: ". . .[W]e, Milton Nevil Williams and Eloise Williams, his wife, Birdie W. Parker, and Mabel W. Seamans, Grantors, *being all the heirs at law of one W. E. Williams, deceased, except for Warren Edgar Williams, an incompetent, and the Grantee herein,* . . . do hereby grant, sell and quitclaim. . . ." (Emphasis added).

We note that in Milton's verified petition for guardianship filed on April 18, 1958, he represented Warren's interest in the land as an undivided one-fifth interest, whereas his petition to sell the interest filed on July 30, 1970, and the subsequent sale on Agust 11, 1970, represented that interest as an undivided one-tenth interest. We also note that in the meantime, on February 6, 1970, Milton had recorded a quitclaim deed executed in the state of Missouri on February 3, 1970, by "Nola West Fetsch sole heir of Ida Williams West" conveying to Milton all her right, title and interest in the lands here involved. Milton readily admitted that he paid Mrs. Fetsch nothing for her interest in the land, but he explains that she was simply interested in assisting him in caring for his incompetent brother, Warren.

This case was well tried by the chancellor as well as the attorneys involved, but we disagree with the chancellor as to where the preponderance of the evidence lies. As we view the chancery record in this case on trial de novo, we conclude that the chancellor's finding that Ida Williams West was the daughter and heir at law of Louisa J. Williams is against the preponderance of the evidence and the chancellor's decree must be reversed. It is clear that the chancellor left some issues to be determined following the report of the Commissioners he appointed as above set out, so the decree is reversed and this cause is remanded to the chancery court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

HARRIS, C.J., dissents.

CARLETON HARRIS, Chief Justice, dissenting. I recognize that this is a close case, with some rather convincing items of evidence on both sides, but I certainly cannot say that the findings of the chancellor were clearly against the preponderance of the evidence. We have said on divers occasions that we will not reverse a chancellor unless his findings are clearly against the preponderance of the evidence. See *Hampton* v. *Hampton,* 245 Ark. 579, 433 S.W. 2d 149. The reasoning behind these holdings is that the chancellor, who sees the parties and their witnesses, and observes their demeanor while testifying, is in a better position to evaluate the credibility of their testimony.

The majority opinion seems to be mainly predicated on the purported letter written by Ida V. Williams West, but, to me, the letter does not carry the weight, significance, or importance, that is attached to it by the majority.

Let it be remembered that everything that an individual knows about his ancestry is acquired from hearsay evidence; he knows what he has been told; he cannot say of his own knowledge where he was born or to whom he was born. Whatever Mrs. West thought about her ancestry had to come from other persons. To me, what an older brother or sister, or other close relative, says, is much more persuasive. Here, as will later be discussed, Warren E. Williams, Sr.,[1] admittedly a son of Louisa, clearly demonstrated that certainly it was his belief that Ida was his blood sister.

In this case, Mrs. Mabel Seamans, one of the children of Warren E. Williams, Sr., testified that she knew her aunt, Mrs. West, all of her life and that this aunt lived in the Williams home in the early days part of the time. She testified positively that Mrs. West was her father's blood sister. She stated that she had heard her aunt request many times to be buried at the foot of her mother's grave, meaning Louisa Williams—and Mrs. West is actually buried there. She also testified that she observed her father's funeral record, which reflected the relatives attending the funeral and that Mrs. West was listed as a sister. This exhibit was offered in evidence and the entries on the funeral record were placed there by Eloise DeWeese,

[1]Warren E. Williams was thirteen years older than Ida.

one of the appellants herein. Milton Nevil Williams testified that he always understood that Mrs. West was his father's blood sister, and he never had any indication of any other relationship from his father, mother, or aunt. He said the first time that he ever heard anything to the contrary was "drifting words" around 1953 when his aunt died. He also testified that during the football seasons of 1933 and 1934, he lived with this aunt. These two witnesses testified from direct knowledge of the relationship of Ida West to their father, and as Warren Williams, Sr.'s own children, they, it would appear, had a much greater opportunity to know the facts than the grandchildren. Also, to me, the testimony of Mrs. Seamans and Williams was much more convincing for the testimony from appellants was far less positive. For instance, Eloise DeWeese testified that according to *her understanding,* Warren Edgar Williams was the only child of Louisa J. Williams. Likewise, Virginia P. Calaway, also a granddaughter of Warren E. Williams, Sr., testified that it was *her understanding* that Ida West was raised by John J. and Louisa Williams, but was not legally adopted. Walter Parker, brother of Mrs. DeWeese and Virginia P. Calaway, testified that it was *his impression* that Ida Williams West is a foster daughter.

Certainly there was one person who lived during the lifetimes of these witnesses who should have known his relationship to Ida West and that was Warren Williams, whose every action indicated that she was his sister. On two occasions, Warren and Ida joined in trust deeds dealing with the lands in question; a 1932 deed of trust recited that Warren and wife and Ida V. Williams West were the sole heirs at law of Louisa J. Williams, deceased. Why would Warren E. Williams have his sister join in the execution of these conveyances unless she did in fact bear the relationship of daughter to Louisa Williams and was actually his blood sister? In addition, there were other exhibits which, in my view, clearly establish what Warren E. Williams thought about the matter. A letter was offered, dated December 13, 1908 from Williams to Ida V. Williams (West), wherein he addressed her as "Dear Sis", and concluded his letter with the expression, "From your Bud, W. E. Williams." Another exhibit was a "correspondence box", which was given to Ida by Warren Williams as a Christmas present

in 1891. In the bottom of the section containing the ink well, Warren E. Williams inscribed, "To Ida, from her Brother, Warren E. Williams, Christmas, 1891."

The evidence contains a written communication from Louisa J. Williams to Ida in the form of an entry in an album addressed to "Dear Ida", and closing with the words "and take what God sends is the wish of your mother, Louisa J. Williams." There was also an authenticated copy of a Federal Census Report of 1880, that I deem to be admissible,[2] which reflected that Ida was the daughter of John and Louisa Williams and I consider this admissible hearsay relative to the pedigree of the children of the Williams family, since this information had to be given to the census taker by some member of that family.[3]

Without mentioning other items of evidence, suffice it to say that I cannot agree, as originally stated, that the findings of the chancellor were clearly against the preponderance of the evidence. Accordingly, I would affirm the decree.

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[2]See Ark. Stat. Ann. §§ 28-931 and 28-932 (Repl. 1962).

[3]Ida was five years of age at the time of the census.

WHOLESALE APPARELS, INC., DOUGLAS PARRISH AND FLOYD McCANN *v.* HUBBARD PANTS COMPANY

73-174 502 S.W. 2d 453

Opinion delivered December 17, 1973

House, Holmes & Jewell, for appellants.

W. J. Walker, for appellee.

J. FRED JONES, Justice. This is an appeal by Wholesale Apparels, Inc., Douglas Parrish and Floyd McCann from a joint and several circuit court judgment rendered in favor of Hubbard Pants Company on an account for merchandise sold to Wholesale Apparels, Inc. with payment personally guaranteed by Parrish and McCann.

The background facts appear as follows: Parrish and McCann organized a new corporation under the name of Wholesale Apparels, Inc. The new corporation having little, if any, net worth contemplated business operations which necessitated acquiring on credit a stock of goods for resale. The corporation, in order to acquire such merchandise for resale, sought credit from various suppliers, one of whom was the appellee, Hubbard Pants Company. The Hubbard Company, before extending credit to the corporation, required a personal guaranty agreement from Parrish and McCann. On July 27, 1970, Parrish and McCann arranged for the purchase of merchandise from Hubbard Pants Company and delivered to Hubbard an agreement which reads as follows:

> "We agree to personally indemnify your Company on any balance owed your Company by Wholesale Apparels, Inc. located in Little Rock, Arkansas."

In reliance upon this agreement, Hubbard advanced credit to Wholesale Apparels, whose unpaid balance on account finally amounted to $14,487.89. When Hubbard pressed for payment of this balance, Mr. Parrish, as president of Wholesale Apparels, wrote a letter to Hubbard Company on September 8, 1971, advising that Wholesale had not had sufficient sales to meet its obligations; admitting that it owed to Hubbard Company a balance of approximately $15,000, and inquiring if Hubbard Company would accept $4,500 as payment in full. Hubbard refused this offer and on November 19, 1971, it filed its suit praying a joint and several judgment against Wholesale Apparels, Inc. and Douglas Parrish and Floyd McCann as guarantors.

On appeal to this court the appellants contend that there is no substantial evidence to support the trial court's finding that the guaranty agreement executed by Parrish and McCann was an unlimited and continuing agreement. They argue that their agreement was only intended to cover the balance due on the initial purchase and was not intended to apply to balances due on subsequent purchases. According to the testimony of the credit manager for Hubbard Company and a copy of invoice sent out on July 31, 1970, the credit balance on the initial purchase amounted to only $121.20, and this amount was subsequently paid. Sheets from the ledger maintained by Hubbard Company were introduced into evidence and show numerous entries of charges and credits between July 31, 1970, and June 30, 1971, and the balance on the account in the amount of $14,487.89 is not questioned.

The only question on this appeal is whether there is any substantial evidence to sustain the trial court's finding that the guaranty agreement was entered into with the intention and for the purpose of guarantying the payment of the corporate account over the entire period involved in this case, or whether it was intended to cover only the initial transaction as contended by Parrish and McCann.

Following several entries on the ledger sheets above referred to, there is shown an account balance, as of November 10, 1970, in the amount of $4,338.50. On that date

Mr. Parrish wrote a letter to Hubbard Company confirming a previous telephone conversation in relation to one of the stores owned and operated by Wholesale Apparels. The letter advised that 50% of the stock in Wholesale Apparels was owned by Mr. Parrish and 50% by Mr. McCann, and the letter then reads in part as follows:

> "This being a new Corporation and starting with a small net worth, Douglas Parrish and Floyd McCann have personally endorsed any liabilities of this company to the Hubbard Company. This endorsement should be in your credit files.
> * * *
> The stated balance of $5,025.25 in your letter of November 2 agrees with our records. . . ."

We are of the opinion there is substantial evidence to support the trial court's finding.

The judgment is affirmed.

HARRIS, C.J., not participating.

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK *v.* CAREY E. CLARK

73-67 502 S.W. 2d 110

Opinion delivered December 17, 1973

Chowning, Mitchell & Hamilton, for appellant.

Spencer & Spencer, for appellee.

CONLEY BYRD, Justice. Appellant, Mutual Life Insurance Company of New York, issued a total disability policy to appellee, Carey E. Clark, in which the term total disability is defined to mean ". . . a disability which wholly and continuously disables the member so that he can perform no duty pertaining to his occupation and during which he is not engaged in any occupation for remuneration or profit. . . ." To reverse a judgment, entered on a jury verdict, in favor of appellee for total disability benefits, appellant contends:

> "I. The court erred in overruling the defendant's motion for directed verdict made at the conclusion of all of the evidence and in refusing to give defendant's requested instructions Nos. 2 and 3.
>
> II. The court erred in giving court's instruction No. 6 (plaintiff's No. 5) over the general and specific objections of appellant.
>
> III. The Court erred in giving court's instruction No. 8 (plaintiff's No. 6) over the general and specific objections of appellant."

The record shows that appellee, a veterinarian, was the sole owner and operator of Clark Animal Hospital in El Dorado from 1950 until April 12, 1968, when he suffered a heart attack. At that time he was placed in intensive care for nine days and remained in the hospital for an additional ten days before being permitted to go home. Upon being advised by his physician that he could not continue to operate the animal hospital and carry on his veterinarian practice, he employed a young veterinarian, Dr. Granville Wright, to take over the main load of his occupation. Dr. Wright stayed for two years before leaving. Appellee then employed Dr. Gene Dunn and later employed a second veterinarian to assist in the operation of the animal hospital and to help with the large animal practice. Appellee no longer does any large animal practice but does go by the hospital. Some days he spends no

more than five minutes at the animal hospital. Other days he spends as much as five or six hours. It is estimated that he will average somewhere between 14 to 16 hours at the clinic each week. While there he may perform minor operations on small pets, such as spays or tonsillectomies. He is interested in the financial success of the hospital and likes to be consulted on the purchase of drugs and difficult cases. His gross receipts and net profits for the operation of the animal clinic for the years of 1966 through the first nine months of 1972 were as follows:

Year	Gross Receipts	Net Profit
1966	$54,596.00	$19,426.00
1967	57,930.00	20,803.00
1968	50,163.00	10,572.00
1969	66,980.00	13,771.00
1970	80,740.00	26,763.00
1971	95,279.00	29,252.00
1972 (9 mos.)	82,252.00	26,971.00

The foregoing figures for the years 1968 through 1972 have used the salaries of the two employed veterinarians as expenses before arriving at net profits.

Dr. Jacob Ellis testified that appellee suffered what is technically known as an infarction of the miocardiam which is sometimes referred to as coronary thrombosis or coronary occlusion. He considers appellee to be permanently and totally disabled. He consented to appellee working if he had proper assistance to where he would not negotiate physical or mental effort that would be stressful to him under any set of circumstances. While testifying that appellee was more disabled in 1972 because of the progressive nature of the disease than he had been since April of 1968, Dr. Ellis testified that it was necessary that a person, with appellee's disease, be stimulated physically and mentally to the fullest extent possible to improve circulation. He described the situation as "walking a tightrope between activity and inactivity."

Dr. Joseph B. Wharton, Jr. stated that in his opinion appellee was unable to perform his doctor of veterinary medicine work physically to any degree that would gain him a continuous livelihood.

Appellant paid the disability benefits for 1968. In 1969, after some investigation, appellant wrote appellee as follows:

"Dear Dr. Clark:

This is in reference to our conversation of May 27th.

As you are aware, we authorized payment of your Disability Benefits under this Policy. I would anticipate that by now you have received your benefit check from AVMA.

I would like to point out however that there was some doubt in our minds as to whether you currently qualified for these payments under the terms of the policy. However, at this time we have resolved the doubts in your favor.

Your request that we accept claim statements on a quarterly rather than a monthly basis cannot be complied with. While we are quite pleased to learn that your doctor indicates that he no longer needs to see you every month because of the progress you have made, we will, nevertheless, not be able to grant this request. However, we are willing to allow you to submit claim statements every other month.

I'm sorry for the delay which resulted however because of the circumstances of your particular situation it was necessary to conduct a thorough review of your file. If you have any questions, please feel free to call me.

Sincerely,

Milton W. Johnson
Senior Approver
Group A&S Claims
Mail Drop 20-1"

In 1970 appellant had appellee examined by Dr. Wells in Little Rock, Ark. and continued the disability payments

through December, 1971. On January 14, 1972, appellant wrote appellee as follows:

"Dear Dr. Clark:

Your file has been referred to me for review.

As you know your Policy defines total disability as 'a disability which wholly and continuously disables the member so that he can perform no duty pertaining to his occupation and during which he is not engaged in any occupation for remuneration or profit.'

We no longer feel that you qualify for total disability benefits under this definition.

MONY is glad to have been of help to you during your period of total disability.

Sincerely,

(Miss) Anne McNamara
Senior Claims Approver
Group A&S Claims Section
Mail Drop 807"

POINT I. Appellant here argues that it was entitled to a directed verdict. In so doing it recognizes the effect of decisions such as *Avemco Life Insurance Company* v. *Luebker,* 240 Ark. 349, 399 S.W. 2d 265 (1966), and therefore does not seek a reversal on the grounds that there was insufficient testimony to go to the jury on the question of whether or not there were any substantial and material acts necessary to be done pertaining to appellee's occupation that he could not perform in the usual and customary way.

On the other hand appellant contends that the definition means what its language says—*i.e.,* that proof of physical disability or inability alone does not entitle appellee to recover, but that he must also prove by a preponderance of the evidence that during such period of disability he was not engaged in any occupation for remuneration or profit. In its reply brief appellant takes the

view that the phrase "and during which he is not engaged in any occupation for remuneration or profit" should be treated as a condition precedent to recovery.

Most authorities recognize that "total disability" occurs where a professional is unable to perform any substantial part of his ordinary duties even though he can still perform some of them, *Leibowitz* v. *Mutual of Omaha Ins. Co.,* 71 Misc. 2d 838, 337 N.Y.S. 2d 314 (1972), or that he may be able to perform some acts at intervals, *Pacific Mutual Life Ins. Co.* v. *McCrary,* 161 Tenn. 389, 32 S.W. 2d 1052 (1930). Our own cases have given similar constructions to policies such as is here involved. See *Alexander* v. *Mutual Benefit Health & Accident Association,* 232 Ark. 348, 336 S.W. 2d 64 (1960), and the cases therein discussed.

The definition of "total disability" here involved is not substantially different from the definition involved in *New York Life Insurance Company* v. *Dandridge,* 204 Ark. 1078, 166 S.W. 2d 1030 (1942), which provided that disability should be considered total when the insured is "wholly prevented from performing any work, from following any occupation, or from engaging in any job for remuneration or profit." We there permitted a recovery on behalf of a deaf school teacher even though it was conceded she was not completely helpless. In *Occidental Life Insurance Company of California* v. *Sammons,* 224 Ark. 31, 271 S.W. 2d 922 (1954), we permitted a recovery for an insured suffering from a heart condition who had earned $180 as a part time salesman notwithstanding a house confinement clause. In each instance we have pointed out that we have refused to construe such clauses literally, for in that event the insured could recover only if he were continuously and helplessly confined to bed. We perceive no real distinction between the language of appellant's policy and the clauses construed in our earlier decisions. Consequently, we hold that the trial court properly overruled appellant's motion for a directed verdict.

POINT II. The instruction of which appellant complains provided:

> "You are instructed that the provisions of the policy which I have quoted relating to total disability do not mean what a literal reading would require, that is, a state of absolute helplessness; but they mean that, if there are any substantial and material acts necessary to be done pertaining to Plaintiff's occupation that he could not perform in the usual and customary manner, he would be totally disabled within the meaning of this policy."

Appellant objected on the basis that the instruction ignored the policy provision "and during which he is not engaged in any occupation for remuneration or profit." We find no error. To accept appellant's contention would require a literal construction of such policies which, as we have pointed out under Point No. I, *supra,* this and most other courts refuse to do.

POINT III. The instruction to which appellant here objects provided:

> "You are instructed that insurance to compensate a total disability is not insurance upon one's business but is a guarantee of continued personal fitness enabling one to employ and adapt not only his mental qualification and mental preparation for his business; but also the continued use of physical vigor and energy in the performance of manual pursuits connected with his business as well, to the extent that he may perform all the substantial and material acts necessary to be done in the conduct of his business in the usual way."

The objection of appellant is that the instruction is abstract, reverses the burden of proof and ignores the requirement that appellee had to prove that he was not engaged in an occupation for remuneration or profit.

The contention that the instruction was abstract is not supported by the record. Appellant had introduced for comparison purposes appellee's income tax records for the periods before and after the heart attack episode in April 1968.

The argument that the instruction ignored the requirement that appellee must prove that he was not engaged in an occupation for remuneration or profit is premised upon appellant's theory that such a showing was a condition precedent to recovery. As we have pointed out under Point No. I, *supra,* policies such as this do not receive such a literal construction but are related to the definition of "total disability". In fact the record would indicate that from April of 1968 through December, 1971, appellant must have interpreted the policy in accordance with our construction thereof since it made payments for those periods.

We do not understand how this instruction reversed the burden of proof that was clearly given to the jury under the other instructions.

Affirmed.

FOGLEMAN and JONES, JJ., dissent.

JOHN A. FOGLEMAN, Justice, dissenting. I join in the dissenting opinion of my brother Jones. I would add two comments.

1. Any danger that insurance companies may try to eliminate any chance of recovery for total disability in a policy by writing a definition could be controlled by the requirement that a policy be approved by the Insurance Commissioner, who may disapprove it if it contains misleading clauses or exceptions or conditions which deceptively affect the risk purported to be assumed in the general coverage of the contract. Ark. Stat. Ann. §§ 66-3209, 3210 (Repl. 1966).

2. It is high time that this court give attention to the notice given to the bar February 21, 1966, that cases tried after that date would be examined in the light of recommendations contained in the opinion in *Avemco Life Insurance Company* v. *Luebker,* 240 Ark. 349, 399 S.W. 2d 265, where the court, "with very considerable reluctance," followed *Mutual Benefit Health & Accident Association* v. *Murphy,* 209 Ark. 945, 193 S.W. 2d 305,

the fountainhead of our very extreme and unsound position from which this court dictates the terms of total disability policies.

J. FRED JONES, Justice, dissenting. As I interpret the majority opinion in this case, it simply prohibits insurance companies from entering into contracts with a definition and meaning of "total disability" different from the general definition and meaning we have applied in prior cases where it has been necessary for this court to define total disability within the meaning of a particular contract.

The group policy involved in this case insured a veterinarian against total disability defined as ". . . a disability which wholly and continuously disables the member so that he can perform no duty pertaining to his occupation and during which he is not engaged in any occupation for remuneration or profit. . . ." The evidence as I read it indicates that Dr. Clark did have a heart attack which did wholly and continuously disable him so that he could perform no duty pertaining to his occupation for a period of time; that after his recovery from the initial attack he was still wholly and continuously disabled from performing the more rugged duties of his occupation such as vaccinating and operating on large unruly animals such as horses, cattle and large dogs, but was able to and did engage regularly in the routine duties pertaining to his occupation at his clinic to the extent of vaccinating and performing surgery on small dogs and other animals.

Had the policy in the case at bar simply insured against total disability without attempting to define what would constitute "total disability" for the purpose of payments under the terms of the policy contract, or even if the policy definition had been ambiguous, then certainly I would agree that general definitions and meanings we have announced and approved in prior cases should be applied. I would agree that "total disability" must be something less than a vegetable state but certainly it should be more than inability to perform a single one of many duties pertaining to an occupation.

In any event, it is my view that insurance companies and individuals should be permitted to define "total disability" within the meaning of their contracts for the purpose of indemnity payments and premium rates, so long as the definition does not conflict with the term it defines, and so long as it does not go beyond the bounds of good conscience and common sense.

The policy in the case at bar was a group policy for the benefit of veterinarians, and I think we might reasonably assume that it was written on a premium rate commensurate with the loss ratio based on what constitutes total disability as defined in the policy. As I read the majority opinion, it would indicate that if the insurance company had simply referred to the disability as "disability" and had not referred to it as "total disability," there would have been no limitation on the insurance company in defining the extent of disability it was insuring against. On the other hand, if the company had simply insured against "total disability" without attempting to define what it meant by total disability, then, of course, it would have been this court's duty to have applied the general definition of total disability in which the instructions complained of would have been proper instructions.

It appears to me that the cases cited by the majority are clearly distinguished from the case at bar. A total and permanent disability policy was involved in *New York Life Ins. Co.* v. *Dandridge,* 204 Ark. 1078, 166 S.W. 2d 1030, and to be totally and permanently disabled under the terms of the policy, it provided that: "Disability shall be considered total whenever the insured is so disabled by bodily injury or disease that he is wholly prevented from *performing any work,* from *following any occupation,* or from *engaging in any business* for remuneration or profit. . . ." (Emphasis supplied). The insured in that case was a school teacher who had become deaf followed by a nervous condition resulting in indigestion, insomnia and other complications.

Occidental Life Ins. Co. of Calif. v. *Sammons,* 224 Ark. 31, 271 S.W.2d 922, involved a monthly indemnity

policy under which it was provided that monthly indemnity would be paid for life and while the insured was wholly and continually disabled and necessarily and continuously confined and regularly visited and treated by a physician as defined in the policy. The policy then provided that the monthly indemnity shall be payable for such disability only if the insured is absolutely unable to leave the house and the yard situated immediately around the house; that in order to receive the monthly indemnity the insured must at all time remain within such confines without any exception but one, namely the insured, when deemed necessary and prescribed by the physician or surgeon, may be transported to the office of the physician or surgeon or to the hospital or sanitarium. The policy further provided that if at any time the insured should leave such confines except for such transportation to the office of the physician, hospital or sanitarium, the monthly indemnity should terminate and the rider would be of no force or effect. In that case this court adopted the "liberal" construction as to "house confinement clauses" and held that the trial court did not err in applying the liberal construction of the policy in that case. It was stipulated in the *Sammons* case that the insured had left the house and yard for the purpose of taking rides and walking for recreation and visiting friends at various business places, all under the advice of his physician.

In *Avemco Life Ins. Co.* v. *Luebker,* 240 Ark. 349, 399 S.W.2d 265, the policy definition is not set out but the case turned on whether the insured was disabled from performing *all* (rather than *any*) of the substantial and material acts necessary to the prosecution of his business.

In *Alexander* v. *Mut. Benefit Health & Accident Ass'n.,* 232 Ark. 348, 336 S.W.2d 64, the provisions of the insurance policy are not set out in the opinion but the insurance company argued that the insured was not totally and permanently disabled if he was able to earn a livelihood. The insured relied on the cases applying the test as to whether the insured can perform all the substantial and material duties to his occupation. The trial court and jury agreed with the insured and we affirmed.

I am of the opinion that the contracting parties in an insurance contract have a right to agree on the extent of disability that is insured against, even under the term "total disability" when the definition is clear, reasonable and not misleading, and where ambiguities are not open to definition by courts of law. I would reverse.

G.A.C. TRANS-WORLD ACCEPTANCE CORPORATION *v.* JAYNES ENTERPRISES, INC., D/B/A JAYNES MOBILE HOMES ET AL

73-165 502 S.W. 2d 651

Opinion delivered December 17, 1973

Fitton, Meadows & Adams, for appellant.

Bill F. Doshier, for appellees.

CONLEY BYRD, Justice. At issue here is the constitutional validity of Ark. Stat. Ann. § 31-501 (Repl. 1962), in so far as it authorizes a pre-judgment garnishment without notice. The trial court, relying upon *Sniadach* v. *Family Finance Corporation,* 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969), held the statute void in so far as it authorized the issuance of a garnishment by a clerk without notice and prior to judgment. For reversal appellant, G.A.C. Trans-World Acceptance Corporation, points out that the garnishment here involved is against certain accounts receivable due to appellee, Jaynes Enterprises, Inc., a business corporation and contends that the holding in *Sniadach* v. *Family Finance Corp., supra,* is limited to wages.

In making its argument appellant recognizes that the United States Supreme Court in *Fuentes* v. *Shevin,* 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972), has construed the *Sniadach* case contrary to its contentions. However, it says that since the *Fuentes* case is only a four to three decision with two justices not participating, there is a question as to its effectiveness as a precedent. Cases from other jurisdictions have gone both ways upon the contentions made. *Roofing Wholesale Co., Inc.* v. *Palmer,* 108 Ariz. 508, 502 P. 2d 1327 (1973), would support appellant's position. *Etheredge* v. *Bradley,* 502 P. 2d 146 (Alas. 1972), supports the trial court's position. There are some dissenting opinions in both cases.

For a number of reasons, we are inclined and do accept the interpretation of the *Sniadach* ruling as set forth in the *Fuentes* case until such time as the United States Supreme Court rules to the contrary. Some of such reasons are:

1. Other decisions of the United States Supreme Court such as *Goldberg* v. *Kelly,* 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1969), and *Bell* v. *Burson,* 402 U.S. 535, 91 S. Ct. 1586, 29 L. Ed. 2d 90 (1970), have extended the same Due Process principle of notice and a fair hearing to welfare rights and the suspension of a driver's license;

2. It is most illogical to say that the Due Process Clause of the Fourteenth Amendment requires notice and an opportunity to be heard only when dealing with wages, welfare rights and drivers licenses but that no such notice and an opportunity to be heard are prerequisites to depriving a citizen of any other property or rights that he may possess;

3. The statute in question is admittedly void as to wages and is not necessarily severable so as to remain valid to other assets; and

4. The General Assembly, following the *Fuentes* case, has by Act 144 of 1973, enacted a rather practical procedure for giving of notice to defendants

against whom a writ of replevin is sought—inferentially it would not be impossible to make a similar provision with respect to garnishment proceedings.

Finally appellant argues that the appellees, Jaynes Enterprises Inc., d/b/a, Jaynes Mobile Homes, Bill Jaynes and Violet Jaynes, waived any right to a prejudgment hearing by signing a guaranty giving the appellant, in case of default, the right to take possession of contract rights and/or accounts or proceeds of the sale thereof wherever found and giving it the right to enter for such purposes without legal process. We find no merit to this contention. (1) The waiver contention under a somewhat similar contract was held not to preclude a preseizure hearing in the *Fuentes* case, *supra.* (2) This issue was not raised in the trial court and cannot be raised for the first time on appeal. (3) Furthermore, appellant did not rely upon the provision of its contract but invoked the aid of the court under the garnishment statute.

Affirmed.

GEORGE ROSE SMITH, BROWN and FOGLEMAN, JJ., concur.

JOHN A. FOGLEMAN, Justice, concurring. I fully concur in the result reached by the majority, but for a totally different reason, which would avoid the necessity of ruling upon the constitutionality of Ark. Stat. Ann. § 31-501 (Repl. 1962) insofar as it provides for prejudgment garnishment. I shall first state my reasons for concurring in the result after which I will state my reasons for feeling it is extraordinarily important for this court to follow its usual rule in respect to considering constitutionality of statutes.

The writ of garnishment in this case was issued and served on March 13, 1973, the date of the filing of the complaint. The bond required by Ark. Stat. Ann. § 31-501 in cases of prejudgment garnishment was executed and filed on April 11, 1973, one day prior to a hearing in the Chancery Court of Boone County, in which the

suit was originally filed. That hearing was on appellees' demurrer, which was then treated as a motion to transfer the action to the circuit court, and, as such, granted. On April 16, appellees filed their demurrer and their motion to quash the writ of garnishment, both based, in part, upon the contention that the writ was void because the bond was not filed until after the writ was issued and because its penalty was not double the amount for which the garnishment was issued.

We have never directly ruled that the failure to post a bond will require a writ of garnishment to be dissolved. We have, however, said the failure to give bond, standing alone, is not a ground of demurrer to the complaint in the principal action, but is sufficient cause for quashing an attachment upon motion to quash or set aside the order of attachment. *Alexander* v. *Pardue,* 30 Ark. 359. While the defect may be waived by the defendant in the action in which an attachment is issued, this court has clearly taken the position that an attachment issued without a bond having been made should be dissolved upon motion of the defendant, even though the court found it unnecessary to determine whether the failure to file the attachment bond was a mere irrgeularity or a jurisdictional error rendering a judgment in attachment void. *Austin* v. *Goodbar Shoe Company,* 60 Ark. 444, 30 S.W. 888. There we said:

> Now, from what has been said, we are of the opinion that the want of a bond was such an error—"jurisdictional error," if that is a better expression of it—as that, upon motion of the defendant during the pendency of the proceeding, and before judgment, the attachment would necessarily be dissolved; * * *.

The analogy between prejudgment attachment and prejudgment garnishment is great. See Comment, Garnishment Before Judgment in Arkansas, George B. Collins and J. W. Steinsiek, 8 Ark. L. Rev. 121; Case note, Constitutional Law-Prejudgment Garnishment of Wages, 23 Ark. L. Rev. 660, James E. Darr; *Foster* v. *Pollack Company,* 173 Ark. 48, 291 S.W. 989. We have denominated garnishment as a species of attachment. *Lawrence* v.

Ford Motor Credit Company, 247 Ark. 1125, 449 S.W. 2d 695; *Allen* v. *Stracener,* 214 Ark. 688, 217 S.W. 2d 620. In *Foster,* we held garnishment to be a provisional remedy in the sense of the statute fixing the jurisdiction of such remedies by a justice of the peace upon the authority of our holdings that attachment was a provisional remedy, saying that the two remedies are so nearly alike that it would seem that there would be no reason for holding attachment to be a provisional remedy and garnishment of the sort resorted to in that case not a provisional remedy. In *Lawrence,* we found no difficulty in holding that the statute governing a dispute about the validity of an attachment and assertions of claims against attached property to be applicable to garnishment proceedings because the service of a writ of garnishment upon a debtor is an attachment of the debt or a form of levy thereon. Clearly, what we have said with reference to the failure to file any bond in an attachment action would govern prejudgment garnishment proceedings.

We have frequently, and without exception, held that garnishment is a statutory procedure and that strict compliance with garnishment statutes is essential to the validity of the proceeding. *Hervey* v. *The Farms, Inc.,* 252 Ark. 881, 481 S.W. 2d 348; *Roach* v. *Henry,* 186 Ark. 884, 56 S.W. 2d 577; *Missouri Pacific R. Co.* v. *McLendon,* 185 Ark. 204, 46 S.W. 2d 626; *Schiele* v. *Dillard,* 94 Ark. 277, 126 S.W. 835; *First National Bank of Huttig* v. *Rhode Island Insurance Company,* 184 Ark. 812, 43 S.W. 2d 535. While the *McLendon* and *First National Bank of Huttig* cases turned upon the issuance of the writ of garnishment before the issuance of process for the defendant in the case, both stand for the proposition that a plaintiff has no right to have a writ of garnishment issued without complying with the statutory procedure. In the *McLendon* case, this court, citing *First National Bank of Huttig* v. *Rhode Island Insurance Company,* supra, said:

> There is no claim in this case that the statute was complied with before the writ of garnishment was issued and served. The proceedings therefore were void.

Inasmuch as there is ample authority in our own cases for quashing this garnishment, it is not necessary to resort to authorities from other jurisdictions. I would add, however, that so holding would place us in line with the general rule supported by the vast weight of authority that, when a garnishment statute requires the posting of a bond, this action is a condition precedent to the issuance of the writ, and, if the bond is not filed, the writ is void and should be dissolved. See *Van Moorhem* v. *Roche Harbor Lime & Cement Co.,* 169 Wash. 354, 13 P. 2d 496 (1932); *Citizens National Bank* v. *Pollard,* 31 S.W. 2d 508 (Tex. Civ. App. 1930); 6 Am. Jur. 2d 928, Attachments, § 518; 38 C.J.S. 361, Garnishment, § 145.[1]

Even though this issue, raised in the trial court, was not argued on appeal, it is the long-standing rule of this court that, irrespective of the reasons set forth by the trial court as the basis for its decision, we will not reverse if the decision reached by the trial court is correct. *Reamey* v. *Watt,* 240 Ark. 893, 403 S.W. 2d 102; *Reeves* v. *Arkansas Louisiana Gas Co.,* 239 Ark. 646, 391 S.W. 2d 13; *Polk* v. *Stephens,* 126 Ark. 159, 189 S.W. 837.

This court has said for more than 75 years that courts do not and should not pass upon constitutional questions unless the answers to those questions are so necessary to a determination of the case that it cannot otherwise be decided. *Missouri Pacific Ry. Co.* v. *Smith,* 60 Ark. 221, 29 S.W. 752; *Porter* v. *Waterman,* 77 Ark. 383, 91 S.W. 754; *Smith* v. *Garretson,* 176 Ark. 834, 4 S.W. 2d 520; *Honea* v. *Federal Land Bank of St. Louis,* 187 Ark. 619, 61 S.W. 2d 436; *Satterfield* v. *State,* 245 Ark. 337, 432 S.W. 2d 472; *County of Searcy* v. *Stephenson,* 244 Ark. 54, 424 S.W. 2d 369; *Mobley* v. *Conway County Court,* 236 Ark. 163, 365 S.W. 2d 122; *Rome* v. *Ahlert,* 231 Ark. 844, 332 S.W. 2d 809. We have even said that where the case can be disposed of without determining the constitutional question, it is our *duty* to

[1]Our holdings in such cases as *Smith* v. *Howard,* 23 Ark. 203, and *Mandel* v. *Peet,* 18 Ark. 236, that a party may amend a bond filed by it which is defective, are also in harmony with the weight of authority on the subject, but are in nowise inconsistent with the rule that a garnishment issued before the bond is filed is void and should be quashed.

do so *(Herman Wilson Lumber Co.* v. *Hughes,* 245 Ark. 168, 431 S.W. 2d 487); that constitutional questions are *never* decided unless necessary *(Little Rock Road Machinery Co.* v. *Jackson County,* 233 Ark. 53, 342 S.W. 2d 407); and that constitutional questions are not decided unless the case cannot be disposed of on any other ground *(Bailey* v. *State,* 229 Ark. 74, 313 S.W. 2d 388, cert. denied 358 U.S. 869, 79 S. Ct. 101, 3 L. Ed. 2d 101).

Our predominant rule was founded upon the language of Judge Cooley quoted in *Missouri Pacific Ry. Co.* v. *Smith,* supra. A part of that quotation follows:

> In any case, therefore, where a constitutional question is raised, though it may be legitimately presented by the record, yet, if the record also presents some other and clear ground upon which the court may rest its judgment, and thereby render the constitutional question immaterial to the case, that course will be adopted, and the question of constitutional power will be left for consideration until a case arises which cannot be disposed of without considering it and when, consequently, a decision upon such question will be unavoidable.

In *Board of Equalization* v. *Evelyn Hills Shopping Center,* 251 Ark. 1055, 476 S.W. 2d 211, we did not reach constitutional arguments there made "in accord with our long-standing rule that constitutional issues will not be determined unless their determination is essential to disposition of the case," citing *Martin* v. *State,* 79 Ark. 236, 96 S.W. 372 and *Bell* v. *Bell,* 249 Ark. 959, 462 S.W. 2d 837.

The reasons for abiding by our well established rules in this regard are particularly compelling in this case. In *Sniadach* v. *Family Finance Corp.,* 395 U.S. 337, 89 S. Ct. 1820, 23 L.Ed. 2d 349 (1969), the Supreme Court of the United States went no further than to hold that the garnishment statute involved was void insofar as it authorized the issuance of a garnishment by a clerk of the court without notice and prior to judgment, when the subject of the garnishment was wages. Wages are not

involved in this case. It is true the United States Supreme Court in *Fuentes* v. *Shevin,* 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 (1972), has extended the *Sniadach* principle to a replevin action. I do not feel the fact this case was decided by a 4-3 vote, with two justices not participating, renders it ineffective as a precedent in cases which are indistinguishable. It is true that several jurisdictions have applied *Sniadach* to invalidate statutes similar to ours, insofar as they provide for garnishment of other assets and property [see *Etheredge* v. *Bradley* 502 P. 2d 146 (Alaska 1972) and cases cited therein], but, on the other hand, the Supreme Court of Arizona in *Roofing Wholesale Co., Inc.* v. *Palmer,* 108 Ariz. 508, 502 P. 2d 1327 (1973), reached a completely contrary result. The Arizona Supreme Court, expressing the belief that it was not unreasonable to ask that the United States Supreme Court speak with a majority voice before the Arizona court should declare unconstitutional statutes enacted by the state legislature, said:

> Admittedly, were we convinced that the four man majority of the United States Supreme Court in Fuentes, supra, would become at least a five man majority when the two judges who did not participate in the particular case are called up to participate in a similar question, we would then be inclined to follow the decision as set down in Fuentes, supra. When, however, we have doubts that once the full court hears the case that the opinion will stand, we are reluctant to declare unconstitutional Arizona statutes based upon a decision by less than a clear majority.

While I would not like to go as far as the Arizona court has gone, the reasons stated by that court should certainly give this court pause before it disregards its well established rule about avoidance of the decision of constitutional questions. In considering this matter, it is significant that the General Assembly of 1973 saw fit to provide for procedures relating to prejudgment replevin but did not do so in regard to prejudgment garnishment. It is not unreasonable to assume that our legislative branch thought that *Fuentes* dictated a re-

vision of procedures as to replevin actions but thought that it did not have the effect of extending *Sniadach* to prejudgment garnishment of anything other than wages.[2] There is no reason to believe the legislature should have been less conscious of creditors' rights in one instance than in the other. Furthermore, the dissenters in *Fuentes* assert that the four-judge majority has reached a result representing no more than ideological tinkering with state law. When a full court reaches a case such as this one, it may well hold that the rule of *Fuentes* has no application to a contract of the type here involved where the garnishment may well reach a debt which is covered by a security agreement given by the defendant to the garnishing plaintiff. The record here discloses that the security was given for a "floor plan" type of financing appellees' business of selling mobile homes. It has been suggested that there is a clear indication that the court in *Fuentes* did not hold the statutes involved to be unconstitutional on their faces. The Supreme Court, 1971 Term, 86 Harvard Law Review, 1, 94. The majority in *Fuentes* specifically states that its holding was a narrow one. This has led to speculation that some attachment statutes will not be affected. Case note, Replevin—Prior Notice and Hearing—Due Process, 40 Tenn. Law Review 125, 133 (1972). In this same case note, the same uncertainty as to the ultimate effect of *Fuentes,* which caused the Arizona court to feel that it was not bound thereby, was expressed thus:

> Perhaps the most interesting sidelight of the instant case is that it is a 4-3 decision, with Justices Powell and Rehnquist, who frequently are aligned with the three dissenters, Justices White, Burger and Blackmun, not participating. Therefore, an aura of doubt surrounds the further application of the instant holding to other state prejudgment remedies.

The limitations recognized in *Sniadach* certainly justify this doubt, for the majority in *Sniadach* said:

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[2]In a footnote to the opinion in *Fuentes* the majority pointed out that six different courts, in upholding summary prejudgment proceedings, had contrued *Sniadach* as closely confined to its own facts.

> A procedural rule that may satisfy due process for attachments in general, see McKay v. McInnes, 279 US 820, 73 L Ed 975, 49 S Ct 344, does not necessarily satisfy procedural due process in every case. The fact that a procedure would pass muster under a feudal regime does not mean it gives necessary protection to all property in its modern forms. We deal here with wages—a specialized type of property presenting distinct problems in our economic system. We turn then to the nature of that property and problems of procedural due process.

I cannot subscribe to the position taken in the majority opinion that our statute could not be valid as to assets other than wages. But we should not really consider this possibility, because of the desirability of avoiding the constitutional question and because, if *Sniadach* is to be limited to prejudgment garnishment of wages, then the appellees in this case would have no standing to raise the constitutional issue. See *May* v. *State,* 254 Ark. 194, 492 S.W. 2d 888, where we held our abortion statute to be constitutional as to laymen, but recognized that the holdings of the United States Supreme Court in *Doe* v. *Bolton,* 410 U.S. 179, 93 S. Ct. 739, 35 L. Ed. 2d 201, and *Roe* v. *Wade,* 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147, had the effect of striking down the prohibition in that statute as against physicians during the period preceding approximately the end of the first trimester of pregnancy.

I would affirm the order of the trial court, but reserve the question of constitutionality of the garnishment statute as to prejudgment garnishments in cases such as this until such time as we are directly confronted with that problem and cannot dispose of the case on any other basis in the hope that, by the time we are so confronted, the United States Supreme Court, by action of a full court, may have given the matter further treatment.

GEORGE ROSE SMITH and BROWN, JJ., join in this opinion.

M. D. THOMPSON & SON COMPANY
ET AL *v.* ROBERT L. McCUAN

73-188 502 S.W. 2d 93

Opinion delivered December 17, 1973

Riddick Riffel, for appellants.

Hodges, Hodges & Hodges, by: *David Hodges,* for appellee.

CONLEY BYRD, Justice. The Workmen's Compensation Commission awarded total disability benefits to appellee Robert L. McCuan. The circuit court affirmed the order of the Commission and appellants, M. D. Thompson and Son Company, et al, appeal contending that there is no substantial evidence to support the Commission's findings.

It is not disputed that Mr. McCuan was injured in the course of his employment nor that he has suffered some disability. Appellant's real contention seems to be that if Mr. McCuan is totally disabled, the greater part thereof is due to his age instead of his injury.

The record shows that Mr. McCuan at the time of injury was drawing Social Security and that he attempted to keep his earnings within the prescribed limits for drawing the maximum available benefits. He was injured when a tree fell on him. One medical doctor placed his permanent functional disability at 20%, another at 33 1/3%. One of the doctors testified that when Mr. McCuan's age, educational background and spinal fracture

were considered, one would not reasonably expect Mr. McCuan to go back to the work he was doing in a regular and unrestricted capacity at any time in the future.

Appellee testified that he was 68 years of age. He had a little schooling when he was a boy—maybe the third grade. He farmed with mules until 1949 and then with a one row tractor until '63. His work outside of his own farming or as a farm hand consisted of manual labor such as logging. Prior to the injury he had done any kind of manual labor he wanted to do. After the injury he was unable to help the wife with the house work. He could not walk a quarter of a mile without stopping to rest.

Other witnesses corroborated Mr. McCuan's testimony that he was an able-bodied laborer before the injury and unable to do manual labor thereafter.

Mr. Leon Underwood with the Arkansas Rehabilitation Services testified that rehabilitation could provide no beneficial services to Mr. McCuan in view of his age and education.

Thus, from the foregoing, one can readily observe that there was ample evidence to show that Mr. McCuan was an able-bodied, manual worker prior to his injury and that thereafter he was unable to perform any remunerative services. As pointed out in *Furlong* v. *Northwestern Casket Co.,* 190 Minn. 552, 252 N.W. 656 (1934), the fact that an employee is of failing physical powers and will probably be incapacitated for work in a few years as a result of such weakness does not bar the employee from Workmen's Compensation benefits if his incapacity to work is the result of his injuries. We cannot here say that there is no substantial evidence to support the Commission's finding that the injury created the disability. See also *Meadowlake Nursing Home* v. *Sullivan,* 253 Ark. 403, 486 S.W. 2d 82 (1972).

Affirmed.

HARRIS, C.J., not participating.

LEONARD C. DUNN *v.* CHRISTINE DUNN

73-182 503 S.W. 2d 168

Opinion delivered December 17, 1973
[Rehearing denied January 28, 1974.]

Shackleford & Shackleford, for appellant.

Haskins, Ward & Rhodes and *Bruce Bennett,* for appellee.

FRANK HOLT, Justice. Appellant brought this action for a divorce against the appellee and for a determination of their respective property rights. The issues were joined by appelee's counter-claim by which she also sought a divorce and adjudication of her property rights. The chancellor found that the appellant husband did not prove grounds for a divorce and "the proof falls far short of establishing fraud or deceit" on the part of the appellee wife when her husband made her joint owner of all his personal and real property; that the appellee had established her alleged grounds for divorce based upon personal indignities; that the various instruments, which included passbook savings accounts, certificates of deposit and deeds which were changed by appellant husband to create tenancies by the entirety or joint ownership, were valid; and that the trial court was not divested of jurisdiction by the appeal from the divorce decree inasmuch as the court specifically reserved jurisdiction for thirty days in order for the parties to effect an agreement between themselves as to a division of their property rights. When this was not accomplished within the specified time limit, a final order was then rendered.

For reversal appellant first contends that the court erred in upholding the validity of a revocation by Leonard (appellant) of his revocable trust and subsequent transfer of his property to the joint ownership of himself and his wife, Christine (appellee), inasmuch as a confidential relationship existed between them with Christine being the dominant party which created a presumption of coercion or fraud, which presumption Christine did not rebut with sufficient evidence that the instruments were freely and voluntarily executed. Our cases hold that where a confidential relationship exists between a donor or grantor and a dominant donee or grantee, then that donee or grantee must produce evidence to show that the instruments were freely and voluntarily executed. *Norton* v. *Norton,* 227 Ark. 799, 302 S.W. 2d 78 (1957), involving a mother-grantor, son-grantee relationship; *Gillespie* v. *Holland,* 40 Ark. 28 (1882), involving a sister-grantor,

brother-grantee relationship; *Young* v. *Barde,* 194 Ark. 416, 108 S.W. 2d 495 (1937), where the gift to the dominant daughter-grantee was referred to as prima facie void; and *Jamison* v. *Duncan,* 233 Ark. 780, 348 S.W. 2d 709 (1961), involving an aged and mentally weak uncle-grantor. Of course, the confidential relationship based on faith and repose as well as the dominant position must be supported by testimony before the presumption of coercion will arise. *Donaldson* v. *Johnson,* 235 Ark. 348, 359 S.W. 2d 810 (1962).

Leonard and Christine were married on July 31, 1971, when he was 68 and she was 47. It follows that a confidential relationship was therefore established by the marriage. Of course, it is recognized that no greater confidential relationship is known to the law than that which exists between a husband and wife. See *Gillespie* v. *Holland, supra;* 41 Am. Jur. 2d, Husband and Wife, § 272.

We now review the evidence with respect to the dominant party in this confidential relationship. In 1967 Leonard had suffered permanent brain damage from a stroke. A year later his wife died. On April 27, 1971, Leonard signed a will making numerous relatives of his and his deceased wife his beneficiaries of a substantial estate. On June 8, 1971, he executed a revocable trust to the same effect. These instruments were drafted by a Little Rock attorney after consultations with him. He was driven there from his home at Hampton by one or two of his relatives who were minor beneficiaries. During the first part of this year, he proposed marriage to three different women in the locality. Each refused his proposal. A widow testified "[H]e just didn't know and he wasn't capable of knowing what he wanted." Another woman said that the first time he came to see her he said he was "looking for a wife" and "it kinda of stunned me." This woman said he was unable to speak distinctly because of his stroke. The other woman testified that he surprised her by proposing marriage the first time she was with him and that on May 29, after several dates, she refused marriage. She also noticed he had a definite speech problem. He assured each of these women that they would never need to continue work since he was financailly well to do.

In the early part of 1971, through a mutual friend, Leonard was introduced to Christine, who had recently returned to her local community from out of state employment after several years' absence. In June, he proposed marriage to her. About the middle of July she accepted his proposal and they were married on July 31. About a month following the marriage, he told her about the revocable trust and under the terms of it she would receive nothing. Within a few days, accompanied by him, she drove to El Dorado to consult with an attorney who had previously represented her father. As a result of the conference Leonard signed shortly thereafter (September 2, 1971) a revocation of his trust agreement and then conveyed all of his real property and various savings accounts to their joint ownership. In March, 1972, they moved into a new home at nearby Tinsman, Arkansas. The construction and furnishing approximated $36,000 and were paid for by the sale of some of Leonard's timber. At the time they moved, she acquired possession of all his passbooks and certificates of deposit (totaling approximately $117,000) and kept them in her possession until this litigation arose in July, 1972, which was one year after their marriage. The week before Christine left Leonard she cashed one certificate of deposit for approximately $15,000 at Camden. She immediately drove to El Dorado and deposited $14,000 of the funds in a bank in her name.

A doctor, who treated Leonard in 1967 following his stroke, testified that he suffered permanent brain damage and as a result he became dependent and easily subjected to influence by others. A clinical psychologist examined and tested Leonard a short time before the trial and it was his opinion that his mental condition was below average; his judgment in his social affairs was in the mentally deficient range; and it would be difficult for him to function in some areas of life. Furthermore, that due to Leonard's mental deficiency he would depend on any person in whom he had trust and confidence.

The attorney who drafted his revocable trust about two months before the marriage testified that, although he appeared to have testamentary capacity, Leonard want-

ed someone to assist him in making his decisions and he indicated that he needed greater assistance in making decisions than the average client. The purpose of the trust was to prevent a "prospective wife" from getting any of his property. However, if he "got along fine" upon remarriage he wanted to cancel the trust and "take care of his wife." Other evidence was adduced by lifelong friends that before Leonard's stroke he was mentally alert and above average and since then he was an entirely different individual; that he got things "backwards;" that he refers to a man as "she" and a woman as "he;" that he was no longer talkative and had a bad memory. Leonard's relatives testified that he could not talk well and that someone had to write his rent receipts and he was unable to take care of his store and rent houses alone.

Leonard himself testified. During his testimony he referred to Christine as "him" or "he". He would also refer to a man as "she" and if he referred to a woman he used the pronoun "he" or "him." He was unable to remember the names of the various financial institutions in which he had his savings deposited. He could not recall the counties where he held real estate consisting of approximately 500 acres, other real estate and rental property. He was unable to remember his sister-in-law's name who cared for him after his stroke and assisted him in his store. He had difficulty in remembering Christine's unmarried name nor could he remember the name of his closet living relative, a sister. He was unable to give the date of his marriage to Christine and where they spent their honeymoon. When asked why he transferred his property to Christine as a joint owner, he said "I couldn't tell you that. I reckon I was doing it because Christine wanted it that way."

In our view this evidence is sufficient to establish that Christine was the dominant personality in this marriage relationship. This is true even though there was evidence that Leonard was physically able to drive a car, cultivate a garden, collect rent, hunt and cook. Since we hold that this evidence is sufficient to invoke the presumption of coercion or the instruments were not freely and voluntarily executed, the burden of producing evi-

dence shifts to the party who must rebut the presumption. The presumption of coercion is a strong one. The presumption is not a "Thayer's bubble" which bursts upon the production of any evidence of a flitting bat "disappearing in the sunshine of actual facts." *Mockowik* v. *Kansas City, St. J. & C.B.R. Co.,* 196 Mo. 550, 94 S.W. 256 (1906), quoted in McCormick, Evidence, § 345 (2nd. Ed. 1972). In *Gillespie* v. *Holland, supra,* we said:

> . . . . contracts, and most especially gifts, will be scrutinized with the most zealous care when made between parties who occupy such a confidential relation as to make it the duty of the person benefited by the contract or bounty to guard and protect the interests of the other and give such advice as would promote those interests. . . .

One scholar has written:

> Except as the court may be restrained by constitutional requirements of due process of law. . ., there would seem to be no reason in law or logic why there should not be accorded to any or all presumptions the weight which the court feels would best serve the interests of justice. If dissipation by a bare denial from an interested witness seems to accord too trifling an effect to a presumption, the court would seem justified to require more before the presumption is rebutted. Barnhart, Use of Presumptions in Arkansas, 4 Ark. L. Rev. 128, 141 (1950).

In *Ball* v. *Hail,* 196 Ark. 491, 118 S.W. 2d 668 (1938), the testimony of both the employer and the employee was held insufficient to overcome the presumption that the employee-driver was acting for his employer at the time of the accident, since both were interested witnesses.

The principal testimony, introduced to rebut the presumption of coercion or that the transactions when effected were not freely and voluntarily made, is Christine's. She testified that the property was taken out of the revocable trust and placed in their joint names following an automobile accident about a month after

their marriage. The evidence appears uncontroverted that this was the first time she knew of the antenuptial instrument precluding her from any statutory property rights. Christine testified that, as a result of the wreck, Leonard worried that she would receive nothing if he died and it was his own idea to revoke the trust and change the will to protect her. In the circumstances of this particular case, we hold that the testimony of Christine, an interested witness, was not sufficient to rebut the presumption that the transactions between her and Leonard were not freely and voluntarily made. Neither was the testimony of an abstractor, who notarized the two deeds the day following the revocation of the trust, the purchaser of the timber, nor the contractor, who constructed their new home, sufficient due to their very limited knowledge of the relationship between the parties and the conveyances. Therefore, the chancellor erred in upholding the trust revocation and property transfers.

Appellant next contends that the court erred in refusing to grant him a divorce on his complaint and that the divorce granted Christine on the counter-claim is not supported by a preponderance of the evidence. Suffice it to say that it appears that Leonard's proof of alleged indignities is absolutely uncorroborated, as is required, even though the corroboration need only be slight. *Welch* v. *Welch,* 254 Ark. 84, 491 S.W. 2d 598 (1973). Christine was granted a divorce relying also on the personal indignities provisions of Ark. Stat. Ann. § 34-1202 (Repl. 1962). Christine testified that Leonard shoved her with a crutch in the chest or throat resulting in a broken collarbone. Leonard denied the attack stating she injured herself. One witness testified that when she saw Christine in the hospital she observed a very small bruise about her collarbone. No other witness corroborated Christine's testimony about any incident or systematic mistreatment. Although only slight corroboration is required, the corroborating testimony must be directed towards specific acts and conduct and not an isolated incident. *Welch* v. *Welch, supra.* In our view neither party was entitled to a divorce.

Appellant next contends that his appeal from the April 5, 1973, decree divested the trial court of jurisdic-

tion and therefore the subsequent order on April 25, 1973, awarding an attorney's fee and a division of the property was improperly rendered. By a formal decree dated April 5, 1973, the chancellor denied Leonard a divorce, refused to void the transactions in which Christine was made a joint owner of Leonard's property and granted Christine a divorce on her cross-complaint. At the same time, the court stated that it was taking under advisement the disposition of their property rights for a period of thirty days in order to permit the parties to resolve this controversy between themselves. Further, "that in the event such property division is not agreed upon within the said thirty days, the Court will grant a hearing and determine that issue and enter an order either designating division in kind or sale of same and a division of the proceeds thereof." Leonard promptly appealed.

On April 18, 1973, being unable to effect an agreement respecting the distribution of their asserted property rights, Christine petitioned the court for a supplemental attorney's fee (a $500 temporary fee was initially awarded) and further petitioned the court that the cash assets be distributed equally and that the real property allegedly owned by Leonard and Christine jointly be appraised, sold and the assets divided equally. Also that the payment of $500 per month to each party from the impounded funds be continued. Leonard responded asserting that the court no longer had jurisdiction inasmuch as he had already appealed from the April 5 decree. On April 25, following a hearing, the chancellor decreed $5,000 as a supplemental attorney's fee, ordered the real property appraised, sold and all cash assets divided euqally, and refused a continuance of the $500 monthly payment from the impounded funds to each party. The chancellor specifically found that "no final appealable order was entered by this court on the 5th day of April, 1973, and the court does have jurisdiction . . . and IT IS FURTHER ORDERED, CONSIDERED AND ADJUDGED THAT the Decree of April 5, 1973, and this order comprise a Final Order in this case." Appellant also appealed promptly from this decree.

In *McConnell & Son, et al* v. *Saddle,* 248 Ark. 1182, 455 S.W. 2d 880 (1970), we held that a judgment, to be

final, must dismiss the parties from the court, discharge them from the action, or conclude their rights to the subject matter in controversy. There we said:

> Cases can not be tried by piecemeal, and one can not 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 be taken, but not before . . .

See also *Piercy* v. *Baldwin,* 205 Ark. 413, 168 S.W. 2d 1110 (1943).

Obviously in the case at bar, the chancellor was avoiding a piecemeal appeal since he limited their negotiations to thirty days which is the statutory time for an appeal. Ark. Stat. Ann. § 27-2106.1 (Repl. 1962). Well within that thirty days he adjudicated all issues between the parties. The chancellor also found that the latter order was intended to constitute the final order. In the circumstances, we find no merit in appellant's contention. Certainly no prejudicial effect is demonstrated. We affirm that part of the decree allowing the supplemental attorney's fee. Let it be remembered that the property in controversy consists of approximately $117,000 in cash assets and is in excess of 500 acres, together with other real estate, timber and rental property. In fact, the amount of the fee is not questioned on appeal.

The decree is reversed and the cause remanded for proceedings not inconsistent with this opinion. In doing so, it is without prejudice for the appellee to assert and establish any of her statutory rights as a result of this marriage, including maintenance.

Reversed in part—affirmed in part.

HARRIS, C.J., not participating.

J. T. ROACH *v.* STATE OF ARKANSAS

CR 73-128 503 S.W. 2d 467

Opinion delivered December 17, 1973

Don Langston and *Hubert Graves,* for appellant.

Jim Guy Tucker, Atty. Gen., by: *Philip M. Wilson,* Asst. Atty. Gen., for appellee.

FRANK HOLT, Justice. Appellant was convicted by a jury of robbery and sentenced to eleven years under the penal provision of Ark. Stat. Ann. § 41-3602 (Repl. 1964), and the habitual offender act, Ark. Stat. Ann. § 43-2328 (Supp. 1971). Appellant was also sentenced to an additional five and one-half years for the use of a firearm in commission of the felony. § 43-2336.

Appellant first contends for reversal that the trial court's continuance of "this case on its own motion because of uncertainty as to how a witness subpoenaed by the defendant would testify prejudiced the defendant's ability to defend himself and violated his right to a speedy trial under the U. S. Constitution, Amendments 6 and 14, and the Constitution of the State of Arkansas, Article 2, Section 10."

The granting of a postponement of a criminal trial may be made upon a showing of "sufficient cause." Ark. Stat. Ann. § 43-1705 (Repl. 1964). The granting of a continuance by the trial court is a matter within the court's sound discretion and will be upheld absent a showing of abuse of discretion. *Nowlin* v. *State,* 252 Ark. 870, 481 S.W. 2d 320 (1972), *Randall* v. *State,* 249 Ark. 258, 458 S.W. 2d 743 (1970). Several days before trial the court was informed that in accordance with appellant's demand his attorney had subpoenaed a fellow

prisoner as a witness for his defense. A local attorney was appointed to represent the prospective witness who appellant expected would admit to the robbery and exonerate appellant. The witness' appointed attorney, however, was in the hospital on the day of appellant's scheduled trial. The attorney requested the right to be present when his client testified in order to fully advise him of his constitutional rights as a witness. The trial court, on his own motion, reset the case for trial about two months later. Appellant objected and maintained the trial court should proceed even though the witness' attorney was ill. We note that the witness, subpoenaed by appellant, testified at a later trial date and disclaimed any participation in the alleged offense. In the circumstances, we find no abuse of discretion in the court's postponement of the rial.

Neither do we find merit in appellant's contention that his right to a speedy trial was violated. Our speedy trial statute, Ark. Stat. Ann. § 43-1708 (Repl. 1964), would have required appellant's trial within two terms of court from the time charged. Ark. Stat. Ann. § 22-310 (Repl. 1962) indicates that the terms of court in Sebastian County, Fort Smith District, commence on the first Monday in February, June and October. Appellant was arrested in the third term and tried in the first or succeeding term, therefore, meeting the two term requirement. See also *Givens* v. *State,* 243 Ark. 16, 418 S.W. 2d 629 (1967), *Randall* v. *State, supra, Gardner* v. *State,* 252 Ark. 828, 481 S.W. 2d 342 (1972).

Appellant's second contention is that the court erred in allowing a pistol, seized in a warrantless search of his car, to be introduced into evidence. Warrantless car searches are permissible due to the mobility of the object to be searched where there exists probable cause to believe that the automobile contains articles the officer is entitled to seize. *Carroll* v. *United States,* 267 U.S. 132 (1924), *Easley* v. *State,* 255 Ark. 25, 498 S.W. 2d 664, and *Cox* v. *State,* 254 Ark. 1, 491 S.W. 2d 802 (1973). In the instant case the deputy sheriff in Leflore County, Oklahoma, testified, based upon information about the robbery and a description of the appellant and his

vehicle, that he and other officers found the appellant's car parked and abandoned on the side of a highway. Appellant had run out of gas and left the car in search of a service station which, it appears, was unknown to the officer. The absence of the driver at the time of discovery of the car does not necessarily eliminate the mobility factor. There existed probable cause for the search. The officer had certain information which fit the description of the get away car. He testified that he saw the pistol when he shined his flashlight through the car window. Additionally, Okla. Stat. Ann. 21 § 1289.13 makes it unlawful to transport a loaded firearm over a public highway or roadway, subject to certain exceptions enumerated in 21 § 1289.6. Upon observing the weapon in the back seat of the car, the officer had probable cause to believe an offense had been committed and could validly seize the loaded pistol without a warrant under the standards of *Carroll* v. *United States, supra.*

Appellant's third contention is that the trial court erred in denying appellant's motion for a mistrial. When the deputy sheriff who seized the pistol was called to testify, the prosecuting attorney asked defendant "[H]ave you prior to this time testified in this court on a hearing on motion to suppress?" The question was never answered. Any possible prejudice was removed by the court admonishing the jury not to consider the question. *Washington* v. *State,* 227 Ark. 255, 297 S.W. 2d 930 (1957), and *Howell* v. *State,* 220 Ark. 278, 247 S.W. 2d 952 (1952).

Appellant next contends that the trial court erred in denying appellant's motion for a directed verdict. Appellant's only argument is that the testimony of a seventy-three year old woman, the victim of the robbery, was insufficient to sustain a verdict of guilty of robbery. This contention is absolutely meritless. The victim's unequivocal identification of appellant constitutes ample substantial evidence to support the finding of the jury without detailing other corroborating evidence.

Appellant's fifth contention is that the court erred in submitting the verdict forms to the jury. The jury was

initially given three verdict forms: i.e., guilty of robbery, guilty of robbery with a firearm and not guilty. After finding the defendant guilty of robbery with a firearm, evidence was then introduced that defendant was previously convicted of other offenses or that he was a habitual offender. The jury was again instructed and sent out to deliberate with three verdict forms: (1) penalty verdict for robbery—no previous felony convictions (2) "Penalty Verdict For Robbery and Under Habitual Criminal Act" and (3) "Penalty Verdict For Use of Firearm." The jury used the penalty verdict for robbery as a habitual criminal and imposed an eleven year sentence. On the separate penalty verdict form for the use of a firearm, the jury assessed an additional five and one-half years. Thus a total of sixteen and one-half years was imposed by both verdicts. Appellant contends that it was not the intention of the legislature that both statutes be applicable in the same case.

We perceive nothing contrary to legislative intent nor any violation of due process or double jeopardy in submitting *both* allegations: i.e., being a habitual offender (§ 43-2328) together with committing a felony with a firearm (§ 43-2336) to the jury. The former permits the jury to increase a minimum prescribed sentence when a previous conviction is properly shown. The latter provides an additional sentence of not to exceed seven years for one committing a felony by using a firearm. See also *Johnson* v. *State,* 249 Ark. 208, 458 S.W. 2d 409 (1970). § 43-2337 provides that the period of confinement, if any, "shall be in addition to any fine or penalty provided by law as punishment for the felony itself, **** and shall run consecutively, and not concurrently, with any period of confinement imposed for conviction of the felony itself." In the case at bar, the jury was permitted to consider evidence relating to the habitual offender act. As indicated, we find nothing inconsistent or unconstitutional in the jury separately considering and assessing the extra five and one-half years for committing the felony with a firearm. Based upon the separate verdicts, the court properly ordered the latter sentence to run consecutively to the first sentence as the legislature clearly directed.

Appellant next contends that the court erred in allowing the introduction of a South Carolina document to prove a previous felony conviction in that jurisdiction. § 43-2329 or our habitual criminal act provides that a properly authenticated certificate of conviction in another jurisdiction is admissible for purposes of increasing a minimum sentence in our state if that particular offense in the other jurisdiction would be punishable by imprisonment in the petitentiary in this state. Exhibit 2, which is in question, reads an "indictment for Larceny" to which appellant pled guilty and received eighteen months imprisonment in 1960 in South Carolina. The ambiguity about which appellant complains centers around whether appellant was indicted for grand or petit larceny. If the latter, then the conviction could not be used for habitual offender purposes in Arkansas. So. Car. Code § 15-352 (1962) provides that larceny of goods below $20 is a misdemeanor. The appropriate Arkansas statute [Ark. Stat. Ann. § 41-3907 (Repl. 1964)] breaks the felony misdemeanor distinction at $35.

Appellant was obviously charged under South Carolina's grand larceny statute since he received eighteen months as punishment in the penitentiary. The South Carolina petit larceny statute contains a maximum imprisonment provision of thirty days in the county jail. However, it is impossible to determine from the indictment whether the crime appellant committed there would have been punishable by imprisonment in the Arkansas penitentiary. The South Carolina indictment does not reveal the value of the property stolen. For example, had appellant stolen property valued at $30, the crime would have been grand larceny in South Carolina and petit larceny in Arkansas. Therefore, since our statue is penal in nature and subject to a strict construction, the state did not meet its burden of adducing sufficient evidence that the South Carolina conviction would be punishable by imprisonment in the Arkansas penitentiary as our statute so clearly requires. We do not construe, as the state contends, that appellant did not sufficiently object to the admissibility of exhibit 2. Therefore, its introduction into evidence was manifestly prejudicial

to appellant's rights even though the jury in a colloquy with the court advised it had considered only exhibit 5 as constituting a felony, which appellant had admitted when he testified as to the correctness of the document. We cannot say with confidence and without speculation that appellant's eleven year sentence, based upon being a habitual criminal, and his additional sentence of five and one-half years for the use of a firearm were not enhanced or increased by the jury in its deliberations due to exhibit 2, which was inadmissible. We accordingly reduce both verdicts to a total of four years (three years minimum for robbery, plus one year for the admitted felony conviction) to remove all possibility of any prejudicial effect to the appellant. Should the state, through the attorney general, elect to accept this reduction within seventeen calendar days, the judgment is affirmed. Otherwise, it is reversed and the cause remanded. *Richards* v. *State,* 254 Ark. 760, 498 S.W. 2d 1.

We deem appellant's objection as to exhibits 5 and 6 as being waived since the appellant does not favor us with a discussion of them in his argument.

Appellant next contends that the trial court erred in denying appellant's motion for credit for approximately five months he was in jail awaiting trial. The appellant is an indigent and was unable to make bail. We deem it unnecessary to reach this issue in the case at bar inasmuch as by our per curiam order on November 13, 1973, we permitted this sole issue to be presented on two separate petitions pursuant to Criminal Procedure Rule No. 1. Should the appellant desire, he is permitted to file an amicus curiae brief on this issue. In the event we determine pre-trial incarceration credit is constituionally required for indigents, then he will be so entitled.

Affirmed upon acceptance of modification of judgment; otherwise, reversed and remanded.

PATRICIA HALL PETTIJOHN FOR HERSELF & TWO MINOR CHILDREN *v.* WAYNE SMITH, TROY HOWELL AND NATIONAL SURETY CORPORATION

73-163 502 S.W. 2d 618

Opinion delivered December 24, 1973

Lee Ward, for appellant.

G. W. Knauts, for appellees.

CARLETON HARRIS, Chief Justice. Patricia Hall Pettijohn, appellant herein, and her former husband, Howard J. Hall, are the parents of two minor children, Wanda Lucille Hall, age 12 years, and James Howard Hall, age 10 years. The Halls were divorced in Clay County, Missouri, in November, 1970, appellant having been awarded the divorce. Two different versions of the custody order

contained in the decree are in existence, a purported photostat held by appellant reflecting that she was awarded custody, and Hall having had possession of a purported decree, attested by the Clay County, Missouri Clerk as being signed by the judge, reflecting custody of the children in Mr. Hall. The evidence (at the trial, hereafter discussed) reflects that the children had, from time to time, stayed with both parents, and it is undisputed that at the time of the events hereinafter set out, the children, by common consent of the parents, were living with appellant in her home in Piggott, Arkansas. Wanda had been with her mother since sometime in 1971, and the little boy was brought to appellant by Mr. Hall in November, 1972, Hall remaining in Piggott at that time. Charges were brought by Mrs. Hall against her ex-husband wherein he was charged with grand larceny, it being asserted that he had taken a collection of Avon bottles, said to be of a value of more than $100.00. Hall was arrested and jailed. On December 19, 1972, appellant filed a suit in the Chancery Court at Piggott asking for official custody of the two minor children, and service of summons was personally served on Hall in Clay County, Arkansas by Deputy Sheriff Troy Howell on that same date. The next day, Hall was released from jail on bond and, while appellant was at work at her employment just over the Missouri line, went with Deputy Sheriff Howell in the latter's car to the home of the grandmother and picked up Jimmy; thereafter, Hall and the deputy sheriff met an automobile in which Wanda was riding, Howell stopping such automobile and Wanda being transferred to the deputy sheriff's car. The children were taken to the police department where they transferred to Hall's automobile. Hall then, with the children, drove to the Pettijohn residence, followed by Officer Ralph Cavaness of the Piggott Police Department. Cavaness and Hall waited in the Cavaness car outside the home while the children went into the house to obtain their clothes. An older sister, Reta, came out of the house to talk to her father and Cavaness stated that he told her that she had better go back into the house. The children returned with their clothes, got in the car with their father and he drove them out of the state.[1]

[1]Wanda, about ten days later, was permitted to return to her mother's home.

Thereafter, appellant instituted suit against Sheriff Wayne Smith, Deputy Sheriff Howell, and Officer Cavaness, asserting that those persons, acting jointly with Hall, used the authority of their offices to coerce and compel the two minors to leave the home of their mother, against their will, with the intent and purpose of aiding and abetting Hall in removing them from the State of Arkansas "without any process of any nature from any court". Mrs. Pettijohn sought damages in her own behalf and on behalf of the two minor children, and further sought punitive damages. On trial, the jury returned a verdict for appellees[2] after a request for directed verdict for appellant against the defendants at the close of all the evidence had been denied. From the judgment entered in accordance therewith, appellant brings this appeal. Eight points are asserted for reversal, but inasmuch as we agree with appellant that the motion for a directed verdict should have been granted, there is no necessity to discuss in detail the other points. First, let us determine the authority of an officer in general. Under the provisions of Ark. Stat. Ann. § 43-403 (Repl. 1964), an officer may make an arrest in obedience to a warrant of arrest delivered to him, and may arrest without a warrant where a public offense is committed in his presence, or where he has reasonable grounds for believing that the person arrested has committed a felony. See also *Johnson* v. *State,* 100 Ark. 139, 139 S.W. 1117, and *Howard* v. *State,* 137 Ark. 111, 208 S. W. 293. Ark. Stat. Ann. § 42-201 (Repl. 1964) authorizes the prevention of public offenses by proceedings for suppressing riots and resistance to lawful authority, for requiring security to keep the peace, or for good behavior, and for arresting and confining insane, drunken, and disorderly persons.[2a] Ark. Stat. Ann. § 41-1601 (Repl. 1964) defines false imprisonment as "the unlawful violation of the personal liberty of another, and consists in confinement or detention without sufficient legal authority." In *Watkins* v. *Oaklawn Jockey Club,* 86 F. Supp. 1006, decided by the United States District Court for the Western District of Arkansas, Hot Springs Division, Judge John E. Miller said:

[2]The complaint against Cavaness was dismissed at the close of evidence.

[2a] See also Ark. Stat. Ann. §§ 43-429—43-436 (Supp. 1971), sometimes called the "Stop and Frisk" Statute. This was passed by the General Assembly and became Act 378 of 1969.

> "Every confinement of the person is an imprisonment, and any express or implied threat or force whereby one is deprived of his liberty or compelled to go where he does not wish to go is an imprisonment."

This was the holding of our court in the early case of *Floyd* v. *State,* 12 Ark. 43. In *St. Louis I.M. & S. Railway* v. *Waters,* 105 Ark. 619, 152 S.W. 137, we pointed out that in an action to recover damages for false imprisonment, where the arrest is without a warrant, if the imprisonment is proved or admitted, the burden of justification is on the defendant.

Other jurisdictions hold similarly. In the Maryland case of *Mahan* v. *Adam,* 124 A. 901, the Court of Appeals said:

> "Any exercise of force, or threat of force, by which in fact the other person is deprived of his liberty, compelled to remain where he does not wish to remain, or to go where he does not wish to go, is an imprisonment; the essence of the tort consists in depriving the plaintiff of his liberty without lawful justification, and the good or evil intention of the defendant does not excuse or create the tort."

In *Griffin* v. *Clark,* 42 P. 2d 297, the Supreme Court of Idaho stated:

> "In false imprisonment or unlawful restraint, the primary right involved is the liberty of the citizen; the right of freedom of locomotion; the right to come and go or stay, when or where one may choose. In the main the authorities disclose that in order to constitute an unlawful restraint or false imprisonment the essential thing is the restraint of the person. *** The true test seems to be not the extent of the restraint, nor the means by which it is accomplished, but the lawfulness thereof. There need be no actual force or threats, nor injury done to the individual's person, character, or reputation. Neither is it necessary that the wrongful act be committed with malice or ill will, or even with the slightest wrongful intention. Nor is

> it necessary that the act be under color of any legal or judicial proceeding. All that is necessary is that the individual be restrained of his liberty; compelled to remain or go where he does not wish to; prevented from moving from one place to another as he may deem proper and desire, without sufficient authority, either directly or indirectly in any manner or by any means, by words alone, by acts alone, or by both, by merely operating on the will of the individual, through reasonable fear of personal difficulty, by actual or apparent force, etc., and the detention must be against the will of the person detained."

See also the Utah case of *Hepworth* v. *Covey Bros. Amusement Co.*, 91 P. 2d 507, and the Missouri case of *Titus* v. *Montgomery Ward & Co.*, 123 S.W. 2d 574.

Let us turn now to the facts in the instant case. Wanda, the twelve-year-old daughter, testified that on December 20, she was riding in a car with her aunt on the way to see her grandmother near Carryville. They were proceeding in that direction when a police car came up behind them with the lights flashing. She said that appellee, Troy Howell, was the driver of the car and that her little brother Jimmy, and her father were in the police car with him. Wanda stated that her father walked over and told her to get out of the car, which she refused to do, and Deputy Sheriff Howell said, "You are getting out of the car, young lady." She knew that he was a police officer and she got out and entered his automobile. Howell then drove off with the others in his car and went to the establishment where her older sister, Reta, worked; Wanda was told by her father to go get the house key from her sister. After obtaining the key, they were then driven to the police station where she, her brother, and father, transferred to the father's automobile and proceeded to the home of the mother where she and Jimmy were to get their personal clothing and articles. The witness said that Officer Ralph Cavaness followed them out to the home, and stood by his automobile while the children went into the house and obtained their belongings. She stated that her father then made her and the little brother get into his car and they were driven to Missouri.

Wanda testified that she first told her father that she would not go, and that she was unwilling to go with him, being afraid of him. She said that she did not get out of the automobile in which she was riding until Deputy Sheriff Howell ordered her to do so; that she obeyed because he was an officer; further, that she would not have gone with her father except for the presence of the officer. Wanda stated that she stayed in three different houses in Kansas and that finally, after her constantly repeating that she wanted to return, he permitted her to come back home. The little girl also testified that, in her presence, Jimmy stated that he wanted to stay in Piggott with "Mom". The witness said that Deputy Sheriff Howell did not take hold of her but did say, "You are going"; that he didn't offer to strike or harm her and that she did not recall him saying anything after telling her to get into her father's car.

Joyce Nash, a sister of appellant, testified that she was with Wanda when they were stopped on December 20. She said that Mr. Hall and Howell walked over to their automobile and the father told Wanda to get out of the car. When she refused, the witness quoted Howell as saying, "You are going, young lady; get out of that car." She stated Howell was wearing a "police uniform", and that she knew that he was an officer; that when she asked Howell if he was not going to let the mother know about it, "he says he didn't have to let her know anything."

Cathey Nash, another sister, was at her mother's home when Jimmy was picked up. She said Hall told Jimmy to get his things and that Troy Howell stated that Mr. Hall had a right to take Jimmy; that the latter cried and said he didn't want to go. She testified that Howell did not take hold of Jimmy and that she read a "paper" Mr. Hall had with him, but that it didn't mean anything to her. She added Jimmy was given his Christmas presents to take with him.

The Circuit and Chancery Clerk for Clay County, Arkansas testified that no order, or process, commanding an officer to do anything about the custody of Wanda or Jimmy had been issued by his office.

Ralph Cavaness, the city policeman, testified that acting under orders given to the radio operator by Sheriff

Smith and Howell, he followed the Howard Hall car to the Pettijohn home; he was aware that Hall and appellant were having a "custody fight." He said he waited in the car while the children obtained their wearing apparel and other items and said nothing except that he told Reta, when she came out of the house, that she had better go back to the house. He admitted that what he said to her was equivalent to an order. Cavaness stated that the radio operator had told him that he had a warrant, "the papers to pick the kids up."

Deputy Sheriff Howell, a deputy for four and one-half years, testified that he took Hall to pick up the children. He said that his purpose was "to keep down the peace", and that he had so acted in numerous "similar cases"; he admitted that on the occasion here in question he had been told by the sheriff to do so. Howell testified that he knew that under normal conditions he would need a process of some kind but stated, "not when the sheriff informs you to go, or tells you, sometimes you don't—you take his word." He said that he was given no process of any kind. Howell testified that the little boy cried when the father told him he was to leave with the father, and it appeared to him that Jimmy did not want to go. Howell denied that he made any statements, or did anything to force the children to leave. However, he did admit a fact which is very pertinent to this litigation, viz., that he stopped the automobile in which Wanda was riding. From the record:

> "We met a car, a Chevrolet, '63 Chevrolet, and the little boy said, 'My sis is in this car, that car', and we turned around and I got them stopped just the other side of the Four-Mile-Turn, on the gravel road out there. I pulled up behind them and turned my light on.
>
> Q. Uh-huh. Officer Howell, at that time was there any trouble out there?
>
> A. There was no trouble.
>
> Q. Did you or Mr. Howard J. Hall make the first—make any statements to the occupants of that other car?

A. I did not make no statements.

Q. Tell the jury, the best you remember it, what happened there.

A. Mr. Hall got out and got the girl out of the car; I got out of my car and went back and opened my left back door and let the girl sit down in my car."

Sheriff Smith did not testify.

There is no contention on the part of appellees that the officers were serving a court order, or doing anything at the direction of any court. While Howell denied making any statements, or taking any active part in picking up the children as testified to by the witnesses, the admitted act of stopping the car was completely without authority and, in itself, establishes liability. No unlawful act was being committed, or thought by the officer to have been committed when the car was halted, and the flashing light would certainly indicate authoritative police participation to those being stopped. One needs no great imagination to visualize the effect upon the children, either at the car or at the house, of a uniformed officer apparently acting in concert with their father.

From a legal standpoint, it makes little or no difference what the officer thought, or that he was acting under the orders of his superior (though this might be considered in mitigation of damages). The act of stopping the automobile, and of taking Hall in the police car to pick up the children, thus supporting the acts by Hall and lending an aura of official sanction by his presence, under the circumstances herein constituted false imprisonment of the children.

The failure of the sheriff to testify is interesting, and has some significance, in that no reason is ever given for the action taken. In *Starnes* v. *Andre,* 243 Ark. 712, 421 S.W. 2d 616, this court said:

> "Failure of a party to an action to testify as to facts peculiarly within his knowledge is a circumstance which may be looked upon with suspicion by the trier of the facts. *Fordyce* v. *McCants,* 55 Ark. 384,

18 S.W. 371; *Broomfield* v. *Broomfield,* 242 Ark. 355, 413 S.W. 2d 657. His failure to testify gives rise to the presumption that his statements would have been against his interest. *Cady* v. *Guess,* 197 Ark. 611, 124 S.W. 2d 213."

Certainly, the burden was on the sheriff to explain his actions, and no legal reason, or for that matter, reason at all, having been given, the court should have granted the directed verdict for appellants.

As stated earlier, this holding precludes any necessity to discuss other points in detail. However, we have held that on remand for trial of a law case, it is tried *de novo.* See *Clark* v. *Ark. Democrat Co.,* Supplemental Opinion, 242 Ark. 497, 413 S.W. 2d 629. Aside from the directed verdict, four instructions were offered by appellant and refused by the court, but there is no reason to discuss these offered instructions since we have no way of knowing what the evidence will be on a second trial. Point VI is a contention that the court erred in refusing to let Mrs. Pettijohn tell the jury the reason given by the father in bringing Jimmy to her to make his home in Piggott. There was no tender of what this evidence would have been, and not knowing what she would have said, we cannot pass upon the point, though it is difficult to determine how the officers could have been liable for some statement made by Hall to his ex-wife.

It was also alleged that the trial court erred in refusing to let Mrs. Pettijohn testify that Mr. Hall was bound over by the Piggott Municipal Court for trial on the grand larceny charge. The court did not err as this would have been entirely hearsay testimony on the part of appellant. We are not here called upon to determine whether the clerk's records could have been properly offered to that effect.

Finally, it is asserted that the court erred in refusing to allow Mrs. Pettijohn to tell the jury that she had been awarded full and exclusive custody of the minor children by the Clay County, Arkansas, Chancery Court pursuant to the suit which she had filed, and which we have earlier

mentioned.[3] Again, Mrs. Pettijohn testifying to this fact would not have been the best evidence, but we are of the view that any evidence relating to this custody court order would have been inadmissible because of the fact that the order was not entered until after the events had occurred which are here complained of.

In accord with the views herein expressed, the judgment is reversed, and the cause is remanded to the Clay County Circuit Court with instructions to proceed in a manner not inconsistent with this opinion.

It is so ordered.

TROY C. HODGE *v.* CITY OF MARMADUKE ET AL

73-111 503 S.W. 2d 174

Opinion delivered December 24, 1973
[Rehearing denied January 28, 1974.]

[3]Hall was in the courthouse on the day of the custody hearing, appearing in the Municipal Court during the morning on the grand larceny charge. The custody hearing was held in the early afternoon, but Hall elected not to stay for this hearing.

W. B. Howard and *Jack Segars,* for appellant.

Alfred J. Holland and *Kirsch, Cathey, Brown & Goodwin,* for appellees.

GEORGE ROSE SMITH, Justice. This case centers upon the asserted pollution of a drainage ditch and a water well. The appellant, as the owner of the lands upon which the ditch and well are situated, brought suit to enjoin the city of Marmaduke from continuing to discharge into the ditch the effluent from the municipal sewage treatment plant. Sewer Improvement District No. 1 and certain taxpayers are also parties to the suit, but for convenience we will refer only to the city. The chancellor refused to issue the requested injunction, finding that the city had acquired a prescriptive right to the use of the ditch and that the plaintiff's water well was not actually being affected by the city's activity. The appellant questions the sufficiency of the evidence to support each of those findings.

Hodge owns extensive farm lands that are bounded on the south by State Highway 34. Along the north edge of the highway, and admittedly upon Hodge's land, there is a large drainage ditch that varies from 3 to 18 feet in depth and from 21 to 65 feet in width. For forty years or more the city of Marmaduke has discharged the surface water from its streets into the ditch. The appellant concedes that the city has acquired a prescriptive right to use the ditch for the disposal of surface water.

In 1962 the city completed the construction of a settling basin, or lagoon, for the treatment of sewage. The lagoon is on the south side of Highway 34, approximately across the road from the western part of Hodge's property. The city provided an outlet from the lagoon into the ditch by laying a tiled duct under the highway—a project that closed the highway to traffic for about ten days. The city had discharged the effluent from the lagoon into the ditch for almost ten years when this suit was brought in 1971.

Apparently the suit was precipitated by the fact that the lagoon finally filled up to such an extent that it no longer converted sewage into an acceptably harmless effluent. While the suit was pending the city constructed a second lagoon, which concededly corrected the deficiency that had developed. The chancellor's final decree was entered after the second lagoon was in operation and had proved to be efficient.

We consider first the city's asserted prescriptive right to use the drainage ditch as an outlet for its treatment plant. Although there are comparatively few cases involving the acquisition of a flowage easement by adverse use, the parties are not in disagreement about the law. The basic principles of adverse possession are applicable. As the Nebraska court said in *Courter* v. *Maloley,* 152 Neb. 476, 41 N.W. 2d 732 (1950); "That an easement may be acquired by prescription for the flow of waters there can be no doubt. Such an easement however cannot be acquired except by open, notorious, exclusive, and adverse use for a period of ten years." (In Arkansas the period is only seven years.)

The appellant, in insisting that the city did not acquire an easement by prescription, relies upon *LeCroy* v. *Sigman,* 209 Ark. 469, 191 S.W. 2d 461 (1945), where we held that in order for a person to acquire a prescriptive easement across unenclosed and unoccupied property—in that case a vacant city lot—he must show some circumstance or act of hostility indicating that the use was not merely permissive. It is argued that here the city failed to make that showing.

We do not find the chancellor's contrary conclusion to be clearly against the preponderance of the evidence, the issue being one of fact. Two circumstances support the chancellor's decision. First, when the original lagoon was created in 1962 the public highwy was blocked for ten days while the conduit was being laid from the lagoon to the ditch. Not only that construction work but also the discharge of the effluent into the ditch were obvious to anyone using the highway. Hodge, whose land was just across the road, does not say that he was unaware of what was taking place. Thus he must have

known that the city was incurring substantial expense in creating a new access to the ditch, for the discharge of something more than mere surface water. It is fair to say that Hodge was not justified in assuming that the city's use of the ditch was merely permissive and therefore subject to his veto at any time.

In the second place, we are not convinced that Hodge's land was unoccupied within the *LeCroy* rule. His cultivation of his fields stopped at the edge of the ditch. He now argues that, even so, the ditch itself was unoccupied land, since trees and other vegetation had grown up within it. That situation, however, cuts both ways. It is equally reasonable to say that the ditch was occupied by those who were asserting a flowage easement therein and that therefore the cessation of Hodge's cultivation at the edge of the ditch amounted to a recognition of the adverse user. We conclude that the chancellor's finding of a prescriptive right must be sustained.

The second point for reversal involves the water well near Hodge's residence. Here the candor of Hodge himself and of his counsel lightens the difficulty of our decision. The water from the well has a slightly unpleasant odor, but that is admittedly due to iron and sulphur in the soil. It is also admitted that even if the effluent from the treatment plant percolates from the ditch into the well—an issue of fact upon which the evidence is in dispute—the resulting impurity of the water is physically harmless to the health of one who drinks it. Moreover, the testimony indicates that the State Department of Health found the expanded municipal sewage treatment plant to conform to ecological standards.

Hodge testified that when he discovered, just before this suit was filed in 1971, that there was at least some minimal percolation from the drainage ditch to his water well, he stopped using that water for household purposes and thereafter hauled in all the water needed for domestic use. The chancellor found that there was in fact no percolation of the effluent from the ditch to the well, but the appellant insists that the proof preponderates against that conclusion.

The factual issue is a close one, upon which we are not persuaded that the trial judge's finding of no percolation is clearly against the weight of the proof. There is, however, another reason for affirming the decree. Hodge admits that the water, even if impure, is harmless to health; but he insists that the city's maintenance of the treatment plant is a private nuisance, because as a reasonably sensitive person he is justified in his unwillingness to drink water that may be traced in part to a plant where human sewage is treated. He relies upon such cases as *Powell* v. *Taylor,* 222 Ark. 896, 263 S.W. 2d 906 (1954), where we held that the maintenance of a funeral home in a municipal residential district may be enjoined as a nuisance, simply because such an establishment, though not physically offensive, tends by its continuous suggestion of death and dead bodies to destroy the comfort and repose sought in home ownership. Hodge argues, upon the same premise, that the contamination of his well, even though not physically harmful, is so offensive as to amount to a nuisance that should be abated.

We think the force of that argument to have been blunted by the passage of more than seven years, during which the challenged condition existed continuously. In the *Powell* case the neighboring landowners brought their suit at once, not after the asserted nuisance had been tolerated for many years. That fact distinguishes that case from this one. We do not hold—we do not even imply—that one who pollutes a stream without objection for more than seven years acquires a prescriptive right to continue. We do hold, however, that when, as here, the discharge is regarded as lawful and harmless by the public authorities, one in Hodge's present position cannot complain after having tolerated the situation for more than seven years. Of course our opinion does not foreclose Hodge's right to relief if the second lagoon eventually fails, as the first one did, with the result that improperly treated sewage is piped into the ditch.

Affirmed.

HARRIS, C.J., not participating.

MARY RAINER AND TOM RAINER *v.* PAT ROWLETT

73-181 502 S.W. 2d 617

Opinion delivered December 24, 1973

Guy H. Jones, Phil Stratton and *Guy Jones Jr.,* for appellants.

Brazil & Roberts, for appellee.

GEORGE ROSE SMITH, Justice. The appellee, Pat Rowlett, brought this suit against her parents, the appellants Tom and Mary Rainer, to obtain the custody of Pat's four-year-old daughter, Janet Diana Rainer. The appellants, relying upon an oral contract with Pat, defended the suit upon the theory that they had "equitably adopted" the infant. The chancellor attached scant weight to the contract and awarded custody to Pat. In seeking a reversal the appellants continue to assert a contractual right to the custody of their grandchild.

The facts are so unusual as to be without precedent. In 1967 the appellee, then an unmarried fourteen-year-old high school student, became pregnant in Texas,

where the Rainer family was living. A few months later the family moved to Guy, Arkansas. It was orally agreed between Pat and her parents that when the child was born it would be entered upon the birth records as the child of Mr. and Mrs. Rainer, who agreed to bring up the infant as their own. That course was followed. After the child's birth Pat continued to live with her parents and went back to school. For some three years the infant was supported by the elder Rainers and was told that they were her parents and that Pat was her sister.

In July, 1971, Pat married Jerry Rowlett, who knew that Janet was Pat's daughter. The Rowletts soon moved to a home of their own, taking Janet with them. The child was then told that the Rainers were her grandparents and that Pat was her mother. Mrs. Rainer, who was apparently the dominant moving force throughout the sequence of events, testified that she allowed the Rowletts to take the child upon a trial basis only, to see if the marriage was successful. After more than a year the Rowletts experienced some rather inconsequential marital difficulties, which they attributed to their fear that Mrs. Rainer would take Janet away from them and to Mrs. Rainer's reaction to Jerry's proposal that he adopt Janet. In January, 1973, Mrs. Rainer obtained possession of the child by telling Pat that she would look after the child while Pat was shopping. Mrs. Rainer refused to give up the child, so that Pat was compelled to bring this suit to regain custody.

The chancellor's decision was plainly right. We stress the fact that the oral contract did not provide that the Rainers would adopt Janet, subject to the various safeguards contained in our adoption statutes. Instead, Pat was to release her own parental rights to the Rainers, who would bring up the child as their own. Such a contract is contrary to public policy. As the Restatement of Contracts points out, "a bargain by one entitled to the custody of a minor child to transfer the custody to another person, or not to reclaim custody already transferred of such child, is illegal unless authorized by statute." Rest., Contracts, § 583 (1932).

We expressed that view in *Washaw* v. *Gimble,* 50 Ark. 351, 7 S.W. 389 (1887), saying: "The custody of a child is

not the subject of gift or barter. A father cannot, by a mere gift of his child, release himself from the obligations to support it or deprive himself of the right to its custody. Such agreements are against public policy and are not strictly enforceable." In the case at bar there is the added circumstance that Pat was only fourteen when the agreement was made and was therefore entitled to disaffirm the contract upon reaching her majority, even if the agreement had been valid.

The true issue before the chancellor, as in any custody case, was the best interest of the child. As between a mother and grandparents, the mother is entitled to her child unless she is unfit to be entrusted with its care. *Nolan* v. *Nolan,* 240 Ark. 579, 401 S.W. 2d 13 (1966). Here there is no such intimation. To the contrary, even Mrs. Rainer testified that Pat is a good mother. Upon the proof the chancellor's conclusion was the only proper one.

Affirmed.

HARRIS, C.J., not participating.

ARKANSAS STATE HIGHWAY COMMISSION *v.* RUTH MULLENS

73-184 502 S.W. 2d 626

Opinion delivered December 24, 1973

Thomas B. Keys and *Philip N. Gowan,* for appellant.

John J. Calloway, for appellee.

LYLE BROWN, Justice. This eminent domain case concerns a 104 acre tract with a quarter mile frontage on State Highway 23. The highway commission cut a considerable swath across the lands, taking 51.10 acres for Interstate 30 and a rest area. After the taking there remained wooded lands north of the new highway and the homesite and cultivated lands south of the new highway and fronting on State Highway 23. By her testimony the landowner fixed her damages at $28,100; her expert witness fixed the damages at $20,300. The jury awarded damages of $28,100. For reversal appellant contends (1) that the testimony of the landowner to the before taking value was insubstantial, and (2) that the court should have struck the before value of the landowner's expert witness. We find no merit.

It is axiomatic that a landowner has more leeway in fixing values than does an expert. We said in *Arkansas State Highway Comm.* v. *Fowler,* 240 Ark. 595, 401 S.W. 2d 1 (1966): "It is not necessary to show that he was acquainted with the market value of such property or that he is an expert on values. He is deemed qualified by reason of his relationship as owner to give estimates of the value of what he owns. The weight of his testimony is, of course, affected by his knowledge of the value." To the same effect see *Arkansas State Highway Comm'n* v. *Kennedy,* 248 Ark. 301, 451 S.W. 2d 745 (1970).

Appellee and her husband purchased the property in 1960 and moved onto it. After the husband's death in 1965, appellee continued to live there another six years. She detailed a good knowledge of the topography. The house is located on high and level ground; to the north of the

house the land is uphill; at the point where appellant indicated the rest area, there is a beautiful view of the entire countryside, including the river, the town of Ozark, and the locks and dam. She estimated the value of the entire tract before the taking at $400 per acre, based on what she thought a willing buyer would pay. On cross-examination she was questioned concerning why all the acreage—woodlands and cultivated lands—was valued at $400 an acre. She said her figure was based on a sale of the acreage as a unit. She conceded that her knowledge of sales in the area was based on hearsay; however, she related she sold two acres off the tract fronting on Highway 23 for $750 an acre.

The fact that the landowner had no personal knowledge of the details of other sales does not destroy her testimony. The fact that she took into consideration what she had heard several different persons say in discussing the value of lands did not make her testimony on that score inadmissible. *Arkansas State Highway Comm.* v. *Russell,* 240 Ark. 21, 398 S.W. 2d 201 (1966). It is also said in *Russell* that if cross-examination shows a questionable basis for the landowner's values, that fact has a bearing on the weight to be given the witness' testimony. We think the landowner's testimony passes the substantial evidence test.

Now as to the before taking value given by the expert, Eddie Anderson. The witness has lived in Ozark all his life and for the past nineteen years has been a licensed real estate broker. He has made many appraisals in the area, some for federal agencies and others for private landowners. He has been acquainted with the subject property all his life. He gave an across the board value of $300 per acre. He believed the highest and best use of appellee's property was for homesite development. He said there was a good view in every direction, including the locks and dam, the Arkansas River, the town of Ozark and a mountain range. He stated specifically he did not know of another tract of 100 acres in Franklin County comparable favorably to the subject property.

As to the three comparables used, one was a three acre tract which sold for $1800 per acre; another a 23 acre

tract which sold for $1,087 per acre; and another a 51 acre tract abutting a dirt road which sold for $200 an acre. We are unable to say the trial court erred in not striking the witness' before value testimony.

Affirmed.

HARRIS, C.J., not participating.

MAURICE G. MORLAN *v.* MILDRED C. MORLAN

73-203 502 S.W. 2d 628

Opinion delivered December 24, 1973

Denver L. Thornton, for appellant.

James J. Calloway, for appellee.

LYLE BROWN, Justice. Appellant's petition for a divorce was denied. We affirm because the appellant failed to meet the requirement of corroboration.

The parties were intermarried in 1954 and lived together until March 11, 1972. For several years prior to the separation they lived in Memphis where appellee still resides. At the time of separation appellant moved to El Dorado. The divorce petition alleged general indignities.

Appellee denied the allegation and alleged in substance that the separation resulted from appellant having an affair with a woman in El Dorado. In addition to denying appellant's prayer for divorce the court awarded custody of the minor child to appellee; ordered appellant to pay $300 per month for support of the wife and minor child; and gave possession of household furnishings and an automobile to appellee. The latter did not ask for a divorce.

Appellant testified at length relating that appellee was in the habit of drinking, committing acts of hysteria, consistently spending money beyond their income, embarrasing appellant, and committing acts of violence toward appellant. He denied having an affair with another woman but in oral argument the incident was admitted.

In the absence of collusion in a contested divorce comparatively slight evidence of corroboration is sufficient. *Anderson* v. *Anderson,* 234 Ark. 379, 352 S.W. 2d 369 (1961). Witness R. A. Chapel resides in El Dorado and has business dealings with appellant. The witness testified that in February 1972 he received a telephone call from appellee trying to locate appellant; that "she got kind of loud" and wanted to know if the witness knew a woman named Bobbie; that appellee used some profane language and said "This is some more that is going to pay for this". Mrs. Chapel was called as a witness. She testified that when appellant moved to El Dorado he had a black eye; that she inquired of the cause and appellant attributed it to an accident. Appellee was called as a hostile witness. She said the parties scuffled on the evening of March 11, 1972, the date of the separation; that in the same encounter she threw a glass at appellant and in the same confrontation she tore his shirt. She said she was incensed because of "the other woman" and by having learned that appellant had lied about his whereabouts on a previous night which was spent away from home. Summarizing, appellant's corroboration related to a telephone call inquiring about another woman; a black eye which appellant attributed to an accident; and a physical encounter with appellee on March 11. Appellant refers us to the testimony of several witnesses called by appellee and urges that their testimony corroborates appellant's testimony. Sharon Cook said she heard the couple argue

about bills which the witness did not consider uncommon among married couples. Dorene Dundas said she had heard the Morlans fuss about appellant not spending more time with his young son. Charlene Ulander said she had heard appellee use abusive language towards appellant. Mark Morlan, the seventeen year old son of the parties, said he "got between" the couple one night when they were arguing. None of those witnesses related how often they witnessed the described events, neither is it clear who was the aggressor, nor is it revealed when the incidents occurred.

To sustain a divorce on grounds of indignities it must be shown that the misconduct of the offending spouse was conducted habitually and continued for such a period of time as to make the married life intolerable for the other spouse. *Preas* v. *Preas,* 188 Ark. 854, 67 S.W. 2d 1013 (1934). "Indignities may mean a number of things in various circumstances but in order to constitute the grounds for divorce they must be constantly and persistently pursued with the object and effect of rendering the situation of the opposing party intolerable." *Gibson* v. *Gibson,* 234 Ark. 954, 356 S.W. 2d 728 (1962); see *Welch* v. *Welch,* 254 Ark. 84, 491 S.W. 2d 598 (1973). In view of the recited requirement of the law, and in further view of the fact that the chancellor saw and heard the witnesses and with the right to judge their credibility, we are unable to say his finding was against the preponderance of the evidence.

Appellant does not argue that the property division or support money was improvident; at least they do not brief the questions. Be that as it may, we are unable to say that the awards made in those areas, along with an attorney's fee, were improper.

In addition to judgment for costs in favor of appellee, she is awarded an attorney's fee of $500 for appeal to this court. In fixing a rather modest fee we note that appellant has not accumulated any savings; his annual salary is around $9000; he has a son in a private school and is paying appellee $300 a month.

Affirmed.

HARRIS, C.J., not participating.

FERDINAND D. HAND AND JAMES W. RANDALL, D/B/A SOUTHLAND INSURANCE AGENCY *v.* NORTHWESTERN NATIONAL INSURANCE COMPANY

73-172 502 S.W. 2d 474

Opinion delivered December 24, 1973

Wright, Lindsey & Jennings, for appellants.

Laser, Sharp, Haley, Young & Boswell, P.A., for appellee.

JOHN A. FOGLEMAN, Justice. This appeal springs from the dismissal of appellants' complaint on motion of appellee. Appellants operate an insurance agency and appellee is their insurer under an Insurance Agents' and Brokers' Errors and Omissions Policy. This action was brought by appellants to recover from appellee the amount of a fire loss allegedly suffered by F. L. and Delma Abernathy which was not covered by fire insurance due to the failure of appellants to renew a policy. Appellee first filed a pleading which it entitled "Motion to Dismiss." This motion alleged that plaintiffs are not the real parties in interest and that defendant was not a proper party. After a response by appellants, which seems to be more responsive to a brief of appellee in support of its motion than to the motion itself, appellee filed an amendment to its motion, "readopting" the allegations of its original motion, but adding that it was not a proper party defendant for the "additional" reason that the policy involved contained the following clause:

> *Action Against Company.* No action shall lie against the company unless, as a condition precedent the Insured shall have fully complied with all the terms of this policy, nor until the amount of the Insured's obligation to pay shall have been finally determined either by judgment against the Insured after actual trial or by written agreement of the Insured, the claimant and the company.

Appellants then filed a supplemental response, which also seems to be more in the nature of a brief than a response. The gist of this response is the contention that the appellants, under the circumstances should not have been required to suffer a lawsuit and judgment against them, when their admitted negligence and the damages suffered in the matter were clear, particularly in view of a denial of coverage by appellee. Appellants also claimed to be the real party in interest because they had paid the full amount of the loss to the party to have been insured, $11,700, of which $10,700 was loaned to

them by Farmers and Merchants Insurance Company, under the terms of a loan receipt in which their right to sue appellee was recognized. Appellee covered all losses in excess of $1,000.

After the circuit judge had advised counsel for both parties by letter that the motion was sustained, appellants filed a motion to set aside the judgment of dismissal (which had not then been formally entered). The grounds alleged were that appellee's motion to dismiss was not a proper pleading under the laws of Arkansas and that, if it were treated as a motion for summary judgment, there remained genuine and material issues of fact. Thereafter, the formal order of dismissal was entered. It contained these specific findings:

> 1. That the plaintiffs are bound by the terms of their written contract with the defendant.
>
> 2. That the plaintiffs are bound by their contract and by the law of this state and are precluded from bringing a direct action against this defendant.
>
> 3. That defendant, Northwestern National Insurance Company is not a proper party defendant in this cause.

The rules of pleading in this state are appropriately liberal and this court has, at least since the adoption of the Civil Code, regarded substance rather than form. In this case, however, the true nature of the pleadings seems well obscured by their titles and the treatment given them by the parties. Whatever they are, we are convinced that the order of dismissal was at least premature.

A motion to dismiss upon jurisdictional grounds or for want of venue has been recognized by this court. See *Hoggard & Sons* v. *Russell Burial Assn.*, 255 Ark. 576, 501 S.W. 2d 613; *Arkansas-Louisiana Highway Improvement District* v. *Douglas-Gould and Star City Road Improvement District,* 138 Ark. 162, 210 S.W. 150. We have also approved its use to obtain dismissal for abuse of process. *Heard* v. *McCabe*, 130 Ark. 185, 196 S.W. 917. When based upon the assertion that the complaint fails to state a cause of action, it is tantamount to a general demurrer. *Meeks* v. *Arkansas Power & Light Co.*, 147 Ark. 232, 227 S.W. 405. Such a pleading is not described in

the Civil Code, or amendments thereto, and our attention has not been called to any case in which it has been recognized for other purposes, except, of course, for the motion to dismiss a chancery case for insufficiency of the evidence on behalf of a plaintiff, provided for by Ark. Stat. Ann. § 27-1729 (Repl. 1962). Ark. Stat. Ann. § 27-1162 (Repl. 1962), relied upon by appellee does not authorize any pleading. It simply authorizes hearings on pretrial motions outside the county in which an action is pending.

This court has always determined the nature and function of a pleading by its content, and sometimes even by the manner in which it is treated by the parties and the trial court, rather than by its title. See *Hoggard & Sons* v. *Russell Burial Assn.,* supra. When we view appellee's first motion in this case, it appears that it should be characterized as a demurrer for defect of parties, authorized by Ark. Stat. Ann. § 27-1115 (Repl. 1962). Appellee says in its brief here that the court correctly granted its motion as a demurrer for defect of parties. In order for such a demurrer to be sustained, the defect must appear upon the face of the complaint. *Hoggard & Sons* v. *Russell Burial Assn.,* supra. See also, *McCallister's Admr.* v. *Savings Bank of Louisville,* 80 Ky. 684 (1883), construing the code section we adopted and now appearing as Ark. Stat. Ann. § 27-1115; *Cleveland* v. *Biggers,* 163 Ark. 377, 260 S.W. 432.

There is nothing in the complaint to suggest that the plaintiffs are not the real parties in interest, i.e., the sole owner of the alleged cause of action against appellee. Even though the insurance contract is the basis of appellants' cause of action, and is described and identified in the complaint, it was not made an exhibit thereto. The terms relied upon by appellee are nowhere mentioned in the complaint. There is nothing in the complaint to indicate that appellee is not the only possible defendant in the cause of action alleged by appellants. The first motion could not properly have been sustained as a demurrer.

The amendment to this motion, by importing grounds based upon facts not appearing on the face of the plead-

ing, seems to have made the pleading a "speaking demurrer." *Hoggard & Sons* v. *Russell Burial Assn.,* supra. Such a pleading is not only not recognized but is abhorred, eschewed and rejected by the courts of Arkansas. *Hoggard & Sons* v. *Russell Burial Assn.,* supra; *Jones* v. *Capers,* 231 Ark. 870, 333 S.W. 2d 242; *Rider* v. *McElroy,* 194 Ark. 1106, 110 S.W. 2d 492. It has only been given consideration when it could be treated as a motion to dismiss for want of jurisdiction. *Hoggard & Sons* v. *Russell Burial Assn.,* supra; *Askew* v. *Murdock Acceptance Corporation,* 225 Ark. 68, 279 S.W. 2d 557.

Somewhere in the course of the proceedings, however, appellee resorted to a discovery deposition of appellant Jim Randall. Nothing in that deposition showed that the court did not have jurisdiction of the cause of action. We do not agree with appellee that it was proper to introduce proof on the question of a defect of parties on demurrer. Although appellee nowhere suggests that its pleadings should be considered as a general demurrer, evidence could not be offered in that case either. This leaves the motion for summary judgment as a basis of treatment of the motion which could result in a dismissal of the action. If so, its character as such was so well veiled that an adverse party might well be excused for not responding to it as such. Appellants suggest that possibility, but appellee does not so treat it.

Appellee, as a matter of fact, states in its brief that the trial court correctly construed its initial motion as the equivalent of a demurrer for defect of parties. It went on to submit that the court correctly allowed the motion to be amended so as to allow proof to be taken on the question regarding a defect of parties and properly dismissed the complaint on that basis. While we do not agree, we should affirm this order, if we could sustain it on any ground. *Reamey* v. *Watt,* 240 Ark. 893, 403 S.W. 2d 102; *Reeves* v. *Arkansas Louisiana Gas Co.,* 239 Ark. 646, 391 S.W. 2d 13; *Polk* v. *Stephens,* 126 Ark. 159, 189 S.W. 837. This being so, and in view of the statement in the order of dismissal that the court had considered the depostion of Randall, we have considered the motion as one for summary judgment and find that

we cannot sustain the order as the granting of such a motion.

In order for summary judgment to be justified, there must have been no genuine issue of material fact. All doubts about the question are resolved and all inferences drawn against the moving party. *Moon* v. *Sperry & Hutchinson Co.,* 250 Ark. 453, 465 S.W. 2d 330; *Evers* v. *Guaranty Inv. Co.,* 244 Ark. 925, 428 S.W. 2d 68. The evidence must be viewed in the light most favorable to the party against whom the judgment would go. *Wilson* v. *McDaniel,* 247 Ark. 1036, 449 S.W. 2d 944. If fair-minded men might differ about the conclusion to be drawn or if inconsistent hypotheses might reasonably be drawn from the supporting testimony, a summary judgment should be denied. *Mason* v. *Funderburk,* 247 Ark. 521, 446 S.W. 2d 543; *Harvey* v. *Shaver,* 247 Ark. 92, 444 S.W. 2d 256. If there is any doubt whatever, a summary judgment should be denied. *Bull* v. *Manning,* 245 Ark. 552, 433 S.W. 2d 145.

The deposition of Randall, the only possible support for a motion for summary judgment in this case, rather than clearly demonstrating the absence of such an issue, tends to indicate that there are genuine issues of material fact. Randall revealed that:

> His agency, having placed homeowner's insurance on the Abernathy property with Farmers and Merchants Insurance Company, a subsidiary of the Silvey Companies for six years, sent renewal notices to the Abernathys and had received a renewal premium from them prior to July 24, 1971, the renewal date. The renewal statement was then placed in the Abernathy file in the agency office instead of being processed for a renewal policy in the usual manner. The agency did not check the "account current" listing furnished it by Silvey from which it could have detected that the insurance company had dropped the Abernathy policy. As a result, the premium was never remitted to any insurance company, and no policy was ever issued. There was no reason to believe that the Abernathy policy would not have been renewed routinely by Farmers and Merchants. The Abernathy dwelling house was later destroyed

by fire. On the date of the fire, Randall notified both Farmers and Merchants and Northwestern. When the Abernathys asserted a claim, Randall notified Silvey, who advised him to call his errors and omissions carrier. When Randall did so, appellee's claims manager, Ken Rhinehart, stated that, in his opinion, appellants had no claim against appellee and that they would have to collect from Silvey. A few weeks later, Randall again talked to Rhinehart who told him that Northwestern could only help if appellants and the Abernathys joined in a suit against the Silvey Company and that Northwestern would defend appellants against any liability they incurred. Randall objected to involving his customers in a lawsuit. According to Rhinehart, the only alternative was for Silvey to pay the claim and file suit against Northwestern to recover. Subsequently, Silvey officials agreed to advance $10,700 of the $11,-700 loss on the basis of a loan receipt executed by appellants. By this receipt, appellants acknowledged receipt of the sum advanced by Farmers and Merchants, repayable only from any net recovery made from appellee. This receipt contained the following clause:

> As security for repayment of the loan I hereby appoint FARMERS AND MERCHANTS INSURANCE COMPANY, its officers and agents, as attorneys in fact, with irrevocable power to collect, compromise, or abandon any such claim and to institute, prosecute, compromise or withdraw, in may [my] name but at the expense of FARMERS AND MERCHANTS INSURANCE COMPANY, any legal proceedings which it may deem necessary or proper to carry into effect the purpose of this agreement.

Thereafter, Northwestern canceled the errors and omissions policy, charging appellants with entering into an agreement that was neither ethical nor legal.

We find no basis for dismissing the complaint as an unauthorized "direct action" by appellants against their "errors and omissions" insurer. Any action by the insured against the insurer on an indemity policy is, of course,

a direct action. But appellee contends that, because there is no statute authorizing such an action, the motion was properly sustained. The action is not prohibited by law, and we see no reason why special statutory authority for such a suit is required. The basic issue is whether appellee breached its contract of insurance with appellants.

We cannot agree with appellee that the statement of Rhinehart must be taken, not as a denial of coverage under the policy, but as a denial of appellants' liability to the Abernathys. We deem Randall's testimony on this point to be subject to a construction contrary to that given it by appellee, so that it would raise a question of fact. At least, we cannot say that the matter is free from doubt.

Appellee says appellants were not guilty of any negligence that proximately caused any damages to the customer of appellants. We see no merit in appellee's contention that there was no liability to the Abernathys on the part of appellants. See *Martin* v. *Langley*, 252 Ark. 121, 477 S.W. 2d 473; *Derby* v. *Blankenship*, 217 Ark. 272, 230 S.W. 2d 481; *Lawrence* v. *Francis*, 223 Ark. 584, 267 S.W. 2d 306.

The policy exhibited to Randall's deposition contains the usual clauses prohibiting the insured from making any payment or assuming any obligation, except at its own cost. It also permits recovery from appellee after a claimant has secured a judgment against the insured. Still, there are circumstances other than the insurer's refusal to defend an action actually filed under which the insured is entitled to recover from its insurer after having made a settlement with a claimant in spite of such clauses. *Home Indemnity Co.* v. *Snowden*, 223 Ark. 64, 264 S.W. 2d 642; *St. Paul Fire & Marine Insurance Co.* v. *Crittenden Abstract & Title Co.*, 255 Ark. 706, 502 S.W. 2d 100; *Carter* v. *Aetna Casualty & Surety Co.*, 473 F. 2d 1071 (8th Cir. 1973); *L. A. Tucker Truck Lines* v. *Baltimore American Ins. Co.*, 97 F. 2d 801 (8th Cir. 1938); *Isadore Rosen & Sons, Inc.* v. *Security Mutual Ins. Co.*, 31 N.Y. 2d 343, 291 N.E. 2d 380 (1972). Randall's testimony would at least raise an issue of fact as to whether appellee, by its inac-

tion in failing to investigate and settle the claim of the Abernathys repudiated the contract or had waived the provisions on which it relies. And there is no certainty that the amount of the loss was $11,700, although it may be that this amount would be fixed under the valued policy law, and there may be a question of fact on this point. The complaint does not show appellants' reasons for making the payment to the Abernathys, but Randall's deposition is adequate to show that when issue is properly joined there could be a question of fact as to appellants' justification in doing so. If appellee's motion was for summary judgment (and appellee does not contend that it was) the burden was on it to show beyond doubt that no question of fact existed. Certainly, the existence of a question of fact is not foreclosed by Randall's deposition. Appellee did not clearly demonstrate that it acted in good faith in failing to recognize the liability of appellants to Abernathy.

There remains the remote possibility that appellee's pleading could have been treated as a motion to dismiss for want of necessary parties under the third subdivision of Ark. Stat. Ann. § 27-1405 (Repl. 1962), although the court's order seems to preclude that possibility, and it seems to have been indicated in our decisions that this statute is to be invoked at trial. See *Duval* v. *Mayson,* 23 Ark. 30; *Powell* v. *Massey-Herndon,* 69 Ark. 79, 62 S.W. 66. Be that as it may, such a motion would fail unless Farmers and Merchants is the real party in interest or is a necessary party plaintiff. But so far as this record discloses, Farmers and Merchants has really only loaned appellants money to be used in satisfying the Abernathys, with the understanding that it is to be repaid only from appellants' recovery from appellee, if any. While we do not consider Farmers and Merchants to be an insurer of appellants in any sense of the word, their position, as far as this record discloses, is somewhat analogous to that of the insurer which pays a part of its insured's loss. If that analogy is drawn, appellants remain the real parties in interest and Farmers and Merchants is not a necessary party to the action. *Limberg* v. *Lutz,* 236 Ark. 264, 365 S.W. 2d 713; *Washington Fire & Marine Ins. Co.* v. *Hammett,* 237 Ark. 954, 377 S.W. 2d 811; *McGeorge Contracting Co.* v. *Mizell,* 216 Ark. 509, 226 S. W. 2d 566. By the same analogy, Farmers and Merchants

was entitled, under the loan receipt, to prosecute the action in the name of appellants. *Graysonia, N. & A. R. Co.* v. *Newberger Cotton Co.,* 170 Ark. 1039, 282 S.W. 975; *Ry. Co.* v. *Fire Assn.,* 60 Ark. 325, 30 S.W. 350, 28 L.R.A. 83; *Dixey* v. *Federal Compress & Warehouse Co.,* 132 F. 2d 275 (8th Cir. 1942).

The order of dismissal is reversed and the cause remanded for further proceedings.

[redacted]

PIONEER FINANCE COMPANY *v.*
DORWON D. LANE ET AL

73-176 502 S.W. 2d 624

Opinion delivered December 24, 1973

[redacted]

Sam Goodkin, for appellant.

Rodney C. Wade and *Booth & Shaver,* for appellees.

JOHN A. FOGLEMAN, Justice. Appellant Pioneer Finance Company, a foreign corporation not authorized to do business in Arkansas, brought suit against appellees on a promissory note executed by them to Rainbow Industries and secured by a security agreement. Appellant alleged that, prior to maturity, the note was assigned to it. The note, an exhibit to the complaint, was an installment note given for the balance of the purchase price on a

Rainbow Home Conditioner. In their answer, appellees alleged that Pioneer Finance Company was not authorized to do business in the State of Arkansas and that the agreement was unenforceable by it in the courts of Arkansas and void ab initio. They also alleged that Rainbow Industries was not authorized to do business in the State of Arkansas and that the agreement was unenforceable by it and void ab initio. Later, appellees filed a motion for summary judgment based upon the fact appellant was a foreign corporation not authorized to do business in Arkansas and alleged it was barred from enforcement of the note under the provisions of Ark. Stat. Ann. § 64-1202 (Repl. 1966).

The circuit court granted this motion for summary judgment after considering the affidavit of the secretary of state in which that official stated Rainbow Industries was not qualified to do business in Arkansas as a domestic or foreign corporation. We reverse the summary judgment because appellees did not meet their burden of demonstrating that there was no genuine issue as to any material fact.

The certificate of the secretary of state had no bearing whatever upon appellant's right to enforce the note. No one has ever asserted that Rainbow Industries is a corporation. In its complaint Pioneer Finance Company alleged that Rainbow Industries was a proprietorship owned by Kyle Day. There is nothing in the note sued on, the security agreement or the assignment to appellant to indicate anything to the contrary. Even if appellees' answer was sufficient to put that question in issue, it has not produced evidence that Rainbow Industries is a corporation, either foreign or domestic. Consequently, the status of Rainbow Industries cannot be a basis for summary judgment in this case.

Appellees have also failed to meet their burden of showing that the assignment of the contract was made in Arkansas. *Widmer* v. *J. I. Case Credit Corporation,* 243 Ark. 149, 419 S.W. 2d 617.

Appellees' arguments with relation to the burden of proof at trial and that appellant was barred from en-

forcement of the note because it transacted a substantial part of its ordinary business in Arkansas are wholly irrelevant at this stage. There is absolutely no evidence as to the nature and extent of the business conducted in Arkansas by Pioneer Finance Corporation in the record at this time. Of course, our statutes and cases make it quite clear that the burden is on the movant to establish that there is no genuine issue of material fact. See Ark. Stat. Ann. § 29-211 (Repl. 1962); *K and S International, Inc.* v. *Howard,* 249 Ark. 901, 462 S.W. 2d 458; *Widmer* v. *J. I. Case Credit Corp.,* supra. It is only when the moving party has clearly met its burden that the opposing party has the burden of demonstrating the existence of such an issue, and only then will its failure to offer evidence in opposition to the motion entitle the movant to a summary judgment. *Hervey* v. *AMF Beaird, Inc.,* 250 Ark. 147, 464 S.W. 2d 557.

The judgment is reversed and the cause remanded for further proceedings.

HARRIS, C.J., not participating.

CITY OF FORT SMITH, ARKANSAS *v.* ODELL BREWER, PAUL BROWDER AND DAVID CORBIN, FOR THEMSELVES AND AS REPRESENTATIVES OF A CLASS

73-179 502 S.W. 2d 643

Opinion delivered December 24, 1973

Daily, West, Core & Coffman, for appellant.

Pearce, Robinson & McCord, for appellees.

JOHN A. FOGLEMAN, Justice. This appeal involves questions about the amount of holiday pay to which firemen in the City of Fort Smith are entitled, and the terms on which it is to be paid. It requires a construction of Act 132 of 1955, as amended by Act 264 of 1957, now appearing as Ark. Stat. Ann. §§ 19-2108 and 19-2109 (Repl. 1968). The action was instituted by appellees Brewer, Browder and Corbin, as a class action on behalf of all firemen of the city. They sought to recover pay for the holidays specified by the statute in lieu of additional days of vacation theretofore granted. They based their action upon an election of the firemen evidenced by a letter to the city's board of directors, dated April 23, 1971, signed by 86 members of the fire department. On June 21, 1971, the city passed its ordinance, No. 2896, effective July 1, 1971, honoring the election. This ordinance provided for "holi-

day pay" by adding one day of pay to every other biweekly pay period, beginning July 1, 1971. Since there are 26 such payroll periods, this would result in payment for 13 holidays. After this ordinance was passed, appellees amended their complaint to challenge it on the method of calculation of a "day's pay" utilized and the allowance of only seven days of benefits in the year 1971. Appellees contended that their work shift required that they be paid holiday pay on the basis of their pay for a 24-hour work shift and that they should be paid for 13 rather than seven holidays during 1971.

The matter was submitted to the circuit court upon a stipulation of facts. The following additional facts, among others, were stipulated:

1. Prior to 1971, the Fort Smith firemen accepted 13 consecutive days of paid vacation in lieu of holiday equalization pay.

2. All firemen receive a vacation of 15 days each calendar year with pay.

3. Those firemen who accepted a holiday vacation of 13 consecutive days prior to July 1, 1971, have no claim in the calendar year 1971 to equalization pay. Others received no vacation time for holiday equalization.

4. An ordinary day's work for a fireman is a 24-hour period beginning at 6:30 a.m. on one day and ending at 6:30 a.m. on the next, after which the fireman is off active duty, although subject to call, for a 48-hour period between each work period.

5. The city has paid firemen on a biweekly basis, since 1967. During a biweekly pay period, a fireman will average working 4 2/3 work periods of 24 hours each and average 56 hours active duty per week or 112 hours per biweekly pay period.

6. In calculating holiday equalization pay under Ordinance No. 2896, and for all budgetary purposes, except for computation of overtime, the city divides

the biweekly salary of each grade and range of firemen by 10, as the city had done for payment of non-uniformed employees and for unused vacation and sick leave time for policemen.

7. Overtime is paid to firemen on an hourly basis determined by dividing biweekly salary by 112.[1]

8. Since 1971 was not a biennial election year, the three election days listed as holidays in the statutes were not observed in 1971, and the city contends that the firemen were entitled to pay for only 10 holidays in 1971 and other odd-numbered years.

The city administrator testified that those firemen who did not receive the full 13 days of additional paid vacation in 1971, would receive seven days of holiday equalization pay, and the city had offered those firemen three days' vacation in addition to the seven days' holiday pay. He also stated that non-uniformed employees worked 80 hours during a payroll period and policemen averaged 40 hours work per week. It was his understanding that firemen could not leave the city during the 48 hours they were subject to call without calling and obtaining permission.

The trial court entered judgment, finding that: the proper method of calculating each day of holiday equalization benefit is to divide the biweekly salary by 4 2/3; Ark. Stat. Ann. §§ 19-2108 and 2109 provide for 13 days of holiday equalization benefits in each calendar year; the firemen are entitled to receive holiday equalization pay for the period of time prior to the effective date of their election in the form of pay and the city may not provide such benefits in the form of days of vacation.

We disagree with the circuit judge's conclusions. At the outset, we should say we also disagree with appellees' contention that these are findings of fact. The facts were undisputed, and the only questions involved turned upon interpretation of Acts 132 of 1955, as amended by

[1]The city administrator explained that overtime was calculated on an hourly basis, because a fireman's overtime work might be less than a full day.

Act 264 of 1957, appearing as Ark. Stat. Ann. §§ 19-2108, 2109.

Appellant's first point for reversal is that the circuit court's holding is erroneous, because it provides appellees with three days' pay for each day of holiday benefit. It argues that the city's method of payment is in keeping with the intent of the act. We agree with this contention. In order that our interpretation of the act be better understood, we set out the act as it appears in Arkansas Statutes Annotated, Volume 2B, with that portion added by the 1957 amendment italicized:

> From and after the passage of this Act all firemen shall be paid for the thirteen [13] Arkansas legal holidays as set forth in Sec. 69-101 and 69-104 of the Arkansas Statutes. Firemen shall also be paid for any additional holidays which may hereafter be declared by legislative act. [Acts 1955, No. 132, § 1, p. 317.] Said equalization pay shall be based on each man's daily rate of pay and in addition to the regular pay schedule. This equalization pay for the thirteen [13] holidays shall be pro-rated and paid during the regular payroll periods; *except that in lieu of said pay, firemen in said cities and towns may accept paid vacations not to exceed thirteen (13) days in any one [1] year. Said paid vacations to be in addition to any vacation time to which said firemen may now be entitled under city ordinance or departmental rules or departmental policy.* [Acts 1955, No. 132, § 2, p. 317; 1957, No. 264, § 1, p. 808.]

We have previously held that the legislative intention of a similar act affecting policemen was that policemen be paid additional compensation for all legal state holidays regardless of whether they actually worked on each of them. *Deason* v. *City of Rogers,* 247 Ark. 1061, 449 S.W. 2d 410. The overriding purpose of the act was expressed in the key words "equalization pay." If it could be said that the language of the body of the 1955 Act does not clearly express the General Assembly's intention that firemen be paid for holidays they might or might not receive, in order that they stand upon the same footing as most city employees who do not work on these holi-

days, but are paid, nevertheless, all doubt may be resolved by the title and emergency clause of the act, to which we resort in such cases. *Cook* v. *Bevill,* 246 Ark. 805, 440 S. W. 2d 570; *Rouse* v. *Weston,* 243 Ark. 396, 420 S.W. 2d 83; *Roscoe* v. *Water & Sewer Improvement District No. 1,* 216 Ark. 109, 224 S.W. 2d 356; *Sager* v. *Hibbard,* 203 Ark. 672, 158 S.W. 2d 922; *Hollis* v. *McCarroll,* 200 Ark. 523, 140 S.W. 2d 420; *Taylor* v. *J. A. Riggs Tractor Co.,* 197 Ark. 383, 122 S.W. 2d 608. The title reads:

> AN ACT Providing Equalization Pay for Firemen for the Thirteen Legal Holidays During Each Calendar Year Based On Their Daily Rate of Pay and in Addition to Their Regular Pay Schedule. Declaring an Emergency and for Other Purposes.

The emergency declared was based upon this statement in Sec. 4 of the Act:

> It is necessary and essential for firemen to work on legal holidays for the protection of the public peace and safety, and adequate fire forces must be maintained at all times. On holidays firemen are denied the free vacation and leisure time enjoyed by other employees and that such equalization pay is needed by the firemen to give them more equitable and adequate support for their services and for the support of their families, and to maintain their present high standard of morale and efficiency.

If any lingering doubt be left, it was completely resolved by the 1957 amendment which permitted the firemen to accept paid vacations not to exceed 13 days in any one year in lieu of "equalization pay." Clearly, acceptance of the paid vacation time would guarantee that every fireman would receive as much time off work for holidays, without loss of pay, as other city employees. It would be rather odd to suggest, as appellees do, that the legislature somehow expected to equalize the position of the firemen of Fort Smith by giving them a "daily rate of pay" which resulted in their being virtually three times as well provided for in this respect as other city employees, or that the firemen of any city whose working periods for firemen are arranged as those in Fort Smith

should be so much better provided for than those in cities where work shifts may be on a 12- or eight-hour basis. It also seems most illogical to ascribe to the General Assembly an intention that the firemen in any city, by merely accepting vacation with pay, would receive approximately one-third as much as they would receive if they took the benefit in the form of "equalization pay." We can only assume that the legislative branch meant to "equalize" so far as possible. Even though it is not for us to pass upon the logic or wisdom of a clearly expressed legislative intention, we should never construe an act, which does not state the intention in clear and unambiguous terms, to reach an illogical result, when it can be construed to reach a logical one. *Warfield* v. *Chotard,* 202 Ark. 837, 153 S.W. 2d 168; *Ledbetter* v. *Hall,* 191 Ark. 791, 87 S.W. 2d 996; *LaFargue* v. *Waggoner,* 189 Ark. 757, 75 S.W. 2d 235; 2A Sutherland, Statutory Construction (Fourth Edition) 37, § 45.12; 50 Am. Jur. 385, Statutes, § 377; 82 C.J.S. 540, Statutes, § 316. See also, *Arkansas State Highway Commission* v. *Mabry,* 229 Ark. 261, 315 S.W. 2d 900; *Watson* v. *Harper,* 188 Ark. 996, 68 S.W. 2d 1019; *Wilson* v. *Biscoe,* 11 Ark. 44.

Still another approach to ascertainment of legislative intent, when ambiguous, is to construe a new act in the light of analogous acts or acts in pari materia. *Indian Bayou Drainage District* v. *Dickie,* 177 Ark. 728, 7 S.W. 2d 794; *Wilkin* v. *Special School District,* 181 Ark. 1029, 29 S.W. 2d 267; *Cooper* v. *Town of Greenwood,* 195 Ark. 26, 111 S.W. 2d 452; *Prewitt* v. *Warfield,* 203 Ark. 137, 156 S.W. 2d 238; *Graves* v. *Burns,* 194 Ark. 177, 106 S.W. 2d 602; *Connelly* v. *Lawhon,* 180 Ark. 964, 23 S.W. 2d 990. See also, *Smith* v. *Page,* 192 Ark. 342, 91 S.W. 2d 281; *Golden* v. *McCarroll,* 196 Ark. 443, 118 S.W. 2d 252; *State* v. *Fidelity & Deposit Company of Maryland,* 187 Ark. 4, 58 S.W. 2d 696; *Chandler* v. *Chandler,* 211 Ark. 332, 200 S.W. 2d 508; *Ross* v. *Rich,* 210 Ark. 74, 194 S.W. 2d 297. We have said that, in construing any statute, the court should place it beside other statutes relevant to the subject and give it a meaning and effect derived from the combined whole. *Boone County Board of Education* v. *Taylor,* 185 Ark. 869, 50 S.W. 2d 241.

For the purpose of construction of such a statute, resort may be had to its relation to other laws. *Ledbetter*

v. *Hall,* supra. Ark. Stat. Ann. § 19-2105 is the statute providing for vacations for firemen. It requires that each employee of a city fire department "be granted an annual vacation of not less than fifteen [15] days with full pay." When this act is considered along with the optional additional 13 days' vacation in lieu of "equalization pay," the intention that this pay be consistent with that provided for vacations, regular or additional, seems even clearer. It is at least clear that the legislature recognized that there was a different standard as to vacation pay, when by Act 241 of 1971 it brought firemen into the purview of the act theretofore requiring a uniform basis for accumulation of sick leave for policemen. See Act 393 of 1969 and Ark. Stat. Ann. §§ 19-1718—1720. When this was done, the firemen were permitted to accumulate sick leave on the basis of "working days," which were specifically defined by the amendatory act as "a tour of duty." If the General Assembly had intended for the act in question to apply in the same manner, it would have defined its terms as it did in Act 241 of 1971, or it would have used the latter act as a vehicle for amending Ark. Stat. Ann. §§ 19-2108, 2109.

When all factors are considered, it seems obvious to us that the adjective "daily" modifying "rate of pay" in the act in question should be applied with the same connotation as the noun "days" in the same section of the act. The mere fact that the city has endeavored to simplify administrative pay calculations for budgeting and payroll purposes by defining a day's pay as one-tenth of the biweekly pay instead of one-fourteenth to conform with the practice as to non-uniformed employees is not so inconsistent with the construction for which appellant contends to be given serious consideration in interpreting the governing act. Neither do we think it reasonable or logical to think the legislature intended that the city could increase or decrease holiday equalization pay by the simple expedient of changing the work shifts of firemen.

Consequently, we cannot accept appellees' contention that in the context of the act in question, "a man's daily rate of pay" is based entirely upon the 24-hour work shift, to the exclusion of the 48 hours between shifts, when the

fireman is off duty, but subject to call. Our construction makes the terms of the act consistent with one another and with other legislation. It is also consistent with the rules of statutory construction. The construction urged by appellees and adopted by the trial court is not productive of the degree of consistency desirable in construing statutes.

As a second point, appellant contends that the trial court erred in holding that firemen should be paid for 13 holidays in calendar years in which no elections are held, apparently because Ark. Stat. Ann. § 19-2108 provides that "all firemen shall be paid for the thirteen (13) Arkansas legal holidays as set forth in §§ 69-101 and 69-104." Yet, three of these days are election days, which do not occur in odd-numbered years. Here again, we believe the circuit judge overlooked the purpose and policy of the acts, i.e., to equalize the situation of the firemen with that of employees who did not work on the specified holidays but were still paid as if they had. There is no intimation that any of these employees is not required to work in odd-numbered years on days which would have been election days in an even-numbered year. The result reached by the circuit court would result in an over-compensation rather than an equalization, because other city employees would be compensated for only 10 holidays in odd-numbered years rather than 13. The argument that firemen are to be paid for 13 holidays in every year overlooks the fact that they are to be paid for the 13 set forth in specific statutes and three of these are election days that occur biennially instead of annually. There is no indication that firemen are to be paid for holidays that do not occur. Furthermore, the language in § 19-2109, that firemen "may accept paid vacations not to exceed thirteen (13) days in any one [1] year" should be a conclusive indication that they might be paid for less but not more.

Both parties refer to *Deason* v. *City of Rogers,* 247 Ark. 1061, 449 S.W. 2d 410, on this point, but it really has no significance here. As appellees point out, this issue was not before the court in that case. It hardly could have been for the case reached this court on a demurrer to a complaint of a policeman seeking pay for the

13 holidays whether he worked or did not work on the holidays. The case was remanded, and there is no holding either express or implied that the policeman was entitled to pay for 13 days each year.

The fact that Fort Smith previously allowed 13 days of vacation each year as equalization has no real bearing on the question, because an administrative or legislative determination by the officials of one city certainly is not to be accorded any significant weight in construction of a statute governing hundreds of cities and towns. There is no maximum limit on the number of days of vacation a city may allow firemen.

We likewise agree with appellant that the city is not required to give holiday equalization pay for 13 days to those firemen who did not receive paid holiday vacations prior to July 1, 1971. The circuit court held that the city could not provide for these benefits by granting days of paid vacation. Yet, some of the firemen had already been granted 13 days of paid vacation. The city provided for equalization pay for seven holidays to those who had not. The mid-year election made by the firemen would certainly be disruptive to orderly administration of the department's financing, to say the least. But the city does not question the right of the firemen to make a new election at the time they did. Consequently, we do not have to be concerned with that question. Yet, it seems that, insofar as possible, the city could take steps to make the election applicable only for one-half the year and allow paid vacation time for all holidays to be considered in excess of the seven for which pay is being added.

We cannot agree that this issue is not before the court. It is clear that the circuit judge thought it was. In their complaint appellees asked that those firemen who had not been given 13 additional days of paid vacation be awarded a judgment in the amount of equalization pay due them. Evidence was given on the subject, without objection by appellees. The trial court in its judgment stated the opposing contentions of the parties on this issue, and we find no objection raised to this statement.

The judgment is reversed.

BYRD, J., dissenting.

CONLEY BYRD, Justice, dissenting. It looks to me that when the Legislature got through enacting Ark. Stat. Ann. §§ 19-2108 and 19-2109, the firemen in the several cities of this state were entitled to be paid for 13 holidays at "each man's daily rate of pay", and that instead thereof, each firemen had an option to elect to take an additional 13 days vacation. Now that the majority of this court has interpreted this statute, thirteen does not mean thirteen but ten. "Daily rate of pay" is now an average wage selected by the city, and the option to receive vacation time in lieu of pay is a qualified option subject to the control of the city's budget.

I submit that every court in this nation, except this court, that has been called upon to construe the term "daily rate of pay" or "daily wage" has calculated the "daily rate of pay" in the same manner that the trial court used—*i.e.,* by dividing the pay received during the pay period by the number of days worked. See *Carlson* v. *Condon-Kiewit Co.,* 135 Neb. 587, 283 N.W. 220 (1939), and *Franklin* v. *J. P. Floria & Co.,* 158 So. 591 (La. App. 1935). Laws are designed to promote the general welfare without regard to specific and individual results.

For the reasons stated I would affirm the trial court.

HAROLD UTLEY ET UX *v.* DAVID RUFF

73-171 502 S.W. 2d 629

Opinion delivered December 24, 1973

Williams & Gardner, for appellants.

James K. Young, for appellee.

J. Fred Jones, Justice. This is an appeal by Harold Utley and wife from a chancery court decree vesting title to a triangular piece of land in David Ruff by adverse possession. For the purpose of clarifying the issues on this appeal, the appellee Ruff is the unquestioned owner of a two acre plot of land in Pope County described as follows:

> "Part of the NE¼ of the NW¼ of Section 34, Township 9 North, Range 20 West described as beginning at a point 856 North of the Southwest corner of said NE¼ of the NW¼, run North 330 feet; thence East 240 feet; thence South 330 feet; thence West 240 feet to the point of beginning."

The appellant Utley holds record title to land in the NW¼ of the NW¼ of Section 34 adjacent to, and immediately west, of Mr. Ruff's land. State Highway No. 7 runs in a southeasterly direction across the east side of the NW¼ of the NW¼ of Section 34 and this litigation concerns the ownership of that portion of the NW¼ of the NW¼ lying east of the highway and between the highway and Ruff's two acre tract in the NE¼ of the NW¼. Utley claims it under the deed record title and Ruff claims it by adverse possession. The litigation arose when Utley built a fence along the east boundary line of the NW¼ of the NW¼ between Ruff's described land and the highway, and Ruff filed suit in chancery for removal of the fence alleging that he had acquired title to the land between Utley's new fence and the highway by adverse possession. Of course Ruff assumed the entire burden of affirmatively proving his title by adverse possession. The chancellor found in favor of Ruff, but on trial de novo we are of the opinion that the chancellor's findings and decree are against the preponderance of the evidence.

There were two survey plats made and prepared by surveyor Ragsdale and one made and prepared by surveyor Orton placed in evidence. These survey plats differ as to the exact location of Highway 7 in relation to the Ruff two acre tract. Ragsdale admitted that his surveys did not accurately locate the highway in relation to the Ruff land as they were not made for that purpose. All the sur-

veys substantially agree as to the location of the division line between the northwest of the northwest and the northeast of the northwest, so that line in relation to the highway becomes immaterial since Ruff claims by adverse possession all the land between the west boundary line of his two acre tract and the highway. The chancellor accepted the Orton survey and we see no reason to discuss the accuracy or differences in the surveys.

The law on adverse possession is well established in Arkansas, but the difficulty arises in applying the law to the facts established by evidence in a given case. The evidence in the case at bar is rather clear that Ruff's two acre tract has never been enclosed by fence and has not been in cultivation since about 1927. It is also clear that the portion he claims by adverse possession has never been in cultivation or enclosed by fence.

Title to land by adverse possession does not arise as a right to the one in possession; it arises as a result of statutory limitations on the rights of entry by the one out of possession. Possession alone does not ripen into ownership, but the possession must be *adverse* to the true owner or record title holder before his title is in any way affected by the possession, and the word "adverse" carries considerable weight. With the exception of saving clauses in favor of minors and insane persons, Ark. Stat. Ann. § 37-101 (Repl. 1962) reads as follows:

> "No person or persons, or their heirs shall have, sue or maintain any action or suit, either in law or equity, for any lands, tenements or hereditaments but within seven [7] years next after his, her or their rights to commence, have or maintain such suit shall have come, fallen or accrued: and all suits, either in law or equity, for the recovery of any lands, tenements or hereditaments shall be had and sued within seven [7] years next after title or cause of action accrued, and no time after said seven [7] years shall have passed."

This statute does not say or mean that one in possession of land for seven years thereby obtains title to it.

The statute simply says and means that when one is in possession of land, no one may question his claim of ownership except within seven years after the cause of action first accrues. So in any case of adverse possession the primary questions are, when did the possession become adverse and when did the cause of action accrue. These questions have been before this court in many cases.

There is some difference between adverse possession under color of title and adverse possession where there is no color of title. The primary difference is that in the absence of color of title possession is limited to the land *actually occupied* (sometimes referred to as "pedal possession"); whereas in adverse possession under color of title, the actual possession, by presumption of law, is constructively limited to the instrument which provides color of title. *Dierks Lbr. & Coal Co.* v. *Vaughn,* 131 Fed. Supp. 219; *Bradbury* v. *Dumond,* 80 Ark. 82, 96 S.W. 390; 11 L.R.A. (N.S.) 772.

One of the cardinal principles of adverse possession in order that it may ripen into ownership is that the possession for seven years must have been actual, open, notorious, continuous, hostile and exclusive, and it must be accompanied with an intent to hold against the true owner. *Terral* v. *Brooks,* 194 Ark. 311, 108 S.W. 2d 489; *Stricker* v. *Britt,* 203 Ark. 197, 157 S.W. 2d 18; *Montgomery* v. *Wallace,* 216 Ark. 525, 226 S.W. 2d 551.

Culver v. *Gillian,* 160 Ark. 397, 254 S.W. 681, was an adverse possession case without color of title. The adverse claimant submitted proof that he put up a sign on the property forbidding trespassers from coming there; that at one time he had underbrush cleared and some of the larger trees cut down; that one year he planted some garden seed on the property, and that within the statutory period he enclosed and rented a part of the land. In holding the evidence insufficient to establish title by adverse possession, this court said:

> "[T]o constitute an adverse possession, there need not be a fence or building, yet there must be such visible and notorious acts of ownership exercised

over the premises continuously, for the time limited by the statute, that the owner of the paper title would have knowledge of the fact, or that his knowledge may be presumed as a fact. In other words, it has been well said that if the claimant 'raises his flag and keeps it up,' continuously for the statutory period of time, knowledge of his hostile claim of title may be inferred as a matter of fact.

In the present case it may be said that, under the circumstances shown by the defendant himself, there has been no actual, visible, hostile appropriation of the lots, to the exclusion of the owner of the paper title, continuously for seven years. The lots were uninclosed and unimproved. There was no actual continuous use of the lots by the defendant of such unequivocal character as to reasonably indicate to the owner that the defendant was making a hostile claim to the lots. *Norwood* v. *Mayo,* 153 Ark. 620.

The defendant claims to have gone into possession of the lots in 1907 and to have held adverse possession ever since. He describes his adverse possession, however, and it is not of such a substantial character as to give him title to the lots. At one time he had the underbrush cleared and some of the larger trees cut down. One year he planted and cultivated a few garden seed. He did nothing from that time until the suit was brought, except that, in 1917, a part of the lots were inclosed and rented. It is true that, in the beginning, he put up a sign on the lots forbidding trespassers from coming there. This of itself would not be sufficient to show adverse possession of the lots against the true owner. It is not even shown that the sign remained posted up continuously for seven years. Therefore we hold that, under his own testimony, the defendant did not acquire title to the lots by adverse possession."

In *Coons* v. *Lawler,* 237 Ark. 350, 372 S.W. 2d 826, we pointed out that to prevail on a claim of adverse possession not under color of title one must show actual or pedal possession to the extent of the claimed boundaries,

and in that case the acts of the plaintiff in constructing a septic tank, filling in a low place on the disputed strip, parking trailers on the property at irregular intervals, planting a row of trees on the property and building a boat dock, fell short of that adverse possession required for a trespasser's claim to ripen into title.

We have also held that seasonable cultivation of patches on unenclosed and undefined lands, without color of title, is insufficient to constitute the continuous, pedal, and actual possession to the extent of the claimed boundaries for the seven years that the law requires of an adverse possessor. *Hill* v. *Surratt,* 240 Ark. 122, 398 S.W. 2d 225. See also *Dierks* v. *Vaughn,* 131 Fed Supp. 219, affirmed 221 Fed. 2d 695 and the Arkansas cases therein cited.

To constitute effective *adverse* possession the possession must be continuous for the full period; if there is a break in the continuity, the adverse holding before and since the break cannot be tacked in computing the period of limitations. *Brown* v. *Hanaver,* 48 Ark. 277, 3 S.W. 27; *Nicklace* v. *Dickerson,* 65 Ark. 422, 46 S.W. 945. See also *Byers* v. *Danley,* 27 Ark. 77; *Pulaski County* v. *State,* 42 Ark. 118.

As already stated, Mr. Ruff had the burden of establishing his claim of title by adverse possession, so we now examine the evidence most favorable to his claim. Mr. Ruff identified a redemption deed to his grandfather, D. P. Ruff, dated in 1896 calling for "Pt NE NW Sec. 34 Twp. 9 Range 20—2 acres." He said he interited the property as the last of the family In pointing out the land in litigation from an aerial photograph, Mr. Ruff said:

> "This little triangle angle right here, Northwest, Northwest, and my property runs to these trees. There is some very large old trees right here that we use to use for shade when we was working there. We use to rent it out and turned off the road and came down here and angled into that property. About where the line between the Utley property use to be the Carter place and our property joins. Angled into that over this little triangle."

Mr. Ruff said he had always regarded the highway as his west line. He said the south, east and north sides of his property had been fenced but there had never been a fence completely around it. He said the fence along his north line came out to where the trees stopped 30 or 40 feet from the highway. He said potatoes and cotton were raised on his "little patch" until about 1927 when he went into the Navy. He said he never knew of anyone claiming the property here involved until Utley erected his fence in 1970. He said that prior to 1970 he did not know where the quarter section lines were; that the highway had been moved from its previous location but that he had always claimed his land as extending to the highway. Mr. Ruff then testified as follows:

"Q. What is the description on your redemption certificate?

A. Well, it only shows 3 acres. 34, 9, 20. Part of the Northeast, Northwest.

Q. Now, are you claiming any property of the Northwest, Northwest?

A. Yes, sir.

Q. And how did you get title to that?

A. Adverse possession.

Q. And I take it you never had any deed or any other evidence of title?

A. No, sir.

Q. Have you fenced that property?

A. No, sir.

Q. You didn't fence it along the edge of the road?

A. No, sir, Mr. Utley did that for me.

Q. Well, was there ever a fence running on your property line that would be your west property line?

A. Not to my knowledge.

Q. You don't recall any?

A. I don't recall any fence being on the west side of our property."

Mr. Ruff said he had two surveys made of his property and both surveys found his southwest corner to be in the highway. He said his two acre tract was located in the northeast quarter of the northwest quarter and he did not claim any property in the northwest of the northwest except the little triangle by adverse possession.

"[W]e just went across it, in an out of the property, as a good, easy natural place coming down from Dover with equipment. That was the first place you approached the property, and we just angled off the road into it by those big trees."

Mr. Lawrence Campbell testified that he is 78 years of age and has been familiar with the Ruff land for about 60 or 70 years. He said he attempted to purchase the property at one time from Mrs. Elizabeth Ruff but she could not make up her mind about selling it. He said he always assumed the Ruff family owned the property, and never did hear of anyone else claiming it. He said he never did know where the property lines were located; that he didn't get that far along in his negotiations with Mrs. Ruff to inquire as to the property lines; that he assumed the Ruff property extended west to the highway, but never did hear anyone claim one way or the other as to the property lines.

Mr. Newton Powers testified that about 1920 the Ruff two acres was planted in sweet potatoes. He said he plowed the potatoes up and stored them in working out a doctor's bill he owed to Mrs. Ruff's brother. He said he never heard of anyone claiming title to the land involved, and did not hear of Ruff claiming title to it until the past few days.

John Page testified that he was the administrator of the Carter estate (Utley's grantor); that he never did know the exact location of the south line of the Carter property, but knew that Ruff claimed some property south of the Carter property. He said he also tried to purchase the property from Mrs. Ruff for a filling station. He said he understood that the Ruff property extended to the road but that he didn't know where the lines were and that he doesn't remember Mrs. Ruff telling him it extended to the road.

County Judge Grant testified that he was originally in the real estate business and had an open listing to sell all of Mr. Ruff's land. He said he had one prospective purchaser for the land here involved, but after a survey by Mr. Ragsdale indicated that about half of the property fronted on the highway, the prospective purchaser refused to buy, because he wanted all the highway frontage.

Chancellor Richard Mobley testified that in 1961, before he was elected chancellor, he represented the Carter heirs in partitioning their property, a part of which was later sold to the appellant Utley. He said he had also represented the Ruffs from time to time and it was his understanding that both the Utley land and the Ruff two acres were bounded on the west by Highway 7. He said he never did hear of anyone making claim to any property east of the highway adjacent to the Ruff property. He said he prepared the deed of conveyance from Carter to the appellant Utley and included in the description: "All of the Northwest quarter of the Northwest quarter of Section 34, Township 9 North, Range 20 West, lying East of State Highway 7." He said there was some question as to the exact acreage owned by the Carters and this description was included in the deed to make sure that Utley would receive everything the Carters owned. He said he prepared the deed from the description in the abstract of title and the name "Ruff" was not mentioned in the abstract.

Mr. Ragsdale testified that he made a survey of the Carter land as testified by Chancellor Mobley but his

testimony adds nothing in support of adverse possession of the land here involved. He did say the property was grown up in bushes and trees and did not appear to have been in use for a long time.

Mr. Ruff, on recall, testified that he had paid taxes on two acres in the *northeast* of the northwest since 1896. He said that when he went into the Navy in 1927, the two acre tract had been in cultivation as far back as he could remember. He then testified as follows:

"Q. When did you go in the navy?

A. January 22, 1927.

Q. Did you cultivate it?

A. Yes, sir.

Q. What crops did you raise on it?

A. Cotton.

Q. How far out did you come? Did you come to the road?

A. No, we came to the big trees that is setting just about on that quarter section line on the west side of our property. *This little triangle that continues out to the road, we merely used that to go in an out of the property.*

Q. Is that where you parked your team?

A. That's right. Not only myself, but the renters that we rented that land in successive years. There is one particular large tree there and they parked their team and wagon when we were chopping cotton and picking cotton. We would take the teams there with a cultivator and cultivate it.

Q. But for a period of ten to fifteen years this was in cultivation?

A. More than that I'm sure.

Q. By cultivation, do you mean row crops?

A. Cotton and potatoes that I know of. Dr. Truette, my second uncle, rented it for many years from my grandmother and planted sweet potatoes in there.

Q. Is that the sweet potatoes Mr. Powers was talking about?

A. That's correct. He worked it with day labor to collect some of his fees. The farmers owed him money and they would come in and do the work." (Emphasis added).

Mr. Utley testified that he purchased and claims the property here involved in the northwest quarter of the northwest quarter of the section. He and surveyor Orton testified that the property was grown up in trees, vines and undergrowth to the extent that a bulldozer was employed for the purpose of clearing the property line for the purpose of a survey. The both testified they found an old fence row consisting of some posts and old wire running north and south for some distance from the north line of the property and about ten feet west of the true boundary line between the northeast quarter and the northwest quarter of the section. Mr. Utley said he built his fence on the true boundary line as established by Orton's survey. We cannot say that the chancellor erred in accepting Orton's survey as establishing the true division line between the northwest quarter and the northeast quarter of section 34 here involved.

The record indicates that the chancellor may have viewed some of Utley's testimony as to his own exercise of dominion and rights of ownership over the property involved with considerable skepticism and for good reason. But the burden was on Ruff to prove his own title by adverse possession as previously defined in the decisions, *supra*. Mr. Ruff recognized his burden in this regard and readily assumed it, but as we view the record, he fell far short of proving adverse possession. He simply proved by several witnesses that they assumed his land

extended west to Highway 7 and had never heard anyone claim that it did not. According to Mr. Ruff's own testimony, he had always considered the highway as being the west boundary of his two acre tract. His testimony was straightforward and carries the ring of truth, but it falls far short of the proof required. He simply says in substance that his two acres in the northeast of the northwest were in cultivation prior to 1927 and the workers, while attending crops on the land, parked wagons and ate their lunches under a tree on the edge of the property here involved. He denied knowledge of any fence ever existing north and south on the west side of his property and said that he only used the property here involved in gaining access to the two acres in cultivation. Of course, use of a passageway over property of another does not affect title to the property outside the passageway and by the same token, the right to a passageway over the property of another is not dependent upon adverse possession of all the property over which the passageway extends.

As already pointed out, for Mr. Ruff to have prevailed in this case, it would have been necessary for him to have proven actual acts indicating his claim of ownership in the possession of the land involved, otherwise the true owner would never know that anyone was claiming adversely and the true owner's cause of action would not accrue until he did have actual or constructive knowledge or notice that his land was being claimed by another. The possession in order to ripen into ownership must be actual, open, notorious, continuous (for seven years), hostile, exclusive, and accompanied by an intent to hold against its true owner.

The decree is reversed.

HARRIS, C.J., not participating.

TOMMY DAIL, A/K/A TOMMY DALE *v.* STATE OF ARKANSAS

CR 73-133 502 S.W. 2d 456

Opinion delivered December 24, 1973

John R. Henry, for appellant.

Jim Guy Tucker, Atty. Gen., by: *O. H. Hargraves,* Deputy Atty. Gen., for appellee.

J. FRED JONES, Justice. Tommy Dale was convicted at a jury trial for selling marijuana. He was sentenced to three years in the Arkansas Department of Correction and fined $500 with the fine suspended. On appeal to this court he contends that the trial court erred in admitting into evidence a plastic bag containing vegetable material identified by a witness as marijuana. He also contends that the trial court erred in failing to grant a mistrial when the prosecuting attorney elicited from the state's witness, Ron Rutledge, testimony to the effect that Tommy Dale had committed other crimes. We find no merit in either contention.

William Ronald Rutledge, an undercover police officer, testified that he purchased a "lid" of substance represented to, and believed by, him to be marijuana from Tommy Dale. He said that when he first met Mr. Dale, Dale informed him that he had access to a quantity of drugs. He said that after his first conversation with Dale he returned later and was told by the appellant Dale that he dealt in pounds of marijuana and did not

deal in "lids." He described "lids" as being plastic bags containing approximately one ounce of marijuana. He said that further discussion of marijuana with Dale resulted in Dale opening a suitcase containing about 20 or 25 bags of what appeared to be marijuana. He said that Dale handed him a plastic bag containing a substance which he believed to be marijuana and be handed Dale $15 in payment. He said he called Sergeant Silvey and delivered the bag with its contents to him. He said the bag was closed by a rubber band wrapped around it; that he placed his label on the bag when he delivered it to Silvey; that the bag offered into evidence was the same bag he purchased from Dale and the contents of the bag appeared to be the same.

Sergeant Silvey testified that he was familiar with the appearance of marijuana; that Rutledge delivered the bag to him and that the bag contained what appeared to be marijuana. He said he placed the bag with its contents in a locked filing cabinet in the police headquarters building and that he, together with Captain Walker and Lieutenant Smith were the only officers in the department having keys or access to the cabinet. He said that he and Captain Walker removed the bag from the locked cabinet and took the bag with its contents to the laboratory in Little Rock for analysis. He said Lieutenant Smith was present when the bag was removed from the filing cabinet; that the bag still had the rubber band around it, together with the label, and that it had not been altered in any way before he and Captain Walker took it to the laboratory for analysis. He said he was with Captain Walker when Captain Walker handed the package to the chemist at the laboratory in Little Rock. Sergeant Silvey's testimony was corroborated by Lieutenant Smith and the testimony of Captain Walker. Manuel Holcomb testified that he received the plastic bag and contents offered in evidence from Captain Walker on November 21, 1972; that he kept the bag and contents under lock and key in the storeroom at the laboratory until he made an analysis of the substance in the bag on November 22. He said the chemical analysis showed the substance in the bag to be marijuana, and this witness identified the package and contents offered in evidence as being the same he received from Captain Walker. The chain of possession was well preserved

under the evidence in this case and we find no merit in the appellant's first contention.

As to Dale's second contention, relative to the testimony of Rutledge on redirect examination, the record appears as follows:

> "Q. I believe, you testified that he mentioned, that Tommy Dale mentioned that he had other drugs?
> A. Yes, sir.
> Q. But I don't believe you, did he mention what specific drugs he had?
> A. Yes, sir. He did.
> Q. Tell the jury what he said?
> A. He mentioned cocain and RJS's, which, and marijuana and hash.
> Q. Cocain, hasish—
> A. Cocain, hash, marijuana.
> MR. PARKER: You may ask.
> THE COURT: You may be excused.
> (Witness excused)
> (Note: Conference at bar of The Court.)"

This testimony was then followed by the testimony of Sergeant Silvey, Lieutenant Smith and Captain Walker. After these three witnesses had finished their testimony, the appellant moved for a mistrial and stated his reasons therefore as follows:

> "During the State's re-cross or re-direct examination of the witness, Ron Rutledge, the State elicited testimony that the defendant, Tommy Dale, was in possession of other and had possessed other narcotics, which narcotics, which drugs were named by the witness on the witness stand and in the presence of the jury. At that time, the defendant moved for a mistrial on the grounds that the testimony elicited from the witness Rutledge was not elicited for proof of the allegations set forth in the Information, but for proof of other crimes which are not admissible, which the only purpose for the elicitation of said other crimes was to show that the defendant was a man of bad character, addicted to crime. The defendant would move The Court to declare a mistrial at this time, based upon the Arkansas Supreme Court

decision, Sweatt versus State, reported in 473 S.W. 2nd, 913."

The state resisted the motion on the ground that the statement attributed to Mr. Dale was a part of the res gestae or facts and circumstances surrounding the sale of the marijuana, wherein the defendant at the time stated he was interested in the sale of pounds and not "lids" of marijuana, and that it did not constitute separate offenses as was the situation in *Sweatt* v. *State,* 251 Ark. 650, 473 S.W. 2d 913, relied on by the appellant. The state also opposed the motion because the testimony was not timely objected to. The trial court overruled the motion for a mistrial and stated that in the court's opinion the *Sweatt* case and the rule announced therein were distinguishable on the facts from the case being tried, and that the holding in the *Sweatt* case was not applicable. We agree with the trial court.

In *Sweatt* v. *State, supra,* the defendant was charged with selling or bartering LSD, a hallucinatory drug, to Robbie White, a 14-year-old boy. Robbie White testified that he bought one LSD tablet from Sweatt for $3.00 on credit and that Sweatt told him the strength of the tablet was 300 micrograms. White testified that after taking the tablet it caused him to "go on a trip"; that his vision was "messed up" and couldn't do things right and felt dead. We held that the jury was justified in concluding from this testimony that Sweatt said the tablet was LSD and in fact it was. In the *Sweatt* case, however, the facts are distinguished from those in the case at bar in the following language:

> "Upon the second point the appellant is right in his contention that the court erred in permitting the State to prove other offenses committed by Sweatt. The court allowed the prosecution to introduce much testimony showing that Sweatt had had marijuana at his apartment and had sold it. In fact, as in *Moore* v. *State,* 227 Ark. 544, 299 S.W. 2d 838 (1957), the other offenses were proved in more detail than was the charge actually being tried."

In *Sweatt* we then reiterated the basic rules stated in *Alford* v. *State,* 223 Ark. 330, 266 S.W. 2d 804 (1954), as follows:

> "'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.'"

We are of the opinion that the evidence objected to in the case at bar falls more within the rule announced in *Davis* v. *State,* 182 Ark. 123, 30 S.W. 2d 830, and cases therein cited. Davis and another, were charged with murder in the perpetration of robbery. The victim Weed was killed about 8 o'clock and a witness was permitted to testify that at a time before 8 o'clock and at a place near the scene of the homicide, he was robbed by the appellants and that they were armed. In that case we said:

> "The testimony was, therefore, competent to show the business in which appellants were engaged that night, and the probable purpose for which they went to Weed's place of business soon thereafter.
>
> It is well settled that if testimony tends to prove the commission of the crime charged in the indictment, it is not to be excluded because it also tends to show the commission of another or different crime."

The testimony objected to in the case at bar was not independent testimony of separate crimes committed by the accused, but was testimony of the witness as to what products the accused said he had available, after which the witness elected to purchase the marijuana. We are of the opinion that the evidence was admissible in the context given and the trial court did not err in refusing Dale's motion for a mistrial. Having reached this conclusion we do not pass on the matter of timely objection argued by the state. However, in *Powell* v. *State,* 231 Ark. 737, 332 S.W. 483, we said:

> "[A]n objection to be effective must be made at the first opportunity to do so, or appellant must move for exclusion. See *Clardy* v. *State,* 96 Ark. 52, 131 S. W. 46. At any rate, because of the delayed objection,

the matter of granting a mistrial was in the sound discretion of the trial court and its action will not be reversed unless an abuse of that discretion is shown."

In the case at bar, we are of the opinion that the appellant's second contention is without merit for the reason that the evidence was simply a part of Dale's offer of the drugs he had for sale and did not amount to testimony of other criminal acts.

The judgment is affirmed.

HARRIS, C. J., not participating.

W. H. CASON, FIDELITY AND DEPOSIT COMPANY OF MARYLAND ET AL *v.* W. J. LEVERETTE

73-59 502 S.W. 2d 459

Opinion delivered December 24, 1973

Sloan & Sloan and *Wright, Lindsey & Jennings,* for R. H. White, Mary Rose White and Fidelity & Deposit Co. of Md.

Sharpe & Long, for appellee W. J. Leverette.

Henry Wilkinson and *Rubens & Rubens,* for appellant-appellee W. H. Cason.

CONLEY BYRD, Justice. This litigation arises out of the refusal of appellants R. H. White and Mary Rose White to vacate lands belonging to appellant and cross-appellee W. H. Cason after the expiration of a written lease.

The record shows that R. H. White and his wife Mary Rose White are substantial land owners in St. Francis County. In addition to farming the 1500 acres owned by them, they, for a number of years, have rented other land including Cason's 240 acres. Up until some seven years before this litigation, appellee W. J. Leverette had worked as a hired hand for the Whites and in that capacity had farmed the Cason land. The lease under which the Whites farmed the Cason land expired on December 30, 1970. During the spring of 1970, Cason and Leverette started negotiations which ultimately resulted in a two year written lease dated March 1, 1971. That the negotiations between Cason and Leverette had re-

sulted in a contract between the two during 1970, is evidenced by a letter from Cason's counsel to White under date of December 23, 1970. Cason's unlawful detainer action against White resulted in judgment under date of April 29, 1971, against White for possession and for damages in the amount of $3,583.33. White promptly filed a notice of appeal and filed a supersedeas bond with appellant Fidelity and Deposit Company of Maryland as the corporate surety. The Whites continued in possession after the supersedeas was filed and made and harvested a bean and a rice crop from the land, but neglected to file the appeal from the unlawful detainer action in time for this Court to take jurisdiction. The Whites satisfied the $3,583.33 judgment, returned possession to Cason and offered a $7,000.00 check in full settlement of all liability.

This litigation was commenced when Cason brought action No. 7432 against the Whites and their supersedeas surety seeking double the rental value for the time from May through December. Leverette then brought an action (cause No. 7438) against Cason claiming damages by the way of lost profits upon his rental contract. The Whites and their supersedeas surety were vouched into this action by Cason. By agreement the two actions were consolidated for trial. The jury upon interrogatories found that Cason was liable to Leverette in the amount of $10,000.00 for his loss of profits and that the Whites were liable to Cason in the amount of $7,000.00. Upon motions by Cason the trial court set aside the $7,000 verdict in favor of Cason and granted a judgment N.O.V. in favor of Cason against the Whites and their supersedeas surety for the $10,000 Leverette verdict together with an attorney's fee in the amount of $1,000. For reversal the several points hereinafter discussed are raised.

POINT NO. 1. The Whites and their supersedeas surety here contend that the first action is res judicata of the issues here involved and that the filing of cause No. 7432 by Cason amounts to the splitting of a cause of action. We do not agree. In the first place the issue of double damages was raised in the first action and

thus the holding in *Coley* v. *Westbrook,* 208 Ark. 914, 188 S.W. 2d 141 (1945), is not applicable. Furthermore, we held in *Dover* v. *Henderson,* 197 Ark. 971, 125 S.W. 2d 798 (1939), that the liability of a principal and surety on a supersedeas bond in an unlawful detainer action for damages subsequent to the entry of the judgment for possession should be tested by an action at law on the bond.

POINT NO. 2. The Whites contend that the court erred in not permitting them to introduce evidence to show that their refusal to vacate was not willful. They also complain that the court erred in instructing the jury that their holding over was willful. Their proffer of proof on this point concerned only evidence that was either presented or should have been presented in the first trial. The trial court properly held that these issues were concluded by the first trial.

POINT NO. 3. The Whites say that Leverette's claim for loss of profits should have been dismissed because his proof on the issue was speculative and conjectural. We do not agree.

The record shows that Leverette was a man of little or no formal education. He was farming 240 acres of land only one quarter of a mile from the Cason land, and, for four of the years he had worked for White, he had farmed the Cason lands. Leverette testified that as he saw the two properties they were identical. On the 48.5 acres of rice that he farmed he made 5,090.44 bushels of rice for a total value of $13,498.07. On the 175 acres of bean land he made 4,621.33 bushels for a total value of $14,336.61. He testified that his total cost of making the two crops was $9,000. Without benefit of records he itemized from the witness stand $8,100 of the costs of making the crops on the lands he farmed. He then took his yield per acre and by multiplying that against the bean and rice allotments on the Cason lands arrived at the total values he would have received had he been permitted to farm the Cason land. Leverette then arrived at what the expenses would have been in making the crop by determining his per acre cost of making the

same crops on the lands he did farm. He also showed that he had acquired the necessary tractors and combines to farm the land before the trial of the first action. Not only White but each witness he called testified that Leverette was a good farmer. Leverette testified he would have made 104 bushels of rice per acre on the Cason land. The Whites admittedly harvested around a hundred bushels per acre.

Leverette testified without contradiction that there was no other land for rent at the time the supersedeas was executed. While there is other evidence on behalf of the Whites that would raise issues as to Leverette's credibility, we cannot say here that the evidence as to lost profits was so speculative or conjectural that a jury issue was not made. At least the evidence meets the standard laid down in *Crow* v. *Russell,* 226 Ark. 121, 289 S.W. 2d 195 (1956).

Notwithstanding that the issue of Cason's liability for loss of profits by Leverette was submitted to the jury upon instructions submitted by White over Cason's objections, the Whites now apparently argue that such profits are not an element of damages for the breach of lease. Cason also makes the same argument but concedes the issue is harmless or should be waived as to him if the judgment over against the Whites is sustained. Our cases on the issue have reached different results. In *Thomas* v. *Croom,* 102 Ark. 108, 143 S.W. 88 (1912), and *Brown* v. *Bradford,* 175 Ark. 823, 1 S.W. 2d 14 (1927), we held that loss profits were not an element of damages. In *Harmon* v. *Frye,* 103 Ark. 584, 148 S.W. 269 (1912), *Black* v. *Hogsett,* 145 Ark. 178, 224 S.W. 439 (1920), and *Crow* v. *Russell,* 226 Ark. 121, 289 S.W. 2d 195 (1956), we permitted the recovery of lost profits for breach of a lease agreement. Our cases in allowing or disallowing lost profits as an element of damages on a lease contract do not explain why a lease contract ought to be treated any differently from any other type of contract in which loss of prospective profits is allowed. See *Williams* v. *Hildebrand,* 220 Ark. 202, 247 S.W. 2d 356 (1952). However, we need not decide here whether lost profits are a compensable element of damages for we have consistently held that a party who requests or

acquiesces in an instruction submitting a particular issue to the jury is not in a position to thereafter complain, *Farmers Co-op Assn'n Inc.* v. *Garrison,* 248 Ark. 948, 454 S.W. 2d 644 (1970). The record here demonstrates that during the trial neither White nor Fidelity raised the compensability of lost profits as an element of damages. On the other hand the record demonstrates that the issue was submitted to the jury upon an instruction requested by White and without objection on the part of Fidelity. Cason has waived the issue here by stipulation.

POINT NO. 4. The Whites argue that Leverette is not entitled to recover damages for breach of his lease convenant, because he knew White was in possession when the lease was executed. We pointed out in *Morrison* v. *Weinstein,* 151 Ark. 255, 236 S.W. 585 (1921), that the possession or holding over of a prior tenant did not prevent a recovery by a tenant against a landlord upon a contractual covenant to give possession, for the liability grows out of the covenant.

POINT NO. 5. The Whites here contend that the trial court erred in rendering judgment non obstante verdicto in favor of Leverette against White in the Leverette v. Cason case No. 7438.

In making this argument they contend only that the issue was a fact one for the jury. We do not agree. As pointed out in *Garrott* v. *Kendal,* 212 Ark. 210, 205 S.W. 2d 192 (1947), a landlord is acting within his rights to execute a lease to another tenant. One who, by his wrongful detention, causes the landlord to become liable to a tenant, such as Leverette, renders himself liable for the damages recovered of the landlord as a matter of law.

POINT NO. 6. Neither do we find any merit in the White's contention that the trial court erred in setting aside the $7,000 damage verdict in favor of Cason. The proof showed that the Whites had tendered a $7,000 check in full payment of the 1971 rent. Also the trial court had instructed the jury that the Whites were liable for double the rent value but that their corporate surety

was only liable for the rent value. When the jury returned the $7,000 verdict, it was reasonably apparent to the trial court that the jury had become confused between the two instructions. When we consider that the trial court not only had the advantage of seeing the parties but heard the arguments of counsel, we cannot say that he abused his discretion in setting aside the verdict.

POINT NO. 7. We find no merit in the contention that the court erred in awarding an attorney's fee as damages to Cason in defending the suit by Leverett. See *Garrott* v. *Kendal, supra.* Neither do we find the $1,000 fee excessive for defending the action.

Affirmed.

JONES, J., dissents.

J. FRED JONES, Justice, dissenting. I do not agree with the majority opinion in this case. I would reverse the judgment in favor of Leverette.

In the first place, when Leverette entered into the written lease with Cason on March 1, 1971, he did so with his eyes wide open to the unlawful detention action then pending between Cason and White. White's written lease with Cason terminated on December 30, 1970, but he was still in possession of the land on March 1, 1971, and Leverette was bound to have known that the contest between Cason and White was for a determination of whether White had rented the land for 1971, or whether Cason was entitled to immediate possession. Leverette agreed to pay rent not in dollars and cents but in bushels of rice and soybeans whether he planted or raised anything on the leased land or not. It is my view that Leverette practically invited such damages as he may have sustained in this case and that he should bear at least some of the consequences of his own actions. That, however, is not the basis of my dissent.

It is my view that Leverette simply failed to prove the damages awarded him by competent evidence in a case

of this kind. He based his damages on what he said his *profits* would have amounted to from the Cason land had it been available to him on March 1, 1971. It is my view that evidence as to prospective profits from annual crops *not* raised on leased lands is entirely too speculative and uncertain to constitute competent and admissible evidence in measuring damages for breach of contract for the lease or rental of such lands.

In arriving at the profits he would have made on the Cason land, it is true, as pointed out by the majority, Leverette did itemize, without benefit of records, his cost of making a crop on other lands he farmed. That is one of the difficulties I find in the admissibility of such evidence. It could be totally self-serving and immune to successful challenge. If the market price of rice should go down and the market price of soybeans should increase during the crop year, there would be nothing to prevent such tenant out of possession from testifying he intended to plant all the land in soybeans and collect his damages on that basis. As I view the majority opinion, it would open the door to proof of prospective profits from the highest and best use of land intended by the tenant as the measure of damages for breach of a farm lease.

I would still adhere to the principle announced as early as 1883 in the case of *Rose* v. *Wynn,* 42 Ark. 257. In that case Rose leased a hotel to Wynn but was unable to deliver possession because a tenant was holding over under a former lease and was successfully resisting eviction under a retention bond. In proof of damages Wynn offered evidence as to the difference he paid for boarding his family and what it would have cost to live in the hotel had possession been delivered to him. In rejecting this evidence as too conjectural and uncertain this court said:

> "The books agree that in an action by a lessee against a lessor for damages for refusal or failure to deliver possession of the demised premises the general rule for the measure of damages is the difference between the rent reserved and the value of the premises for the term.

> If the value of the premises for the term is no greater than the rent which tenant has agreed to pay, then the latter is not substantially injured, and can in general recover only nominal damages, though the landlord without just cause refused to give possession. But if the value of the premises is greater than the rent to be paid, the lessee is entitled to the benefit of his contract, and this will ordinarily consist of the difference between the two amounts. *Adair* v. *Boyle,* 20 Iowa 242; *Trull* v. *Granger,* 4 *Selden, (New York Court of Appeals),* 115; 3 *Sutherland on Damages,* 150; *Green* v. *Williams,* 45 Ill. 206; *Dean* v. *Roesler,* 1 *Hilton* 422.
>
> It seems, also, from the current of adjudications, that if other damages have resulted *as the direct and necessary or natural consequence of the defendant's breach* of the contract, these are also recoverable. For example, if plaintiff in good faith, and relying on the contract, has made preparation to take possession, and these have been rendered useless by the defendant's refusal to comply with his contract, the authorities hold that there may be a recovery for the loss thus sustained." (My emphasis).

I do not contend that in no case can loss of future profits from leased premises be recovered as an element of damages for breach of the lease, but the key words of distinction are those I have emphasized in the above quote from *Rose* v. *Wynn.* In *McElvaney* v. *Smith,* 76 Ark. 468, 88 S.W. 981, we said:

> "When a landlord unlawfully evicts a tenant from the premises, the tenant is entitled to recover as damages whatever loss results to him *as a direct and natural consequence of the wrongful act* of the landlord. If the rental value of the place from which he is evicted is greater than the price he agreed to pay, he may recover this excess and, in addition thereto, any other loss *directly caused by the eviction,* such as the expense of removal to another place." (My emphasis).

In *Thomas* v. *Croom,* 102 Ark. 108, 143 S.W. 88, the

pertinent facts were almost identical to those in the case at bar and in that case we said:

> "The measure of damages for the breach of this implied covenant for possession is the difference between the rental value of the demised premises and the rental price named in the lease, together with such special damages as have necessarily resulted from such breach. * * * The probable profits to a lessee from the cultivation of demised land is not the true measure of his damages resulting from the breach of a covenant for possession, and can not be considered in determining the amount of such damages."

In *Reeves* v. *Romines,* 132 Ark. 599, 201 S.W. 822, Reeves rented land from Romines and was enjoined from cultivating the land in an action brought by Esmonds to whom the land had already been rented for the particular crop year involved. Reeves sued for $600 damages based on the profits he would have made from crops on the land. On the basis of *McElvaney* v. *Smith* and *Thomas* v. *Croom, supra,* we affirmed the trial court in sustaining the demurrer to the complaint.

As already stated, I do not contend that lost profits may not be considered *in any case* for breach of contract for the lease of land or buildings, but I do contend that such lost profits must be ascertainable and result as a direct and natural consequence of the wrongful act and must be proven by evidence free of speculation and conjecture. For example, in the operation of a soda fountain future monthly profits may reasonably be estimated on past monthly profits. *Black* v. *Hogsett,* 145 Ark. 178, 224 S.W. 439. In an egg ranch or a dairy operation, it would appear that daily or monthly profits could be easily and accurately ascertained by simple daily records and such profits could reasonably be projected into the future with some degree of accuracy; but it is my view, that the profits to be derived from rice and soybean farming are an entirely different matter.

It is my view that there are so many hazards and variables controlling the profits any one individual will

derive from rice and soybean farming, or from any other annual field crop production, it would be next to impossible to predict, with any degree of accuracy, the *profits* he would have made from land he did not plant or cultivate, and to prove the amount of such profits without speculation and conjecture.

It is my opinion that the profits Mr. Leverette said he did make on the lands he did farm should not have been accepted in evidence as to profits he would have made on other lands he did not plant or cultivate; and I would reverse the judgment in favor of Leverette and remand for a new trial as to any actual damages, including special damages, he may have sustained as the direct and natural consequence of any wrongful acts of Cason.

MRS. JOEL LAMBERT D/B/A LAMBERT SEED COMPANY *v.* J. D. MARKLEY AND MARIE MARKLEY

73-144 503 S.W. 2d 162

Opinion delivered December 24, 1973
[Rehearing denied January 28, 1974.]

Kirsch, Cathey, Brown & Goodwin, for appellant.

Branch, Adair & Thompson, for appellees.

CONLEY BYRD, Justice. Appellant, Mrs. Joel Lambert, d/b/a Lambert Seed Company, used a two-ton Dodge truck equipped with a "cheater" axle[1] in the operation of her seasonal seed business. While the truck was being driven along the highway near a railroad siding running parallel thereto, the right rear duals from the "cheater" axle became detached, rolled across the ground between the highway and the railroad siding and struck appellee, J. D. Markley, a member of a train crew at work on the siding. Mr. Markley was taken to the hospital where he remained for some time. The railroad employees picked up the dual wheels and transported them to the train station in Paragould where they remained in the control of the railroad company for several days. The driver of appellant's truck did not know that the wheels had become detached until he was stopped at Paragould, several miles from the scene of the accident.

The complaint alleged, and evidence was submitted to the jury upon, the issues of res ipsa loquitur and the specific negligence allegations that appellant failed to maintain her vehicle in a safe operating condition and failed to attach the dual wheels to the truck in such manner to keep the hub and wheels from separating from the truck. There was a dispute in the evidence with reference to the presence or absence of a lock washer required to keep the wheels attached to the truck. However, the trial court submitted the issues to the jury only upon A.M.I. 305, duty to use ordinary care, and A.M.I. 610, res ipsa loquitur. For reversal of a verdict and judgment in favor of Mr. and Mrs. Markley, appellant raises the issues hereinafter discussed.

POINT I. In contending that the trial court erred in giving the res ipsa loquitur instruction, appellant principally relies upon *Ford Motor Company* v. *Fish,* 232 Ark. 270, 335 S.W. 2d 713 (1960). In that case Fish, a game warden, was driving a new Ford pickup which allegedly

[1]This axle sometimes referred to as a tandem axle permits the truck to haul a greater weight under the State's truck licensing laws.

left the highway and caused personal injuries because a defective brake grabbed the right front wheel. Upon proof that the brake mechanism was bolted together at Ford's factory and that it had not been tampered with, the trial court there submitted the issues to the jury on a res ipsa loquitur instruction. We there held the instruction erroneous, but in doing so we neither added to nor qualified the res ipsa loquitur doctrine.

When we remember that the res ipsa loquitur doctrine is based in part upon the theory that the defendant either knows the cause of the accident or has the better opportunity of ascertaining it, it can be readily seen that the case of *Ford Motor Company* v. *Fish, supra,* does not support appellant's position. We there pointed out not only that Fish had not made the necessary showing that he was not also negligent, since he was operating and in possession of the automobile at the time of the injury, but that since the average auto repairman could determine the exact nature of the malfunction of the brake mechanism by merely removing some bolts, the cause of the malfunction could be as easily determined by Fish as by Ford Motor Company. That decision was in accord with the authorities generally which state that if the plaintiff has equal or superior means of information, the doctrine will not apply. See Annotation 46 A.L.R. 2d 110.

In the case before us, Mr. Markley is not in a position to have equal or superior means of information as to the cause of the wheel becoming detached. Even if we assume that the proof shows that the lock washer had been left off the wheel and that caused the wheel to become detached from the truck, that in itself would not establish negligence on the part of appellant. Still the appellant had the better opportunity to have access to all the information as to why her driver did not discover the loosened wheel before it became detached; who placed the wheel on the truck in the first place; whether she had caused proper inspection to be made to see if the wheel was properly secured for operation on the highways; and who could have assembled the wheels without the lock washer being in place. Of course the appellant here furnished proof to the effect that the lock washer was not missing, and, under these circumstances, what we said in *Moon Distributors* v. *White,* 245 Ark. 627, 434 S.W. 2d 56 (1968),

in quoting from *Cassady* v. *Old Colony Street R. Co.*, 184 Mass. 156, 68 N.E. 10, 63 L.R.A. 285 (1903), is most appropriate, to-wit:

> "It is true that, where the evidence shows the precise cause of the accident . . . there is, of course no room for the application of the doctrine of presumption. The real cause being shown, there is no occasion to inquire as to what the presumption would have been as to it if it had not been shown. But if, at the close of the evidence, the cause does not clearly appear, or if there is a dispute as to what it is, then it is open to the plaintiff to argue upon the whole evidence, and the jury are justified in relying upon presumptions, unless they are satisfied that the cause has been shown to be inconsistent with it. An unsuccessful attempt to prove by direct evidence the precise cause does not estop the plaintiff from relying upon the presumption applicable to it."

When the facts are here analyzed, we must conclude that the trial court did not err in giving the res ipsa loquitur instruction. The annotator in 46 A.L.R. 2d 110 points out that a great majority of the courts from other jurisdictions hold that res ipsa loquitur is proper in the case of a detached wheel.

POINT II. Having determined that the case was properly submitted upon the res ipsa loquitur issue, it follows, without further discussion, that the trial court did not err in refusing a directed verdict.

POINT III. Appellant contends that the trial court erred in allowing appellees on direct to read from the deposition of J. C. McDaniel on the theory he was a "managing agent." Different authorities are cited both by appellant and appellees to support their respective contentions that McDaniel was or was not a managing agent within the provisions of Ark. Stat. Ann. § 28-348(d)(2) (Repl. 1962). We need not here determine whether Mr. McDaniel was a "managing agent" for he later took the witness stand and testified to the same facts developed in the deposition. Consequently, the record demonstrates that reading of the deposition was not prejudicial.

POINT IV. Appellant asked the court, in accordance with A.M.I. 603, to instruct the jury that "the fact that an injury occurred is not, of itself, evidence of negligence on the part of anyone." The court declined to give the instruction apparently on the basis that it to some extent conflicted with the res ipsa loquitur instruction which permitted the jury to draw an inference of negligence "from the manner in which the alleged injury occurred."

The drafters of the Arkansas Model Jury Instructions recognized that A.M.I. 603 is inappropriate when Ark. Stat. Ann. § 75-623(c) is applicable. That statute provides: ". . . that if such driver is involved in a collision with a pedestrian in a crosswalk or a vehicle in the intersection after driving past a yield sign without stopping, such collision shall be deemed prima facie evidence of his failure to yield the right-of-way." We can see little difference between the prima facie case raised by the statute and that involved in the detachment of a wheel from a moving vehicle upon a highway. Consequently, where, as here, the case is submitted to the jury only upon the issues of res ipsa loquitur and ordinary care (as distinguished from specific grounds of negligence such as speed and control), we cannot say that in view of the other instructions, the trial court committed prejudicial error in declining to give the instruction.

POINT V. Appellant also contends that the trial court erred in refusing to give her requested instructions Nos. 1 and 2 which stated:

> "1. In connection with the alleged negligence of Lambert Seed Company, Lambert Seed Company is not liable for hidden or latent defects in their trucking equipment which were not or could not have been discovered by ordinary care and ordinary maintenance. If you find from a preponderance of the evidence that the defect which caused the wheel to become dislodged from the Lambert truck was a latent defect, or one which could not have been discovered by ordinary care and ordinary maintenance, then you are instructed the Lambert Seed Company is not guilty of negligence which was proximate cause of the accident.
>
> 2. Lambert Seed Company, as the owner of a motor

vehicle, is not liable for injuries resulting from the defective condition of their motor vehicle in the absence of negligence on their part. Lambert Seed Company was required to exercise reasonable care to see that their vehicle was in proper operating condition and must have exercised reasonable care in the inspection of their vehicle to discover any defects that might have prevented proper operation. If you find from a preponderance of the evidence that Lambert Seed Company and its agents or employees could not have discovered the defect which was to cause the wheel from becoming detached by reasonable care and inspection of the vehicle, then Lambert Seed Company is not guilty of any negligence which was a proximate cause of the occurrence."

The Committee in its introduction to the Arkansas Model Jury Instructions points out the guides that it used in drafting the instructions therein contained. One of those guides is that an instruction must be unslanted. In the per curiam order of April 19, 1965, we pointed out that:

> ". . . Whenever A.M.I. does not contain an instruction on a subject upon which the trial judge determines that the jury should be instructed, or when an A.M.I. instruction cannot be modified to submit the issue, the instruction on that subject should be simple, brief, impartial, and free from argument."

In commenting on what is impartial and unslanted the Committee said:

> "To be unslanted the instructions must be an objective statement of the law. They are to be the court's instructions and not partisian instructions sounding first like the plaintiff's counsel and then like defense counsel. . . . "

Even a casual reading of the two instructions offered by appellant demonstrates that they are slanted toward the defendant. For this reason the trial court properly refused the instructions.

Affirmed.

HARRIS, C.J., not participating.

FOGLEMAN, J., dissents.

JOHN A. FOGLEMAN, Justice, dissenting. I concur in all the majority opinion except that part relating to Point IV. As to that point, I think the failure to give AMI 603 was reversible error. In order to put the matter in proper perspective, the wording of the instruction offered is of considerable importance as is the wording of Instruction 12 given on res ipsa loquitur, which was patterned after AMI 610. They read:

> DEFENDANT'S REQUESTED INSTRUCTION—AMI 603
>
> The fact that an injury occurred is not, of itself, evidence of negligence on the part of anyone.
>
> *Instruction No.* 12: In addition to the rules of law I have just stated with respect to ordinary care and negligence, there are situations in which a jury may, but is not required to, *draw an inference of negligence from the manner in which the alleged injury occurred.* J. D. Markley and Marie Markley attest that this case involves such a situation, and therefore, have the burden of proving each of the two essential propositions.
>
> First, that the alleged injury was attributable to the truck and dual wheels which have been under the exclusive control of the defendant, Mrs. Joel Lambert doing business as Lambert Seed Company or her employees.
>
> Second, that in the normal course of events, *no injury would have occurred if the said defendant had used ordinary care* while the truck and dual wheels were under her exclusive control.
>
> If you find that each of these two propositions has been proved by the plaintiffs, then *you are permitted, but not required, to infer that the defendant was negligent.* (Emphasis mine.)

Just how there is a conflict between these instructions escapes me, and no one has offered any plausible explana-

tion. A simple reading of the two together (with particular reference to the portions of the res ipsa loquitur instruction I have underscored) clearly demonstrates that not only is there no conflict, but the two are completely harmonious and could not cause any confusion. This clearly suggests that the drafters of AMI 603 and 610 prepared them so they could be given without conflict. If they had thought AMI 603 should not be used where a case for the application of res ipsa loquitur arose, it is indeed strange that no caution was given in the "Note of Use" as was frequently done in such circumstances and as was done with respect to AMI 603 in reference to cases when Ark. Stat. Ann. § 75-623(c) (Repl. 1957) is applicable. To infer that these experienced, dedicated, alert and perceptive judges and practitioners were aware of a potential conflict with this statute, but unconscious of the implications of AMI 610, which with AMI 603 and fourteen other model instructions form "Chapter 6, Specific Factors Affecting Negligence and Defenses," seems absurd to me.

A look at the basis for the two instructions will lead to the conclusion that there is no conflict. AMI 603 is based upon such cases as *St. Louis-San Francisco Ry. Co.* v. *Ward,* 197 Ark. 520, 124 S.W. 2d 975 and *International Harvester Co.* v. *Hawkins,* 180 Ark. 1056, 24 S.W. 2d 340. In *Ward,* the rule was articulated. We said:

> Negligence is never presumed but the burden is on the party asserting it to establish the fact by a preponderance of the evidence. Nor is it to be presumed from the fact of injury and no one is liable in damages for a purely accidental injury.

In *Hawkins,* we said:

> It is next contended by the appellant that negligence cannot be inferred merely from the injury. This is also a rule of law so well established that we need not cite authorities in support of it. While negligence cannot be inferred merely from the injury, negligence may be inferred from facts shown in evidence. And the facts here are sufficient to justify the jury under

> proper instructions to find that the appellant was guilty of negligence and that this negligence caused the injury.

Thus the drafters of AMI 603 demonstrated quite clearly by their citation of these two cases that the mere fact that *negligence might be inferred from the facts in evidence* would not preclude the giving of this instruction. See also, *Great Atlantic & Pacific Tea Co.* v. *Gwilliams,* 189 Ark. 1037, 76 S.W. 2d 65, wherein it was said that negligence, or facts from which it may be inferred, must be proved. In other words, negligence must be proved, either by direct or circumstantial evidence.

But what does AMI 610 say? It says that *if* the jury finds that the requisite facts are shown, it is *permitted* but *not required to infer* that the defendant was negligent. This is a positive indication that the two instructions, drafted with *Hawkins* in mind, were intended to be, and are, harmonious, and that AMI 603 should be given, even if the case goes to the jury on res ipsa loquitur alone. Before a jury is even *permitted to infer* that there was negligence from the fact of injury, it must first find that the thing which produced the injury was under the exclusive control and management of the defendant and that the occurrence is such that, in the ordinary course of events, does not happen, if due care has been exercised. *Delta Oxygen Co.* v. *Scott,* 238 Ark. 534, 383 S.W. 2d 885. In *Martin* v. *Aetna Casualty and Surety Co.,* 239 Ark. 95, 387 S.W. 2d 334, we pointed out that evidence showing that there was an injury to a defendant to whom the plaintiff owed a duty of using due care, that the injury was caused by an instrumentality under the control and management of the defendant and that the accident causing the injury was such that in the ordinary course of things would not occur if those having control and management used proper care, in the absence of evidence to the contrary, would be "evidence that the accident occurred from the lack of that proper care." Thus, the fact of injury is not evidence of negligence, even in a res ipsa case. It is only one of the circumstances essential to the permissible inference, and is to be considered along with other evidence.

Examination of the purpose and function of the doctrine of res ipsa loquitur confirms my position and the requirements of AMI 610. Negligence may be proved by circumstantial, as well as direct, evidence. Res ipsa loquitur is nothing more than one type of circumstantial evidence. Prosser, Torts (Fourth Edition) 213, 228, §§ 39, 40; Restatement of the Law, Torts Second, p. 157, § 328D, Comment b; Leflar and Covington, Res Ispa Loquitur in Arkansas, 8 Law School Bulletin 43. In order to make a circumstantial case, not only must the injury be shown, but there must be evidence of the requisite attendant circumstances. See above authorities and Prosser, pp. 214, 218, § 39.

I will not elaborate extensively on the distinction between the admonition against use of AMI 603 in cases where Ark. Stat. Ann. § 75-623(c) is involved and res ipsa loquitur. Of course, res ipsa loquitur is not a statutory declaration. It does appear, however, that the statute in question goes beyond the permissible inference arising from a showing of the elements under which res ipsa loquitur may be invoked. Prima facie evidence in the sense of that statute seems to imply that a presumption or compelled inference arises when the requisite facts are shown, unless there is evidence to the contrary. In this respect, the statute should have the same application as, for instance, former Ark. Stat. Ann. § 73-1007 (Repl. 1957), which was held to establish a rebuttable presumption of negligence which applied in the absence of contrary evidence. *Missouri Pacific R. Co.* v. *Briner,* 213 Ark. 18, 209 S.W. 2d 106. Barnhart, Use of Presumptions in Arkansas, 4 Ark. L. Rev. 128, 132, 150. On the other hand, when res ipsa loquitur applies, the inference is only permissible and a jury is free to hold against a plaintiff, even though the defendant does not introduce any evidence. See Barnhart, Use of Presumptions in Arkansas, 4 Ark. L. Rev. 128, 133.

Although I firmly believe that AMI 603 should have been given even if the evidence had not justified the submission of the question of negligence based upon direct evidence of specific acts or omissions, the submission of the case on both approaches, i.e., res ipsa loquitur and

specific negligence, seems to me to have required that it be given. This instruction negates the all too prevalent thought that if injury occurs someone should pay. If a plaintiff chooses to enter the arena of the courtroom riding both res ipsa (circumstantial evidence) and specific acts of negligence (direct evidence), there is no reason why a defendant should be penalized by being deprived of any protective device he would otherwise have against either.

I respectfully submit that the judgment in this case should be reversed for refusal of appellant's requested instruction based on AMI 603.

FRANCHELLE MURPHY *v.* STATE OF ARKANSAS

CR 73-134 504 S.W. 2d 748

Opinion delivered January 14, 1974

[Rehearing denied February 19, 1974]

Pickens, Boyce, McLarty & Watson, by: *Tim F. Watson,* for appellant.

Jim Guy Tucker, Atty. Gen., by: *James W. Atkins,* Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. On June 23, 1972, the appellant killed her husband, David Murphy, by shooting him with a .22 caliber rifle. To a charge of first degree murder she pleaded insanity. The jury, rejecting that defense, found the accused guilty of second degree murder

and fixed her punishment at seven years imprisonment. Two asserted errors are argued as grounds for reversal.

At the beginning of the trial it was stipulated that Mrs. Murphy fired the fatal shot. Later on the State was allowed to introduce not only the rifle that was used in the homicide but also some .22 cartridges, two wooden clubs, a meat cleaver, and a butcher knife, most of which were found by the police in the bedroom where Murphy was shot. It is now insisted that the exhibits, other than the rifle, had no bearing upon the case and should not have been shown to the jury. Counsel cite *Rush* v. *State,* 238 Ark. 149, 379 S.W. 2d 29 (1964), where we held that the trial court erred in allowing the State to introduce in evidence a pistol that had no connection with the homicide for which the accused was being tried.

Here, however, the articles in question were relevant as bearing upon the matter of premeditation and deliberation, which the State was required to prove. *Simmons* v. *State,* 227 Ark. 1109, 305 S.W. 2d 119 (1957). Mrs. Murphy shot her husband in a bedroom in the couple's home. According to her statement to the police, which was admitted in evidence without objection, Mrs. Murphy discovered on the morning of the shooting that her husband had cashed certain bonds that were kept in a lockbox. She telephoned him at work and asked him to come home, which he did. The two quickly got into a scuffle, and David was shot. In her statement to the police Mrs. Murphy mentioned the two clubs that were in the room and went on to say: "I was going to knock the devil out of him with that stick. That's what I had in mind. And he didn't come close enough to me." The rifle had been between the mattress and springs of one of the beds, but the other weapons were somewhat more accessible. Hence the articles now in question were pertinent as tending to indicate to the jury that Mrs. Murphy had planned the homicide when she persuaded her husband to come home during the morning.

Appellant's second objection is to Dr. Kozberg's testimony that in his opinion Mrs. Murphy was mentally competent at the time of the killing. The witness, a psychiatrist employed by the State Hospital, had participated with other doctors in the examination of Mrs. Mur-

phy at that institution. That examination was conducted pursuant to the statute. Ark. Stat. Ann. § 43-1301 (Supp. 1971). The appellant's present complaint goes not to Dr. Kozberg's professional qualifications but to the fact that the joint staff examination of the accused took only about thirty minutes and that Dr. Kozberg was not sure that he himself asked her any questions. Even so, the witness's expert opinion was admissible, for the reasons stated in *Ark. State Highway Commn.* v. *Johns,* 236 Ark. 585, 367 S.W. 2d 436 (1963). The brevity of the examination was doubtless considered by the jury in weighing Dr. Kozberg's opinion, but the testimony was nevertheless admissible.

Affirmed.

HARRIS, C.J., not participating.

TALMADGE G. HENLEY *v.* STATE OF ARKANSAS

CR 73-137 503 S.W. 2d 478

Opinion delivered January 14, 1974

[Rehearing denied February 19, 1974.]

Louis W. Rosteck, for appellant.

Jim Guy Tucker, Atty. Gen., by: *O. H. Hargraves,* Dep. Atty. Gen., for appellee

LYLE BROWN, Justice. This appeal comes from a second degree murder conviction. The appellant challenges the sufficiency of the circumstantial evidence to support the conviction and secondly, it is contended that the evidence "clearly shows that defendant was suffering from some mental disorder at the time the crime was committed".

We agree that the evidence was circumstantial but we think it was sufficient to sustain the conviction. We shall briefly relate the evidence in the light most favorable to the State. (The defense produced no evidence.) Sometime during the night of June 16, 1972, appellant's wife suffered death by extreme violence. She was found lying by the side of her wheel chair with bruises and contusions all over her body and with broken ribs on both sides. The medical examiner concluded that death resulted from "blunt force injury to the chest and abdomen". The couple lived alone in an apartment. Appellant gave a statement which was introduced by the State without objection. He stated that about 7:00 p.m. on the night in question he took two sleeping pills and went to bed leaving his wife sitting in her wheel chair watching television; that about 5:00 a.m. he discovered his wife lying beside the wheel chair with the television buzzing; and that he called the police.

The landlady lived in an apartment adjacent to the Henley apartment. She testified that at about five o'clock in the afternoon of June 16 she heard an unusual noise coming from the Henley apartment, "three loud thumps". Mrs. Ruth Lucky said she had a call from Mrs. Henley on the telephone at 5:00 p.m. on the 16th. (The jury could have reasonably concluded that the call was one of distress.) Dewayne Lucky said he went to the Henley apartment around six o'clock on the evening of June 16 (evidently in response to the call); that he knocked and received no reply; that he called to the Henleys but received no answer; that he could open the door about two inches and "it felt like something was against the door". The coroner testified he went to the apartment around 7:00 a.m. on June 17. He estimated the time of death to have been from three to twenty-four hours. He found no signs of struggle in the apartment. An assistant medical examiner performed an autopsy at 9:30 a.m. on June 17. He

opined that the victim had been dead from six to eighteen hours prior to the autopsy.

Officer David Isom testified he arrived at the apartment at 5:10 a.m. on the 17th in response to a telephone call, presumably from appellant; that appellant informed him that Mrs. Henley had fallen out of her wheel chair; that she often had blackouts and would come to herself within a few minutes; that the body was 90% bruised; and that appellant "had a wild look in his eyes, like he had been taking pills or something". The officer said the apartment appeared in an orderly condition.

Detective Joe Don Thomas participated in the investigation. He said the wheels on the victim's chair were locked; and that there was no evidence of a struggle or of forcible entry. "I saw the defendant at approximately 6:00 a.m. and talked to him again around noon. . . . . He appeared abnormal; he wasn't remorseful—he was smiling. His speech was slurred, and he could have been under the influence of something. I did not find any alcoholic beverages or bottles. He told me he had taken two sleeping pills at 7:00 p.m.".

The State carries a heavy burden when circumstantial evidence alone is relied upon for conviction. The evidence "must exclude every other reasonable hypothesis than that of the guilt of the accused". *Jones* v. *State,* 246 Ark. 1057, 441 S.W. 2d 458 (1969). If the jury believed the State's evidence then this chain of circumstances was established: There was trouble in the Henley apartment around 5:00 p.m. when the landlady heard three loud thumps; Mrs. Henley made a distress call to her friend, Mrs. Lucky; in response to that call, Dewayne Lucky went to the apartment, arriving around six o'clock; he got no response and could not get in because the door was blocked from the inside; extensive investigation revealed no signs of breaking and entering; appellant was known to have been in the apartment from early in the evening until early the next morning; appellant's explanation of his wife falling because of a blackout was not plausible; it is hardly conceivable that the victim could have received the brutal beating she suffered without appellant being alarmed by it, assuming it was done by

someone other than appellant; it was impossible for the slaying to have been committed before appellant got home for the evening, because in that event he would have discovered the body when he came in. In other words, the proof points inescapably to the conclusion that appellant was in fact in the apartment when the crime was committed. Although the evidence is not as overwhelming as the State argues, we think the chain of circumstances is so connected as to exclude any cause of death other than it was suffered at the hands of appellant.

The other point for reversal is that appellant was suffering from a mental disorder and that the public defender who conducted the trial should have interposed the defense of insanity. We do not agree.

The defense of not guilty by reason of insanity was first advanced and appellant was sent to the State Hospital for observation. It was there found that appellant was probably without psychosis at the time of the offense. The public defender was furnished with an exhaustive record compiled on appellant at Ft. Roots Hospital, a veterans institution for nervous diseases. Those records were introduced at the hearing on motion for new trial. The conclusion of the Ft. Roots staff was that at no time during appellant's last admission (1970) did he show any evidence of psychotic behavior. The report also mentioned some facts uncomplimentary to past conduct. The public defender testified at the hearing on motion for new trial that, under the circumstances, it would not have been to appellant's best interest to plead insanity; that he fully explained the facts to appellant; and that appellant agreed the plea should be withdrawn. We refuse to overturn the case on the second point. In fact the public defender, with the consent of his client, made a tactical decision which was wholly within the bounds of propriety. *Johnson* v. *State,* 249 Ark. 208, 458 S.W. 2d 409 (1970); *Tollett* v. *Henderson,* 93 S. Ct. 1062, 36 L. Ed. 2d 235 (1973).

Affirmed.

HARRIS, C.J., not participating.

SAMMY HICKS ET AL *v.* LEE OTIS NEWTON ET AL

73-190 503 S.W. 2d 472

Opinion delivered January 14, 1974

Shackleford & Shackleford, for appellants.

Spencer & Spencer, for appellees.

JOHN A. FOGLEMAN, Justice. This case involves a dispute about a boundary line. Appellant and the other heirs of Robert and Lula Hicks own 80 acres of land. A part of the northern boundary of that tract is the southern boundary of a 40-acre tract owned by appellees. The dispute was provoked when appellees caused a survey of the boundary to be made and built a fence on this line, which is now conceded to be the true boundary. Appellant then brought this action for himself and his co-heirs, claiming a tract of 0.84 of an acre north of this line and fence. He based this claim upon allegations that an old road along, but lying north of, the true boundary had been recognized as the dividing line by the parties for over 30 years, making this road a boundary by acquiescence. This road, according to the contentions of appellant, lay north of the presently established true line. Appellant also claimed that he and the other heirs of Robert and Lula Hicks held this 0.84-acre tract by adverse possession. Appellees claimed that the fence was on the true boundary and that they, rather than appellant and his co-heirs and their predecessors in title, had held adverse possession of the lands.

After trial, the chancellor, who viewed the property involved, made specific findings that appellant had failed

to sustain his burden of proving that there was an agreed boundary or that he and his co-heirs had title by adverse possession, and entered his decree accordingly, fixing the true boundary on the survey line. Appellant recognizes that the chancellor's findings as to adverse possession, the location of the true boundary and the fixing of a boundary by express agreement are not clearly against the preponderance of the evidence. He argues, however, that the chancellor's decision entirely overlooked the issue as to whether there was a boundary by acquiescence. Even if this be so, appellant failed to meet his burden of proving long acquiescence in the road, if indeed it existed in the vicinity of the disputed area, as a boundary.

The common boundary between the parties is 757.3 feet long. It clearly appears that both the true line and the boundary claimed by appellant lie totally in wooded lands. The evidence appears to clearly establish a boundary, at least by adverse possession, in a road between the owners along the north line of the east half of the Hicks' 80-acre tract, where the lands on both sides are in cultivation, but the disputed line is the north boundary of the west one-half of this tract, which is not cleared or in cultivation. There is evidence from which a finding that the Hicks family recognized a road connecting two north-south public roads, one lying west, and the other east, of the two tracts involved, might have been justified, but there is no evidence that appellees or their predecessors in title did. Although silent acquiescence is sufficient, there is no evidence that the Newtons were ever aware that anyone claimed that the road, said by some witnesses to have ultimately reached the Thomas farm which lay west of the Newton property, constituted a boundary. Even though there was testimony by members of the Hicks family that the Newtons were never known by the witnesses to have claimed any of the land south of this road, there is no evidence that there was any occasion for them to assert a claim. This alleged road, according to the county surveyor, the first witness called by appellant, is now evidenced only by a rutted terrain through the woods. He found pine and gum trees as much as five inches in diameter growing in this terrain. No lane or road in the wooded area was apparent to this surveyor on aerial photographs of the area taken in 1951, 1956 and 1964. He found some posts and wire out in the area, but could not connect them, and he could not find enough posts and wire to establish the course of a fence. Even though he

attempted to sketch what he felt was the center line of this road, he admitted that he could not tell on which side of the road fences had run at some time in the past. According to appellant, his sister and brother, however, the west half of the Hicks tract was timbered and not fenced. He admitted that these lands were always unenclosed and unimproved and used only for making "ties." According to Roosevelt Newton, there once had been an old wagon road which meandered in a westerly and southwesterly direction from its connection with the lane between the Newton land and the east half of the Hicks property. He said that this road was abandoned in 1928. His wife testified that during the 36 years she lived with her husband she never heard of any of the Hickses or anyone claiming to own any of the Newton land north of the true line. Jack Newton, aged 43, testified that he had lived near the Hicks property all his life and never knew of any road that ran anywhere near the southwest corner of the Newton tract, and had never known any of the Hickses to claim any property north of the true line. It is significant that Lewis Hicks, who had lived all his life on the Hicks tract helped Roosevelt Newton to build the fence on the true line, without laying any claim to the disputed tract and without making any objection, beyond saying that the fence was not on the old line. This witness, upon examination by the chancellor, stated that there had been nothing in the woods that would mark the line between owners to the north and those to the south.

This evidence falls far short of establishing acquiescence by the Newtons in any boundary except the true one.

HARRIS, C.J., not participating.

JESS HENDERSON *v.* STATE OF ARKANSAS

CR 73-129 503 S.W. 2d 889

Opinion delivered January 14, 1974

Charles W. Atkinson, for appellant.

Jim Guy Tucker, Atty. Gen., by: *O. H. Hargraves,* Dep. Atty. Gen., for appellee.

JOHN A. FOGLEMAN, Justice. Appellant Jess Henderson relies upon five points for reversal of his conviction of the offense of delivery of a controlled substance, heroin. They are:

I. The Court erred in refusing to quash the indictment.

II. The Court erred in refusing to grant a mistrial.

III. The Court erred in refusing to grant a directed verdict.

IV. The Court erred in refusing to give defendant's requested Instructions No. 1 and 3.

V. The Court erred in refusing to grant a new trial.

We find no merit in any of them.

I. Appellant was indicted by a grand jury. He was charged with unlawfully delivering heroin on May 11,

1972, in violation of Act 67 of 1972 and Act 590 of 1971. The name of the person to whom the delivery was made was not alleged in the indictment. The indictment did not specifically allege that appellant was not a person authorized to deliver heroin. His motion to quash the indictment, which included these and other grounds not argued here, was denied. The trial court, however, treated his pleading as a motion for a bill of particulars. The state filed a bill of particulars, stating that the delivery was made to Janice Sue Smith. No further objection to the indictment was made by appellant prior to trial. The action of the trial court was proper under Ark. Stat. Ann. § 43-1024 (Repl. 1964) which permits the prosecuting attorney to amend an indictment or file a bill of particulars. The bill did not, however, state that Henderson was unauthorized to deliver such drugs. There was no error in this respect. It was only necessary that the indictment name the offense and the party charged. Ark. Stat. Ann. §§ 43-1006, 1008 (Repl. 1964). It is not necessary that the acts constituting the offense be stated unless the offense could not be charged without doing so. *Estes* v. *State,* 246 Ark. 1145, 442 S.W. 2d 221. The act which appellant was accused of violating contains a section, now appearing in Ark. Stat. Ann. § 82-2630 (Supp. 1971), providing that it is unnecessary for the state to negate any exemption or exception in the act in any indictment and that the burden of proof of any exemption or exception is upon the person alleging it. This section also contains a provision that in the absence of proof that a person is the duly authorized holder of an appropriate registration, he is presumed not to be, and that the burden of proof is upon that person to rebut the presumption. The act under which appellant was charged provides that "[e]xcept as authorized by this Act, it shall be unlawful for any person to deliver, * * * a controlled substance." There was no error in this regard.

II. Appellant's contention that a mistrial should have been granted is based upon multiple actions of the trial judge. After the jury was selected but before any evidence had been presented, appellant, out of the hearing of the jury, registered an objection to the introduction of any evidence pertaining to any crime other than that charged in the indictment, and, specifically, relating to the death of Janice Sue Smith, to whom the state contended the heroin was delivered. The trial judge refused

to restrict the prosecuting attorney at that time, but admonished him not to inject this fact unless necessary. During the opening statement by the prosecuting attorney, appellant's objection to a statement to the effect "that we are dealing with human lives" was overruled. The first witness called was Dr. Mae Nettleship, who, in responding to a query whether she had done a drug or blood analysis on Janice Sue Smith, stated that she had done an autopsy. Appellant's attorney promptly objected, asked that the jury be admonished not to consider this statement and warned that, upon repetition, he would request a mistrial. The court did not specifically rule on the objection or admonish the jury. Later, when asked if it were possible for her from her observations to make a determination as to the time of injection of heroin, this witness stated she and Dr. Vinzant worked together, and he always made the observations and conclusions in relation to the time of death. When appellant objected, the circuit judge admonished the jury to disregard that part of the testimony relating to death. No motion for the declaration of a mistrial was made.

Thereafter, the prosecuting attorney was permitted to question Dwight Wells, over appellant's objection, about his having purchased heroin from appellant on the date the offense was alleged to have occurred. When the prosecuting attorney repeated a question to Wells, a witness called by the state, as to whether he saw appellant give any drugs to Janice Sue Smith, appellant's attorney objected on the basis that this was an attempt to impeach the state's witness. The prosecuting attorney then asked and received permission to treat Wells as a hostile witness, claiming surprise on the basis of a pretrial statement made by him to the prosecuting attorney. The court granted this permission and allowed the prosecuting attorney to ask leading questions, all over appellant's objection. After a few questions with reference to testimony given the prosecuting attorney by Wells some time before the trial, appellant's attorney objected and moved for a mistrial on the basis of these questions, together with the circuit judge's remarks in overruling appellant's objection that the witness was not hostile, that it was sufficient that the prosecuting attorney was taken by surprise, that the witness was a hostile witness and that the prosecuting attorney could ask leading questions. After the witness had been extensively examined and cross-examined about

the statement, the prosecuting attorney asked the witness whether the content of the statement or his testimony was the truth. When the court overruled appellant's objection that the question invaded the province of the jury as the judges of the credibility of the witness, appellant moved for a mistrial on the basis of the court's remarks.

Although appellant seems to take the position that he made numerous motions for a mistrial, we find only two occasions when such a motion was made, and they related more particularly to remarks by the circuit judge. There was no error in the court's holding that there was a basis for the claim of surprise, so it was proper for the court to permit the prosecuting attorney to cross-examine Wells about his prior inconsistent statement. Ark. Stat. Ann. § 28-706 (Repl. 1962); *Fisher* v. *State,* 241 Ark. 545, 408 S.W. 2d 894; *Shands* v. *State,* 118 Ark. 460, 117 S.W. 18. We find no abuse of discretion in permitting the cross-examination or denying the motions for mistrial.

III. Appellant contends there is no evidence that he delivered heroin to Janice Sue Smith. This question must be approached with the understanding that the delivery may be shown by circumstantial, as well as direct, evidence. See. *Miller* v. *City of Helena,* 224 Ark. 1016, 277 S.W. 2d 841; *Dixon* v. *State,* 67 Ark. 495, 55 S.W. 850; *Wimberly* v. *State,* 214 Ark. 930, 218 S.W. 2d 730. As we view the matter, appellant's principal complaint is that there is no direct evidence that he made the delivery. But we find the circumstantial evidence to rise above that we have held to be insufficient in other cases because it left the jury only to speculation and conjecture in determining whether any other hypothesis except the defendant's guilt was reasonable. See, e.g., *Jones* v. *State,* 246 Ark. 1057, 441 S.W. 2d 458.

In spite of the fact that Dwight Wells, the principal witness for the state, was obviously reluctant to testify in the case, and there were conflicts and inconsistencies in his testimony, we cannot say that it was not substantial. Wells, a resident of Huntsville, said he had lived with Janice Sue Smith off and on for four or five years, and was living with her on May 11, 1972, the date of the alleged offense. There are many facts disclosed by Wells' testimony

which are undisputed and as to which there is no question about the inferences to be drawn. He testified to the following before being granted immunity from prosecution:

> He had been a user of whatever drug was available including heroin. The Smith girl also used drugs including heroin. He had known Henderson for a couple of years, and had purchased drugs from him on several occasions. On May 11, 1972, he and Janice Sue came to Fayetteville in Wells' car to get some drugs.

When asked to whom he went to obtain the drugs, Wells responded that he'd rather not answer the question. The prosecuting attorney stated he would like to grant the witness immunity from prosecution, and appellant objected. The court directed the witness to answer, advising him that testimony he gave would not be used against him in a criminal prosecution, except for perjury. The witness still seemed reluctant to answer the prosecuting attorney's questions, but said that he saw Janice get her drugs. When asked if she got them from Henderson, Wells said he'd rather not say and then denied knowledge of the identity of the person from whom she got her drugs. He stated that she saw Henderson, that he (Wells) was present and received an affirmative answer to his inquity whether Henderson had any drugs, and that Henderson gave Wells some heroin wrapped in a little package at the time Janice Sue was in another room. He then related substantially the following:

> He and Janice Sue arrived at Henderson's apartment on Cleveland Street about dark, but found him at a house next door. They then went with Henderson to his apartment. Wells took with him the drugs given him by Henderson, which were worth $10 and wrapped in a little package. Janice Sue did not have any drugs at that time, but did later. Wells did not know where she got the drugs, and did not hear any conversation between her and Henderson about drugs, but he was present when she used the drugs she had about 45 minutes to one hour after they arrived. After using the drugs Janice Sue stayed in the bathroom and later "fell over."

After objections to impeachment of the witness were made and overruled, Wells was asked about his recollections concerning a statement he had made to the prosecuting attorney on July 24, 1972. He recalled testifying before the prosecuting attorney that Janice Sue Smith was at Henderson's apartment on Cleveland Street when she got $10 worth of heroin from Henderson and admitted that these statements were true, as far as he knew. He also affirmed the correctness of his answers that the heroin was wrapped in tinfoil, that he got his heroin just a few minutes before Janice got hers, that he was to pay $10 for his and had the same understanding with Henderson in relation to that which Janice got. He also admitted that Henderson handed the heroin to Janice, as far as he knew. Wells then testified that, between him and Janice, he bought two "hits" at $10 each or a total of $20.

On cross-examination, Wells confirmed much of his previous testimony. He admitted making the statement to the prosecuting attorney and that his father was present at the time. He said his attorney was present at the beginning of it. He declined to say that the content of the statement was untrue. Specifically he said:

> He had previously bought drugs from Henderson in Fayetteville several times when Janice was present. He was not present when Janice got drugs from anyone on May 11, 1972, and did not see Henderson deliver any narcotics to her on that occasion or hear any conversation between Janice and Henderson. He did see Janice while at Henderson's with heroin wrapped in tinfoil. Henderson and another man were the only persons present at the house where he found Henderson. They all remained at this house for about a half hour, but no one else was present when he received his drugs from Henderson. When he took the drugs at Henderson's house, he used the syringe that Henderson also used in his presence.

After cross-examination, Wells explained the difference in his testimony and the statement by saying he did not see Henderson put the drugs in Janice's hand, but, while he and Janice were in the kitchen, she went into the bathroom with drugs at a time when only he, Janice and Henderson were in the house. He also reaffirmed

his statement that he and Henderson had discussed money at the house to which he and Janice first went.

On recross-examination, Wells again said: It was true, as he had told the prosecuting attorney, that he helped Janice "shoot up." Both his pretrial statement and his testimony were true.

Whatever contradictions, conflicts and inconsistencies there were in Wells' testimony from the witness stand were for resolution by the jury, which could believe those parts of his testimony they believed to be true and disregard those they believed to be false. *Reserve Loan Line Ins. Co.* v. *Compton,* 190 Ark. 1039, 82 S.W. 2d 537; *Houpt* v. *State,* 249 Ark. 485, 459 S.W. 2d 565; *Bartley and Jones* v. *State,* 210 Ark. 1061, 199 S.W. 2d 965; *Powell* v. *State,* 149 Ark. 311, 232 S.W. 429. Most of the contradictions were more apparent than real. They arise by reason of Wells having stated to the prosecuting attorney that Henderson delivered the drugs to Janice Sue Smith and his having testified during the trial that he did not see the delivery made. The jury would have been justified in concluding that Wells' statement to the prosecuting attorney was based upon circumstances which clearly indicated to him that the delivery was made by Henderson. We think the evidence clearly affords a reasonable basis for that belief, both by Wells and by the jury. We find the circumstantial evidence sufficient to support the jury verdict.

Appellant also argues that the testimony of Wells, who was treated by the trial court as an accomplice as a matter of law, was not sufficiently corroborated. Euletta Mae Jones, another reformed drug addict, testified that she had been acquainted with Wells, Henderson and Miss Smith in May 1972. She knew that Janice Sue had an overdose of drugs on May 11, 1972, at Jess Henderson's house. She had gone to the Henderson house that evening and found Wells, Henderson and Janice Smith there, but left when she learned what had happened. According to Mrs. Jones, those present were worrying about Janice. On a subsequent date she went to Henderson's place with him. While there, Henderson started talking about the events of May 11. He told Mrs. Jones that he had intended to "do the first hit," as he had always done, but Janice wanted to "do it because she hadn't gotten

off in a long time." According to Mrs. Jones, he stated that when Janice insisted, he went ahead and let her do the first hit.

In spite of the fact the trial court considered Wells to be an accomplice of Henderson under the evidence, we do not so consider him. He was nothing more or less than a purchaser of heroin for use by his paramour. If he was the accomplice of anyone, it was Janice Sue Smith, not Jess Henderson. The purchaser is not the accomplice of the seller, nor the recipient, of the deliverer, in spite of the fact that mere possession is a violation of the law defined by the same statute as that under which a defendant is charged. We have passed specifically upon the question where it was asserted that the purchaser was an accomplice of the seller. See *Sweatt* v. *State,* 251 Ark. 650, 473 S.W. 2d 913.

There is some apparent conflict in the authorities from other jurisdictions as to whether one who recommends, or directs a purchaser to, a seller of illicit drugs is an accomplice of the seller. In Arkansas, an accomplice, under the statute forbidding conviction of a felony on uncorroborated testimony of an accomplice, is one who could be convicted of the offense of which the defendant is charged. *Havens* v. *State,* 217 Ark. 153, 228 S.W. 2d 1003. In *Rich* v. *State,* 176 Ark. 1205, 2 S.W. 2d 40, we held, upon the authority of *Wilson* v. *State,* 124 Ark. 477, 187 S.W. 440, that one who assists a purchaser in buying intoxicating liquors and confines his participation in the transaction exclusively to the buying, not the selling, is not guilty of the offense, and not an accomplice. See also, *Eddy* v. *State,* 165 Ark. 289, 264 S.W. 832; *Hobson* v. *State,* 175 Ark. 1169, 299 S.W. 8. We have also held that one who was employed as a laborer in the operation of a whiskey still and was an accomplice in its operation and in manufacturing liquor, was not an accomplice of his employer in the possession of the still, because he could not be convicted of the crime of possessing a still, either as a principal or accessory. *Henderson* v. *State,* 174 Ark. 835, 297 S.W. 836. In *Beck* v. *State,* 141 Ark. 102, 216 S.W. 497, we held that one who acted only as the agent of the buyer of intoxicating liquors and had no other interest in the sale, was not an accomplice of the seller. So long as one acts solely on behalf of the purchaser, he is not an

accomplice of the seller. *Ellis* v. *State,* 133 Ark. 540, 202 S.W. 702.

Under the same rationale, other jurisdictions have held that a "facilitator" of a sale of illicit drugs is not an accomplice of the seller, so long as he is interested only on behalf of the buyer. See *United States* v. *Moses,* 220 F. 2d 166 (1955); *People* v. *Branch,* 13 App. Div. 2d 714, 213 N.Y.S. 2d 535 (1961); *Commonwealth* v. *Harvard,* 356 Mass. 452, 253 N.E. 2d 346 (1969); *People* v. *Lindsey,* 16 App. Div. 2d 805, 228 N.Y.S. 2d 427, aff'd 12 N.Y. 2d 958, 238 N.Y.S. 2d 956, 189 N.E. 2d 492 (1963). These holdings are more compatible with our general test of the status of a witness as an accomplice and with our cases relating to dealing in intoxicating liquors than decisions in jurisdictions holding to the contrary.

There is not a word of evidence to align Wells with the alleged deliverer, Henderson, in this case. His entire interest, so far as this record discloses, was to obtain the heroin for his paramour. Furthermore, even if Wells were properly treated as an accomplice of Henderson, the statements attributed to appellant by Mrs. Jones certainly tended to connect him with the delivery of heroin to Janice Sue Smith. Certainly someone delivered this controlled substance to her. The testimony of Mrs. Jones, if believed, rather than going to show the commission of an offense, along with its attendant circumstances, definitely, but independently of the testimony of Wells, tends in some degree to connect Henderson with the delivery and rises above a mere suspicion of guilt. This was all that was required, even if this evidence itself be considered circumstantial. *Jones* v. *State,* 254 Ark. 769, 496 S.W. 2d 423; *King* v. *State,* 254 Ark. 509, 494 S.W. 2d 476. The sufficiency of this evidence was for the jury. *Austin* v. *State,* 254 Ark. 496, 494 S.W. 2d 472; *King* v. *State,* supra.

IV. Appellant's contention relating to the court's failure to give his requested instructions 1 and 3 is grounded upon the alleged failure of the court to advise the jury that, in order to find Henderson guilty, it must find that he was not authorized by law to deliver heroin. There was no evidence whatever that Henderson had any authority to do so. The circuit judge did instruct the jury that it was unlawful for any person to knowingly

deliver a controlled substance, unless pursuant to a valid prescription of a practitioner while acting in the course of his professional practice. This instruction, along with the instruction that the state must prove the defendant guilty beyond a reasonable doubt, was adequate to advise the jury on this score. In view of this coverage in other instructions, we find no prejudicial error in the refusal of these instructions.

V. The only grounds of appellant's motion for new trial that are argued here relate to points for reversal already discussed.

Since we find no reversible error, the judgment is affirmed.

HARRIS, C.J., not participating.

MARY E. WILLIAMS *v.* ARKANSAS NURSING HOME

73-197 503 S.W. 2d 474

Opinion delivered January 14, 1974

Dodrill & Bethea, for appellant.

Lasley, Sharp, Haley, Young & Boswell, P.A., for appellee Arkansas Nursing Home.

Wright, Lindsey & Jennings, for appellee Commercial Standard Insurance Company.

J. FRED JONES, Justice. Mary E. Williams filed a claim for workmen's compensation benefits and her claim was denied by the Commission. The denial was affirmed by the circuit court. On appeal to this court Mrs. Williams contends that there was no substantial evidence to sustain the Commission's denial of her claim and that is the only question now before us.

It is apparent from the record that Mrs. Williams had been employed as a practical nurse at the Arkansas Nursing Home for about eight years and was 59 years of age on February 22, 1970, when her alleged injury occurred. Mrs. Williams testified that on February 22, 1970, she was helping to lift a patient at the nursing home and she experienced a sharp pain in the small of her back. She said the pain ran down her leg. She said she went to Dr. Price, a chiropractor; that after the first adjustment she felt better and concluded that she could return to work and did return to work on May 10, 1970. Mrs. Williams said she continued to work until May 14 when she had to quit work because of her inability to bear weight on her leg. She said she called Dr. Cornett who referred her to Dr. Ashley Ross. She said she was seen by Dr. Ashley Ross and was referred by him to the orthopedic clinic of the University of Arkansas Medical Center. She said that she had previously injured her back while lifting another patient in November, 1969, and that her back continued to bother her from that injury up until her injury on February 22, 1970. She said an injury report was made out by the supervisor at the hospital on the November, 1969, injury but not on the February, 1970, injury. She stated, however, that an accident form was filled out in July, 1970, by the hospital supervisor, Mrs. Keathley, directed to Colonial Life and Accident Insurance Company setting out the claim for injury on February 22, 1970. She testified that she was seen regularly by Dr. Price from some time in April, 1970, through November, 1970; that she quit going to him for chiropractic adjustments because she was unable to pay for his services.

Dr. Toney B. Price testified that he first saw Mrs. Williams on April 27, 1970, at which time Mrs. Williams complained of severe pain in the lower back and right leg which she attributed to lifting a patient at the Arkansas Nursing Home on February 22, 1970. He testified that he treated Mrs. Williams from April 27, 1970, until November 2, 1970, at which time she quit coming to see him, and at which time she owed a clinical bill of $552. He said that Mrs. Williams did not mention a back injury in 1969 but denied any previous injury. He said he diagnosed Mrs. Williams' condition as subluxation of the 4th and 5th lumbar vertebrae; that in his opinion the condition was not the result of an old injury but could be attributed to lifting the patient on February 22, 1970.

Several medical reports were submitted in evidence. Under date of November 23, 1971, Dr. Price reported that when he first saw Mrs. Williams on April 27, 1970, she was complaining of severe pain in the lower back, right groin and thigh which she attributed to lifting a patient in the course of her employment in 1970. Dr. Price reported that when he first saw Mrs. Williams, she was walking on crutches with a severe limp and inability to bear any weight on her right leg. He said his examination revealed a subluxation of the 4th and 5th lumbar vertebrae with nerve pressure at these points, muscle spasm of the erectorspinae muscles bi-laterally and diminished patella reflex of the right knee. He reported that after chiropractic adjustments Mrs. Williams obtained some relief and was able to walk without crutches, but was unable to resume her regular duties when last seen on November 2, 1970. He reported that he again examined Mrs. Williams on November 16, 1971, and found no change in her condition.

Dr. Ashley S. Ross reported he first saw and examined Mrs. Williams on March 2, 1970, at the request of Dr. James K. Cornett, her family physician. He said she was complaining of right hip and right leg pain. He stated that Mrs. Williams advised him she noticed the onset of her right hip and right leg pain while working at the Arkansas Nursing Home approximately five or six days before he saw her; that she stated the pain started in the groin area, but at the time he saw her, the greater portion of the pain was laterally around the trochanteric area and down the right lateral thigh with continued pain in the groin area. He said that upon examination there

was marked tenderness of the trochanteric bursa area and his diagnosis was "right trochanteric bursitis" as well as a tentative diagnosis of bursitis around the right hip joint.

Dr. Ross reported that Mrs. Williams returned on two subsequent visits and was given injections and also prescribed oral medication, but was still complaining of pain in the right groin and the right hip when last seen by him on March 17, 1970, at which time he referred her to Dr. Woodbridge Morris for further diagnostic studies. He said that x-rays of the pelvis and hip joint and sacroiliac joints did not reveal abnormalities either in the bone or joint structures. His final diagnosis was stated in his opinion as follows:

> "Mrs. Mary Williams had a right trochanteric bursitis which responded fairly well to medication and injections. She had pain in the right groin which was not diagnosed and was most probably due to some type of pelvic pathology.
>
> She was referred to Dr. Woodbridge Morris for further diagnostic studies."

Drs. A. Zand and Georgell Chambers of the University of Arkansas Medical Center Orthopedic Clinic, reported under date of March 24, 1970, that Mrs. Williams was referred to them by Dr. Ashley Ross for a complete physical and laboratory workup. Their report recites a history of a ruptured kidney on the right side which was operated about 16 years ago, also ovarian cyst when 18 years of age which was removed; appendicitis and a cystic lesion which was removed 10 years ago. They reported no limitation in the right hip motion except in certain position when the pain "can catch her." These doctors reported they would like to see Mrs. Williams again in about a week for further laboratory examinations and Mrs. Williams was advised to use crutches. Under date of March 31, 1970, Drs. Duncan and Chambers reported that the crutches with nonweight bearing on the right completely relieved the pain or symptoms, but that Mrs. Williams reported that when she failed to use the crutches she continued to have some pain in the area of the adductors on the right, which the doctors concluded might be due to adductor strain.

On April 14, 1970, Dr. Duncan reported that he had been following Mrs. Williams' progress as to her complaints of tenderness and pain in the adductor region of the right leg, but that on his April 14 examination, she had tenderness in the lower abdomen more marked on the right side just lateral to the midline, and was also tender in the right perineal area with greatest tenderness in the perineum and in the lower abdomen. He recommended a complete gynecological examination by the General Surgery Clinic.

Under date of May 31, 1972, Dr. Charles N. McKenzie reported that he examined Mrs. Williams on that date. He found the Lasegue's signs negative but found that Mrs. Williams did have pain in her right thigh. He found tenderness in the femoral triangle and along the adductor origin. He found the peripheral pulse depressed with a stocking or sock-like decreased sensation about the right ankle and foot. He found some x-ray abnormalities in the thoracic or dorsal spine, but as to the right femur and lumbar spine, he reported as follows:

> "AP and lateral views of the right femur do not show any significant abnormalities.
>
> The AP view of the lumbar spine reveals alignment is good. The sacroiliac joints are well preserved. There are metallic sutures in the region of the right kidney.
>
> The lateral view of the lumbar spine reveals a slightly exaggerated lordotic curve. The intervertebral disc spaces are well preserved. The vetebral bodies are well preserved. There is some very minimal anterior at the L5-S1 level. She does have a moderate degree of calcification which appears to be in the region of the lower abdominal aorta and into the common iliac vessels.
>
> The right and left oblique views do not show any significant over-riding of the facets nor any particular increased sclerosis about the border of the facets."

Under the heading of "Diagnoses" Dr. McKenzie reports as follows:

> "(1) Osteoporosis, rather advanced.

(2) Old compression deformity, T6, with residual mild kyphoscoliosis. (With the history she describes, I do not feel this was incurred with the episode she describes, since her symptoms were not in this area at this time and there is no localized tenderness in this area.)
(3) Status, post-operative, repair (R) kidney; partial hysterectomy.
(4) Hypercholesterolemia."

Dr. McKenzie concluded his report as follows:

"This patient has some symptoms which are rather acute and appear to be valid complaints and I am most suspicious of whether or not she may have a small femoral or internal obturator tear with her symptoms being along the course of the femoral triangle and along the obturator nerve.

This patient's osteoporosis certainly could contribute to her pain in that senile osteoporosis in itself may be painful.

I am not able to demonstrate any instability of the sacroiliac joints of symphysis pubis.

In view of the fact also that the femoral pulses are not very well palpated and I am not able to demonstrate the pulses about the ankle, I would feel at this time that an evaluation by a general surgeon who is also familiar with vascular testing would be in order to make sure this patient has not sustained a nernia [sic] in one of the areas described."

There is substantial evidence in the record before us that Mrs. Williams does have some disability in connection with the use of her right leg. The question before the Commission was whether the pain and disability suffered by Mrs. Williams were caused by an accidental injury sustained to her back while she was employed at the Arkansas Nursing Home. We agree with the appellant's argument that reasonable doubts entertained by the Commission should be resolved in favor of Mrs. Williams, but the question before the circuit court, and this court on appeal, is whether there was any substantial evidence to sustain the Commission's finding that Mrs. Williams'

disability was not caused by an accidental back injury sustained in the course of her employment by the Arkansas Nursing Home. We conclude that there is substantial evidence in the record to support the Commission's finding.

It goes without saying that the burden was on Mrs. Williams to prove her disability was caused by the injury she says she sustained while employed at the nursing home. Mrs. Williams was the only one who testified as to an accidental injury, but she testified that she did feel pain in her back as she helped lift a patient on February 22, 1970, and that the pain persisted until she was examined by Dr. Price on April 27, 1970. Dr. Price was of the opinion that Mrs. Williams had a subluxation of the L-4 and L-5 vertebrae resulting in her disability and attributable to the injury as testified by her. Had this been the only evidence in the record, we could easily say there was no substantial evidence to sustain a Commission finding that such accident did not occur or that such disability did not result. But to reach such conclusion on the record before us, would require us to invade the province of the Commission and say the Commission erred in not accepting Dr. Price's diagnosis and medical opinion in preference to the diagnoses and opinions of Drs. Cornett, Ross, Zand, Morris, Chambers, Duncan and McKenzie.

This appeal does not present the question of whether there was substantial evidence that would have sustained the Commission in different findings than those made, but the question on appeal is whether there was any substantial evidence to support the finding the Commission did make. *Brower Mfg. Co.* v. *Willis,* 252 Ark. 755, 480 S.W. 2d 950; *Wilson Lbr. Co.* v. *Hughes,* 245 Ark. 168, 431 S.W. 2d 487. The Commission had a perfect right, as a jury would have had, to accept the medical diagnoses and opinions of Drs. Ross and McKenzie to the effect that Mrs. Williams' difficulties in her right leg are due to bursitis as opinioned by Dr. Ross, or to the osteoporosis and circulatory complications as indicated by Dr. McKenzie.

The judgment is affirmed.

HARRIS, C.J., not participating.

GEORGE BENNETT *v.* STATE OF ARKANSAS

CR 73-142 503 S.W. 2d 908

Opinion delivered January 21, 1974

Harold L. Hall, for appellant.

Jim Guy Tucker, Atty. Gen., by: *O. H. Hargraves,* Dep. Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. In appealing from a conviction and 21-year sentence for murder in the second degree, the appellant contends only that the State should not have been allowed to introduce a photograph of the decedent's face, taken by the doctor who performed an autopsy to establish the cause of death. The photograph was clearly relevant. The doctor could not positively identify the decedent by name; so the photograph was used to enable another witness to identify the dead body as that of the decedent. It is now argued that the defense did not question the decedent's identity, but even so the State had the burden of proving that fact beyond a reasonable doubt. We may add that there is nothing about the photograph that can fairly be said to be of a gruesome or inflammatory nature.

Affirmed.

HARRIS, C.J., not participating.

RICHARD MITCHELL, D/B/A MITCHELL FUNERAL HOME *v.* GEORGE BEARDEN, SHIRLEY BEARDEN ET AL

73-177 503 S.W. 2d 904

Opinion delivered January 21, 1974

L. V. Rhine, Douglas Bradley, and *Jon R. Coleman,* for appellant.

C. Joseph Calvin, for appellees.

JOHN A. FOGLEMAN, Justice. Appellant asserts that the chancery court erred in enjoining him from constructing a funeral home in Rector on a lot acquired by him for that purpose. The error, according to appellant, is in the court's finding that the vicinity in which the funeral home was to be located was an expanding exclusive residential area which was not in transition to business uses, so that the funeral home would constitute a nuisance. We affirm because we cannot say this finding was clearly against the preponderance of the evidence.

The importance of this finding is delineated in such cases as *Fentress* v. *Sicard,* 181 Ark. 173, 25 S.W. 2d 18;

Powell v. *Taylor,* 222 Ark. 896, 263 S.W. 2d 906; *Howard* v. *Etchieson,* 228 Ark. 809, 310 S.W. 2d 473; and *Blair* v. *Yancey,* 229 Ark. 745, 318 S.W. 2d 589. Through these cases, we have established these general principles, with regard to preventing establishment of funeral homes: A funeral home is not a nuisance per se. The intrusion of a funeral home into an exclusively residential district would ordinarily constitute a nuisance. It may be a nuisance in an area essentially residential in character. If, however, transition of the district from residential to business has so far progressed that the value of surrounding property would be enhanced as business property, rather than depreciated as residential property, the establishment of a funeral home would not constitute a nuisance.

Decisions recognizing the right of property owners to prevent the intrusion of a funeral home into a residential district are based upon the premise that the continuous suggestion of death and dead bodies tends to destroy the comfort and repose sought by home owners. See *Powell* v. *Taylor,* supra. The critical factor in determining the application of the general principles appears to be the effect on property values because of the location of the funeral home. Considerable weight is also given to the predominance of either commercial or residential property in the area. We cannot agree with appellant's analysis of our holdings, insofar as he interprets them to turn upon the manner of operation of a funeral home. While this could become a factor in determining whether injunctive relief should be granted, it is not determinative, and injunctive relief has been approved without any indication that the manner of operation would be in anywise contrary to prescribed standards and regulations.

The lot in question here is 170' x 180' and lies on the west side of Woodland Heights Drive (formerly Old Cemetery Road) in Rector, between two residences. All of the block on the west side of this drive between Second Street and Woodland Heights Cemetery, except for appellant's lot, is occupied by residences. All these dwelling houses were constructed after the cemetery was established. There are four homes between appellant's lot and the cemetery, the entrance of which is approximately

600 feet south of his lot. None of the property east of the street on which appellant's lot faces is developed. It is presently being used as a cow pasture. All the land in the block in which the Mitchell lot is located lying west of that lot and the homes on each side of it is presently used for pasture. There are also residences, however, facing Second Street and lying west of the residence at the corner of Second and Woodland Heights Drive. There had been a "camper" parked northwest of this intersection on the corner lot and a mobile trailer home on the lot just north of that.[1] There is also a machine shop on the north of this block near its western boundary on Idlewild Street. It was built 20 to 30 years ago—long before most of the residences in the area. In the next block to the north there was a dwelling house in which there was a beauty shop and another in which there is an antique shop occupying part of the garage and carport. Both faced Woodland Heights Drive, and there is evidence indicating the operators of these shops live in the dwellings in which they are located. There was testimony that the antique shop was located in a very attractive house. There is no evidence that there is any zoning ordinance in Rector or that there are any building restrictions that would prohibit the building of a funeral home anywhere in Rector.

There was testimony by a licensed real estate broker, who had been in construction work and who claimed to know property values in Rector, that several residences in the area would suffer depreciation in value by reason of the construction of the proposed funeral home. He opined that both Woodland Heights Drive and Second Street were strictly residential, even though there were some shops in the area. According to him, traffic and parking problems would be presented. He said no new businesses were being constructed in the area, but new residences were being built over a two-block area.

Another licensed real estate agent pointed out specific residential properties in the area that would suffer depreciation in value by reason of intrusion of a funeral home at the proposed location. He testified that the "cow

[1]There was testimony indicating that the trailer was not visible from Woodland Heights and that the camper had been removed prior to trial.

pasture" across the street, being suitable for residential purposes, would also suffer depreciation in value. He emphasized the effect of traffic and parking problems resulting from the operation of a funeral home. It was shown by other testimony that Woodland Heights Drive is a major thoroughfare for traffic entering and leaving Rector and carries more traffic than most Rector streets. It is 18 feet wide, with a six-foot dirt shoulder on one side and a three-foot one on the other. Outside the shoulders there are ditches. The Chief of Police testified that traffic congestion resulted when a funeral was in progress. While one car could pass between two others parked on this street, two could not meet and pass.

An appraiser for a savings and loan association, who agreed with other witnesses that the erection of the proposed funeral home would depress values in the area, emphasized loss of the homeowners' privacy. He found no adverse effect attributable to the antique and beauty shops. He also thought the property east of Woodland Heights Drive was suitable for residential development. The owner of one of the "cow pastures" testified he and his two sisters planned to sub-divide it for residential uses and had already platted part of it.

Neighboring dwellers stressed the morbid and depressing effect of a funeral home, restraints on recreational activities of families and the potential traffic congestion. Values of their property ranged from $14,500 to $28,000. There was testimony that bodies would be brought into the funeral home for embalming at all hours of the day and night. Appellant admitted that he would operate an ambulance service which would be used in response to emergency calls at all hours. Deliveries of flowers, caskets and vaults would be made to the establishment.

None of this evidence was substantially contradicted. Appellant pointed out that he planned a parking lot with capacity for 30 cars, without crowding, which he said was adequate for visitation hours and for most funerals. He anticipated that, by crowding, the lot would accommodate 45 cars, and that this would be sufficient parking for almost any funeral in Rector.

One of the arguments advanced by appellant is that the development of the area has been deterred already by reason of the cemetery. There was considerable testimony, however, that the cemetery was not visible from the property involved by reason of the fact that it lay beyond a slight knoll or rise in ground elevation. It was conceded by some of the witnesses that property in the area would be more valuable if the cemetery were not so close. One of the expert witnesses, however, testified that the residential lots in the area would not be diminished in value because of the cemetery.

The mere fact that property values in the area may have already been depressed by proximity to the cemetery does not diminish the weight of the testimony of the various witnesses about the impact of the establishment of the funeral home in that area. Neither does it tend to show that there is any transition toward commercial development, since all the residences have been built since its opening. We do not agree with appellant that there is any testimony that the cemetery has impeded the development of the lands now used for pasture, even though such an inference might possibly be drawn.

On this record, we are unable to say the chancellor's finding was clearly against the preponderance of the evidence. Accordingly, the decree is affirmed.

HARRIS, C.J., not participating.

BILLY JOE ROBINSON *v.* STATE OF ARKANSAS

CR 73-135 503 S.W. 2d 883

Opinion delivered January 21, 1974

Harold L. Hall, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Alston Jennings, Jr.,* Asst. Atty. Gen., for appellee.

J. FRED JONES, Justice. Billy Joe Robinson was convicted at a jury trial for selling cocaine and sentenced to 20 years in the penitentiary. Detective Bob Anderson purchased the cocaine from Robinson and his testimony at the trial resulted in Robinson's conviction. On appeal to this court Robinson contends as follows:

> "The court erred in ruling that the officer could testify that he made purchases on prior visits to defendant's home before defendant completed his examination of the officer."

We find no merit to this contention on the record now before us.

The felony information charged Robinson with the crime of violating the Arkansas Uniform Controlled Sub-

stances Act by unlawfully delivering a controlled substance to wit: Cocaine, against the peace and dignity of the State of Arkansas. Robinson entered a plea of not guilty. Bob Anderson, a detective in the narcotics division of the Little Rock Police Department, testified on direct examination that on January 18, 1973, he went to the appellant's apartment and there purchased a quantity of substance he believed to be cocaine from Billy Joe Robinson. He said he had been to the same address before, but that on January 18, he arrived at the address at approximately 8:15 p.m., knocked on the door and was admitted by Robinson. He said another male individual, whom he did not know, was in the apartment with Robinson at that time. He said he asked Robinson if he had any cocaine to sell and that Robinson answered in the affirmative and inquired as to how much he wanted. He said he told Robinson he wanted a $50 spoon of cocaine, whereupon, Robinson left the living room but returned within a few minutes and handed him the substance wrapped in aluminum foil. He said he stepped into the kitchen and examined the substance under a better light and that the substance appeared to be cocaine. He said he paid Robinson $50 for the substance and left the apartment. He said he drove directly to the narcotics division of the police department and that the substance he purchased was positively identified as cocaine.

On cross-examination Detective Anderson testified that he first met Robinson in the latter part of 1972 at Robinson's apartment. The defense attorney then inquired as to whether anyone accompanied the officer when he first went to Robinson's apartment and met him. The state's attorney objected to the relevancy of the testimony as to who accompanied Detective Anderson and the record then appears as follows:

> "THE COURT: What's the purpose of this testimony, Mr. Hall?
>
> MR. HALL: If the Court please, I want to show that he has been to see this defendant several times before at different places and it has been kept on until the

> date of this arrest; that he induced and entrapped him to get him some. He has been asking to get him some drugs for some period of time.
>
> THE COURT: All right, go ahead."

And, at this point, the state's attorney requested an in-chambers hearing which was granted.

At the in-chambers hearing the state's attorney stated that the state took the position there was no issue of entrapment involved in the case, but that the defendant was raising the issue of entrapment making an in-chambers hearing necessary to "determine whether or not to proceed in that area and it is up to the Court to determine whether a prima facie case of entrapment is established before it goes to the jury."

The trial judge inquired as to what was going to be the problem with the testimony and pointed out that the witness had only been asked when he had previously gone to the residence of the defendant. The state's attorney pointed out to the court that the defendant had subpoenaed a witness under the alias name "G. Blue"; that the defense attorney had raised the issue of entrapment and he anticipated the defense witness, G. Blue, would testify he introduced Officer Anderson to Robinson several months prior to January 18, in an effort to trap Robinson into selling or delivering cocaine. The state's attorney argued in chambers, that from the preliminary questions directed to Officer Anderson on cross-examination, the defense was laying a foundation for the introduction of G. Blue's testimony bearing on entrapment, and that the state was entitled to an in-chambers hearing to determine whether or not entrapment was a valid issue. The trial court then ruled as follows:

> "Well, let's have it then. I don't think he has raised it yet but let's have it anyway."

Whereupon, in chambers, Officer Anderson testified under questioning by the state's attorney, that in December, 1972, he received information that Robinson

was engaged in the business of selling and dealing in narcotics. He said that the very first time he ever went to Robinson's apartment, G. Blue took him there, and that was the only time G. Blue ever went with him to the Robinson apartment. He said that after he was introduced to Robinson by G. Blue, that Robinson took him to a small utility room off the kitchen in the apartment where he purchased from Robinson a bag of green vegetable material which was later found by chemical analysis to be marijuana. He said he subsequently made two other purchases of marijuana from Robinson. He said that G. Blue had no other connection with the matter except to introduce him to Robinson upon his first contact. At this point the record is as follows:

> "THE COURT: Well, just a minute now. What else did G. Blue have to do with your relations?
>
> A. Not a thing.
>
> THE COURT: If he wants to testify to that, well, then, I don't see why he shouldn't. If you want him to get up there and say he went in there and bought marijuana three different times from him or whatever he bought from him, well, I will let you do that, Mr. Hall.
>
> MR. HALL: I have a right to ask him when he first went over, how many times he had been there, who was with him. I don't have to ask him if he bought anything. I asked him how many times he had been there.
>
> THE COURT: Well, now, if you're going to try to show entrapment, that he went over there to persuade this man to, to sell, then you're going to have to, you're going, he's entitled to state the—
>
> MR. MUNSON: (Interposing) That's right.
>
> THE COURT: What happened after he got there.
>
> MR. MUNSON: That's exactly right.
>
> THE COURT: If that's what you're going to do. Now, you are not going to do that, it's ridiculous.

MR. HALL: May I ask the officer a few questions, please?

THE COURT: Go ahead."

The defense attorney then took Officer Anderson on cross-examination in chambers and Officer Anderson testified he had been to Robinson's apartment over a half dozen times; that he met Robinson through G. Blue; that when he purchased the cocaine from Robinson, there was one other man present whom he did not know. He described the height, dress and complexion of the other man who was in the apartment but said he was not introduced to him and did not know his name. He said he had seen the defendant at various times on the street as well as in the apartment. At the close of the in-chambers hearing, following the examination of the witness by the defense counsel, the record is as follows:

"THE COURT: Do you have any questions?

MR. MUNSON: No, Your Honor.

THE COURT: Well, so you won't be surprised, you can ask him any questions you want to. You can do just as much of that as you want."

It is apparent that the above statement was directed to the state's attorney and pertained to further questioning at the in-chambers hearing.

Following the in-chambers hearing, the defense attorney continued his questioning of Officer Anderson before the jury. The officer described the automobile he was driving on his trips to see Robinson, and described the other individual in Robinson's apartment at the time he purchased the cocaine on January 18. He said that the unknown individual was sitting at the kitchen table playing records, and that he did not talk to him or make an inquiry of him concerning drugs. He said that following this purchase on January 18, and as a result of it, Robinson was arrested on February 18.

The state then offered other witnesses who testified as to the identification, analysis and chain of possession of the cocaine offered in evidence. At the close of the state's case, the appellant moved for a directed verdict of acquittal on the grounds that the state had not shown the amount or weight of the cocaine alleged to have been purchased by Anderson and the motion was overruled.

Willie Charles Keese testified as a witness for the defense. He said he was in Robinson's apartment on January 18 when Officer Anderson arrived and asked for a spoon of "coke." He said that when the officer made this request, they (apparently referring to the three of them) were "sitting in the house." Then, apparently referring to himself and Robinson, he said:

> "We went off in the pantry. Went off in the back pantry back in the back and got some aluminum foil and some aspirins, put them in the aluminum foil and ground them up and gave it to him."

He said he watched the whole process and was present when Robinson gave Officer Anderson the aluminum foil containing the ground up aspirins. This witness then identified Officer Anderson as the person to whom he saw Robinson sell the ground aspirin.

On cross-examination Keese testified that he lived next door to Robinson; that he had known him for some time; that they are good friends. He said he visited with Robinson and "we rap together all the time." He said, however, that he did not know very much about Robinson.

> "All I know is that he has been a good friend of mine all the time and he, I know he never had any cocaine and he never messes with the stuff."

He denied that he helped prepare the aspirin he said Robinson delivered to Officer Anderson.

> "No, sir, I didn't help him. I say he ground it up in this paper. I was there watching him."

At the close of all of the evidence, Robinson's attorney renewed his motion for directed verdict of acquittal on the ground that the state had not proved any amount that Robinson was supposed to have delivered to the officer, and the motion was again denied.

We are inclined to agree with the trial court that at the time the in-chambers hearing was requested by the state's attorney and granted by the court, the defense of entrapment had not been raised at that point. We are unable to tell from the record before us what questions would have been propounded to Officer Anderson and what his answers would have been had the defense proceeded with its cross-examination of the officer without the hearing in chambers, but we are also unable to see how the appellant could have been prejudiced in connection with the in-chambers proceedings.

The appellant argues in his brief that the state was anticipating that he was going to call a witness in an effort to prove entrapement which he did not do, and that the state's objection and request for an in-chambers hearing was premature as the defendant had not begun to develop a case of entrapment. We are inclined to agree with the appellant that the state's objection and the court's ruling were premature, but we are unable to follow the appellant's reasoning in arguing that this premature objection and ruling in chambers were prejudicial to the appellant's rights in this case. We agree with the appellant's statement taken from 21 Am. Jur. 2d, Criminal Law, § 143:

> "'Entrapment is an affirmative or positive defense, and one that defendant must prove.'"

But, the appellant in his brief, argues as follows:

> "The appellant understands that the State may offer evidence of other offenses in order to rebut a defense of entrapment but in the case at bar, the trial court ruled on cross-examination of the first witness by the State that the State's witness could testify that he bought marijuana on three different times from the appellant before he ever had a chance to

develop a defense of entrapment. This premature ruling by the trial court was prejudicial to the appellant because if he asked certain questions of the officer, the officer could then relate to the jury other purchases of controlled substances from the appellant before the question of entrapment could properly be raised and testimony received. If the appellant failed in his effort to prove entrapment, the State would have this damaging testimony before the jury even though the defense of entrapment was not successful and the appellant failed to take the witness stand and testify."

As we interpret the entire proceedings in chambers, it simply amounted to the court recognizing the right of the state to elicit from Officer Anderson's testimony that he had purchased marijuana on three occasions from the appellant in the event the appellant proceeded in developing a defense of entrapment. It would appear that the information elicited at the in-chambers hearing should have been as beneficial to the appellant as to the state and amounted to no more than a pronouncement of the law as the appellant's attorney says he already understands it to be, "that the State may offer evidence of other offenses in order to rebut a defense of entrapment."

We do not interpret the court's ruling as indicating the defense attorney would lose control of the questions he could propound to the witness on cross-examination or require him to elicit from the witness other evidence not responsive to the questions he would ask. There is nothing in the record to indicate that the defendant's attorney could not, and would not, have conducted his examination of Officer Anderson before the jury exactly as he did conduct the examination. It would appear from the record that the admissibility of evidence was not so much the question involved as was the question of procedure and timing of evidence to be offered, but which was never actually offered.

The appellant seems to recognize the rule as stated in 33 A.L.R. 2d 883, where under an annotation per-

taining to entrapment to commit offense with respect to narcotics law, § 6 states:

> "When entrapment is interposed as a defense, the predisposition and criminal design of defendant become relevant, and the government may introduce evidence relating to the conduct and predisposition of the defendant as it bears upon the issue of entrapment, its tendency being to show that the law enforcement officers were acting in good faith and in the belief based upon reasonable information that accused was engaged in unlawful traffic in connection with the narcotics law."

This annotation cites the 1926 case of *United States* v. *Siegel,* 16 F. 2d 134, where the court said:

> "'That the government, prior to the question of entrapment having been raised, could not introduce any evidence of complaints having been made to the officers, but that, when the issue of entrapment was raised, then it could show what grounds of suspicion they had.'"

The appellant indicates in his argument that by the ruling of the court in chambers he was forced to abandon his planned defense of entrapment in order to prevent the jury from learning that the appellant was also engaged in the sale and distribution of marijuana. We are unable to understand how the appellant would have been able to avoid this hazard had he proceeded with a defense of entrapment, so it would appear that prior knowledge of the full measure of such hazard should have been to his advantage. Certainly the defense that the appellant did rely on was not consistent with a defense of entrapment. Of course, the law is well settled in Arkansas that in certain cases similar acts or offenses can be shown as tending to show a system, design and guilty knowledge in connection with the offense for which the defendant is being tried. *Caton & Headley* v. *State,* 252 Ark. 420, 479 S.W. 2d 537; *Dail* v. *State,* 255 Ark. 836, 502 S.W. 2d 456; *Alford* v. *State,* 223 Ark. 330, 266 S.W. 2d 804.

A defense of entrapment was entirely inconsistent with the defense actually relied on before the jury in this case. The defendant was being tried for selling and delivering cocaine. The defendant pleaded not guilty and the only evidence he offered was that of his neighbor and close friend, Keese, who testified that he was present at all times when the purchase was made; that he watched Robinson prepare the material he delivered to Officer Anderson; that Robinson did not deliver cocaine; that "he never had any cocaine and he never messes with the stuff." Keese testified positively, following a reminder of the laws against perjury, that the material he saw Robinson prepare and deliver to Anderson was simply aspirin.

Where sale or delivery of controlled substances or contraband is involved, the sale or delivery of the alleged substances is ordinarily presupposed when the defense of entrapment is interposed. In *Brown* v. *State,* 248 Ark. 561, 453 S.W. 2d 50, the defense of entrapment was interposed in a marijuana case. We upheld the trial court in holding that the defense of entrapment was not available, and in that case we said:

> "Appellant denied having any connection with, or knowledge of, the marijuana. In that situation he was not entitled to the defense of entrapment. The question was raised in *Rodriguez* v. *United States,* 227 F. 2d 912 (1955), and the court said:
>
> 'Moreover, in refusing to charge the jury on entrapment, the court stated that the defense was not available where, as in this case, the defendant denies the very acts upon which the prosecution and the defense are necessarily predicated. It is true that this defense may be raised even though the defendant pleads not guilty, but it 'assumes that the act charged was committed,' and where the defendant insists, as she did here, that she did not commit the acts charged, one of the bases of the defense is absent. On this ground and for other reasons mentioned, the district court was not in error in refusing the appellant's motion or requested charge on entrapment.'"

See also 61 A.L.R. 2d p. 677 and 21 Am. Jur. 2d § 144, p. 214.

It is true that the appellant himself simply pleaded not guilty and did not specifically deny that he delivered cocaine to Officer Anderson, but his only witness Mr. Keese testified that the substance actually delivered was aspirin and not cocaine. A similar situation arose in the Texas case of *Stone* v. *State,* 171 S.W. 2d 364, in which the defense of entrapment was argued on motion for rehearing and although the court found no evidence of entrapment, it stated:

> "While appellant did not testify, he had witnesses who denied the sale at the time alleged and raised the issue of an alibi as his chief defense."

See also the Missouri case of *State* v. *Varnon,* 174 S.W. 2d 146, involving the illegal sale of intoxicating liquor where the defense of entrapment was interposed. The appellant in that case contended that his instruction on entrapment should have been given and while the court found there was no evidence upon which to base such instruction, the court said:

> "Appellant denied making any sale of intoxicating liquor. This is not consistent with the defense of entrapment."

The judgment is affirmed.

HARRIS, C.J., not participating.

JIMMIE L. WALTERS *v.* STATE OF ARKANSAS

CR 73-116 503 S.W. 2d 895

Opinion delivered January 21, 1974

J. H. Cottrell and *Floyd J. Lofton,* for appellant.

Jim Guy Tucker, Atty. Gen., by: *Alston Jennings Jr.,* Asst. Atty. Gen., for appellee.

CONLEY BYRD, Justice. Based upon the conduct of the trial court in discharging a jury and granting a new trial, the appellant Jimmie L. Walters seeks to set aside his subsequent second degree murder conviction upon the ground of former jeopardy or at least to reduce the conviction thereof to a degree not greater than involuntary manslaughter.

The record before us as to what occurred in the first trial is rather meager. The portion upon which appellant relies is set forth in a motion to dismiss as follows:

> "That at the conclusion of the first trial of this defendant, the jury retired to deliberate a verdict and during the course of said deliberation, the Jury reported to the Court that they could not reach a deci-

sion and were hung. While determining whether the jury could reach a verdict, the following conversation between the Court and the Jury Foreman occurred:

COURT: Have you reached a verdict?

FOREMAN: No sir.

COURT: What are your numbers now?

FOREMAN: 7 to 5.

COURT: Ladies and gentlemen of the jury, I know some Courts follow the procedure of locking up juries and keeping them for days and often times by doing it, they get a verdict, but this Court doesn't believe in that. I believe that's subjecting you to torture. That's not what you are down here for, to be tortured. You are just citizens doing your duty. You have told me there were two things you were considering—guilt or innocence?

FOREMAN: Yes sir.

COURT: If the proposition had been voted on, what would have been the degree?

FOREMAN: About the least.

COURT: You mean you were hung up between involuntary manslaughter and not guilty?

FOREMAN: Yes sir."

The doctrine of former jeopardy has been set forth in *Atkins* v. *State,* 16 Ark. 568, 578 (1855) in this language, quoting from the still leading case of *United States* v. *Perez,* 9 Wheat. 579, 6 L. Ed. 165 (1824):

" 'We think that in all cases of this nature, the law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into

> consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject; and it is impossible to define all the circumstances which would render it proper to interfere. To be sure, the power ought to be used with the greatest caution, under urgent circumstances, and for very plain and obvious causes; and, in capital cases especially, courts should be extremely careful how they interfere with any of the chances of life in favor of the prisoner. But, after all, they have the right to order the discharge, and the security which the public have for the faithful, sound, and conscientious exercise of this discretion, rests in this, as in other cases, upon the responsibility of the judges under their oath.' "

We do not read anything in *Gori* v. *United States,* 367 U.S. 364, 81 S. Ct. 1523, 6 L. Ed. 2d 901 (1961), nor in *United States* v. *Jorn,* 400 U.S. 470, 91 S. Ct. 547, 27 L. Ed. 2d 543 (1970), as holding to the contrary.

Because of the fact the trial court went beyond the determination that the jury was hung between guilt and innocence and determined that they were hung between a verdict of involuntary manslaughter and not guilty, appellant suggests there was a preoccupation by the trial court in helping the prosecution obtain a conviction. While we must admit that the inquiry was inadvisable, we cannot read appellant's suggestion into this meager record. It appears to us that the trial court had already indicated that he was going to grant a mistrial before making the inquiries as to involuntary manslaughter and not guilty. On the meager record before us we cannot say that the trial court abused his discretion in determining that the jury was hopelessly deadlocked. Consequently, we need not speculate as to what our conclusion would have been had such information been first obtained or had the record shown how long the jury had been deliberating.

Neither can we agree with appellant that the first trial resulted in an implied acquittal of all degrees in excess of involuntary manslaughter. The statements between

the trial court and the jury foreman cannot be considered under the circumstances as a verdict of the jury. See Ark. Stat. Ann. § 43-1226 (Repl. 1964).

Affirmed.

HARRIS, C.J., not participating.

WAYNE R. WILLIAMS *v.* OTIS TURNER, CIRCUIT JUDGE

CR 73-150 503 S.W. 2d 901

Opinion delivered January 21, 1974

Tackett, Moore, Dowd & Harrelson, for Petitioner.

Jim Guy Tucker, Atty. Gen., by: *Philip M. Wilson,* Asst. Atty. Gen., for Respondent.

CONLEY BYRD, Justice. Petitioner, Wayne R. Williams, being charged in Miller County with the offenses of False Pretenses, Ark. Stat. Ann. § 41-1901 (Repl. 1964), and Bribery, Ark. Stat. Ann. § 41-901 (Repl. 1964), asks this Court to prohibit Respondent, Otis Turner, Judge of the Miller County Circuit Court, from proceeding with a trial upon those charges in Miller County on the theory that Miller County has no jurisdiction of the offenses charged. We agree with petitioner and grant the writ.

The false pretense information as finally amended alleges:

> ". . . The said defendant on or about the 10th day of September in Clark County, Arkansas did unlawfully and feloniously with the intent to defraud and

cheat B. F. Wheat, Jr., of the sum of $5,000.00, $4,-000.00 of which is to be paid in Miller County, Arkansas, by falsely, fraudulently and designedly stating to the said B. F. Wheat, Jr., that for said sum, to be paid to certain influential individuals, the son of B. F. Wheat, Jr., Frank S. Wheat, would receive a certain sentence in the felony case then pending against him in Clark County, Arkansas, and would be 'free of prison'; Wayne R. Williams further stated to B. F. Wheat, Jr., that a probated or suspended sentence 'has been arranged with the judge' indicating that the Circuit Judge in Miller County, Arkansas, was to receive part of the payment, which statements were false and were known at that time by Wayne R. Williams to be false and the false representations and pretense were relied upon and believed by the said B. F. Wheat, Jr., in violation of Ark. Stats. 41-1901."

The bribery information as finally amended charged petitioner with the crime of bribery committed as follows:

"The said defendant on or about the 10th day of September, 1973, in Clark County, Arkansas, did willfully, unlawfully and feloniously directly pay and promise to pay a bribe of money in Clark and Miller Counties, Arkansas, to an officer of the State of Arkansas, a person holding a place of trust under the laws of the State of Arkansas, with the intent to influence the actions, decisions and recommendations of said officer in the prosecution of Frank S. Wheat, a defendant in a criminal case then pending in the Circuit Court of Clark County, Arkansas, in violation of Ark. Stats. 41-901."

Our Constitution Art. 2, § 10 guarantees an accused a "public trial by an impartial jury of the county in which the crime shall have been committed." This court, immediately after the adoption of the Constitution of 1874, recognized that this provision of the Bill of Rights was jurisdictional and held that the legislature could not direct or permit a trial in the county other than where the offense was committed.

Respondent recognizes the jurisdictional limitations but argues here that the information allege the crimes were committed in two counties. In doing so Respondent contends that the the jursidiction is controlled by Ark. Stat. Ann. § 43-1414 (Repl. 1964), and Ark. Stat. Ann. § 43-1426 (Repl. 1964) together with the interpretation that we gave to them in *Hill* v. *State,* 253 Ark. 512, 487 S.W. 2d 624 (1972). Arkansas Statutes § 43-1414 provides:

> "Where the offense is committed partly in one county and partly in another, or the acts or the effects thereof, requisite to the consumation of the offense, occur in two (2) or more counties, the jurisdiction is in either."

Arkansas Statutes § 43-1426 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 *Hill* v. *State,* 253 Ark. 512, 487 S.W. 2d 624 (1972), we had before us a charge of disposal of mortgaged property, Ark. Stat. Ann. § 41-1928 (Repl. 1964). In upholding the venue in that case we pointed out that the effects of the acts of the parties outside of Howard County was to dispose of the mortgaged property in Howard County. In other words there would have been no offense committed had the acts of the accused not resulted in the transfer of the mortgaged property in Howard County. Under the crimes here charged against petitioner the offenses were committed at the time of the occurrences alleged to have taken place in Clark County and were complete at that time.

Furthermore, as can be seen from the language of Ark. Stat. Ann. § 43-1426 (Repl. 1964), the presumption of venue only applies where the record does not affirmatively appear otherwise. In this case the informations affirmatively allege that the events giving rise to the offenses occurred in Clark County instead of Miller Coun-

ty. If the State had wanted to contend otherwise, it should have either amended the informations to allege that offenses were committed in Miller County or filed a bill of particulars, as was suggested in *Meador* v. *State,* 201 Ark. 1083, 148 S.W. 2d 653 (1941), to show that it was alleging an offense in Miller County and not in Clark County.

Finally, Respondent contends that the bribery information alleges a payment of a bribe in Miller County. We do not so read the information. As we read the information it charges that whatever petitioner did occurred in Clark County. Had it been the State's intent to charge petitioner with the payment of a bribe in Miller County, it would have been simple to have so stated without any mention of an allegation that he did pay a bribe in Clark County.—Of course nothing herein said will prevent the State from so proceeding against petitioner in Miller County upon a proper allegation.

Having shown that the informations filed against petitioner charged offenses that were allegedly committed only in Clark County, it follows that the Miller County Circuit Court was without jurisdiction.

Petitioner here for the first time challenges the sufficiency of the false pretense charge, because it does not allege that any payment was made by any person to any other person, but we do not reach the question. The record does not show that the sufficiency of the charge was presented to the trial court.

Writ granted.

REATHER WATSON *v.* PHIL ALFORD, ADMINISTRATOR OF THE ESTATE OF NELSON YOUNG, DECEASED, ET AL

73-178 503 S.W. 2d 897

Opinion delivered January 21, 1974

Harkness, Friedman & Kusin, by: *Donald B. Friedman,* for appellant.

Young & Patton, by: *Nicholas H. Patton,* for appellees.

FRANK HOLT, Justice. Appellant sought to set aside a conveyance of land by her deceased husband, Emanuel Watson, and herself to appellees, Stewart Landes and his wife, Gloria Landes. The chancellor dismissed appellant's

third party complaint and refused to set aside the conveyance. For reversal of that decree, appellant contends that the conveyance should be cancelled inasmuch as Emanuel was not competent to know the nature of the transaction in which he participated. Appellant bases this contention on Emanuel's advanced age, 100 years old at the time he signed the deed, and inadequate consideration received for the land. We think the appellant is correct.

The appellee administrator brought suit to foreclose a mortgage in the sum of $1,000.35 bearing 10% interest per annum, together with a 10% attorney's fee. The mortgage was executed in 1966 on property then owned by Charles Watson, Emanuel's son by a former marriage. A few months later Charles died intestate and Emanuel, being the sole heir, inherited the encumbered property. At that time Emanuel was 100 years of age. He died four years later. Reather instituted her third party complaint in the pending foreclosure proceeding. As indicated, she contends that her aged husband was not competent to transact the sale of their land which was attended by inadequate consideration.

In the oft cited case of *Kelly's Heirs* v. *McGuire,* 15 Ark. 555 (1855), the court announced that if one is "of such great weakness of mind, as to be unable to guard himself against imposition, or to resist importunity or undue influence, a contract, made by him under such circumstances, will be set aside. And it is not material from what cause such weakness arises. It may be from temporary illness, general mental imbecility, ... the infirmity of extreme old age." The fact that a grantor is old and in feeble health is a circumstance bearing on the question of mental capacity as is gross inadequacy of price. *Campbell* v. *Lux,* 146 Ark. 397, 225 S.W. 653 (1920), *McEvoy* v. *Tucker,* 115 Ark. 430, 171 S.W. 888 (1914). Of course, we will not set aside contracts for mere inadequacy of price. *Hawkins* v. *Randolph,* 149 Ark. 124, 231 S.W. 556 (1921). The grantor's disability must render him incapable of "intelligently comprehending and acting upon the business affairs out of which the conveyance grew, and to prevent him from understanding the nature and consequences of his act." *McEvoy* v. *Tucker,*

supra. Each case dealing with mental capacity must be decided on its own peculiar facts and circumstances. *Hawkins* v. *Randolph, supra.*

Our cases appear in conflict as to the evidentiary standard which is required to establish mental incapacity in the making of a deed. One line of cases holds that only a clear preponderance of the evidence is the required standard of proof. *Campbell* v. *Lux, supra,* and *McEvoy* v. *Tucker, supra.* However, other cases apply the usual quantum of proof which is required to set aside and cancel a deed: i.e., clear, cogent and convincing evidence. *Whatley and Wright* v. *Corbin,* 252 Ark. 561, 480 S.W. 2d 142 (1972), and *Braswell* v. *Brandon,* 208 Ark. 174, 185 S.W. 2d 271 (1945). *Braswell* was relied upon in *Whatley and Wright* as precedent for the clear, cogent and convincing standard with respect to mental capacity. However, neither *Campbell* nor *McEvoy,* the earlier cases, were recognized in *Braswell* which enunciated the stricter evidentiary requirement by citing *Stephens* v. *Keener,* 199 Ark. 1051, 137 S.W. 2d 253 (1940). Significantly, *Stephens* did not deal with mental incapacity as grounds for setting aside a deed. There, mistake and inadequate consideration were the issues.

We take this occasion to resolve the inconsistency in favor of the less strict quantum of proof which requires only a preponderance of the evidence as pronounced by our earlier cases. The rationale is that we can perceive no basis to establish a different standard of proof involving the mental capacity to make a deed from our rule with respect to the mental capacity to make a will. Both are solemn written instruments. We have long recognized the preponderance test as being our guideline in weighing the evidence of testamentary capacity. *Short* v. *Stephenson,* 238 Ark. 1048, 386 S.W. 2d 501 (1965). Applying this standard we now review the evidence in the case at bar.

There is little doubt that Emanuel had grown feeble and incapacitated in his old age. About ten years preceding this questioned conveyance, he had suffered a stroke and since that time was unable to work. Reather testified

that his stroke impaired his mind and severely limited his ability to function physically and mentally. She was instructed by his doctors not to do anything to disturb or aggravate him. In June, 1966, Landes, the purchaser, came to their house and, after she dressed her husband, he accompanied Landes to view the property. The next day, Landes returned with the necessary legal papers for the conveyance which Emanuel signed. Reather signed the papers only after Emanuel became agitated at her reluctance. The next morning Emanuel inquired if she had seen the word "Deed" on the papers. When she confirmed that she had, Emanuel gave her the $200 check Landes had given him and directed her to take the check to Landes and demand a return of the papers they had signed. Landes refused to do this, stating he would only give them to Emanuel. Two weeks lapsed before Emanuel was physically able to go to Landes' office. At that time, Emanuel was told that the land had been sold. He left Landes' office crying.

Other witnesses corroborated Reather's testimony that due to Emanuel's stroke and age, he was unable to look after his business affairs. A lifetime acquaintance testified that due to Emanuel's stroke and age, he was unable to conduct business affairs and that she, as a frequent visitor, assisted in getting Emanuel in and out of his bed. Further, following his stroke, "[H]is mind would come and go and sometimes you knew what he was talking about and sometimes you didn't." When Emanuel learned his property would not be returned, he went to a local attorney's office and left the $200 check with him. This attorney had practiced law in the locality since 1922 and it appears that he was well acquainted with Emanuel since this time. He testified that Emanuel came to his office frequently before his stroke which was about ten years before the conveyance in question; that since then "he had failed very fast;" that "[Y]ou had a hard time explaining anything to him and he had a hard time understanding anything you tried to tell him;" that at the time the deed was made to Landes, Emanuel had only been released from the hospital a few days; that each time he went to the hospital "he was expected to die;" and "he couldn't remember where he ended up and he didn't understand quite why he made the deed and actually he

didn't know why." At that time about $1,000 was owed on the mortgage of the 67.5 acres. The mortgage was not due for another two years. This attorney testified that he was familiar with the property and described it as "good up hill land." "It was in pasture and in some timber also." Since he had bought and sold land in this locality, he estimated that Emanuel's land had a value of $100 per acre or $6,750. The attorney believed that Emanuel was not competent at the time of executing the deed and should have had a guardian because "[H]is mind was confused and he couldn't comprehend anything."

The appellees adduced evidence from one witness that he had known Emanuel since 1942 and had visited with him on many occasions during which he had made tape recordings for the local county historical society. Some of these occurred about the time of the conveyance in question. It was his opinion that Emanuel had a clear and lucid mind and he was "amazed at his clear recollection and clear consistency when he repeated things."

The Landes attorney testified that Emanuel came to his office in June, 1966, which was a few months after he had inherited the property from his son; that he wanted to deed the land to the mortgagor who held the $1,000 mortgage; that he advised him to try to sell the land for more than the mortgage; that he called Landes who was advised that the land was worth more than the mortgage and suggested he contact Emanuel. Two days later Emanuel and Reather conveyed the property to Landes for $200 plus assumption of the mortgage. It appears that Emanuel was worried that he could not raise the money to pay off this mortgage. Landes testified that he viewed the property and learned that in addition to the $1,000 mortgage there was a lifetime lease on the land held by Nelson Young, a friend of Emanuel's, and after Nelson's death, Nelson's wife would have possession of the land until her demise. Both were in their sixties. The lifetime lease provided that timber could be removed from the land along with fences and buildings. He testified that it was decided that the property was not worth anything in view of the mortgage and the lease; however, $400 would be paid. It is undisputed that only $200 was ever paid. He further testified that since the

conveyance he understood that Nelson Young and his wife were both deceased.

Landes was unaware that at the time Emanuel signed the deed he was recently released from the hospital. However, he was aware that Emanuel was feeble and had suffered a stroke. Landes believed that Emanuel sold him the property because of the mortgage and did not learn until he bought the land that the $1,000 mortgage was not due for two years. Emanuel's actions and behavior did not cause him to believe that he was unable to comprehend the validity of the conveyance.

In summary, Emanuel was 100 years old at the time of the conveyance of the deed; he had suffered a stroke a few years previously affecting him mentally and physically; the day following the conveyance he attempted to rectify it; he had to have constant care and attention as to his physical condition and was released from the hospital only a few days previously; only a $1,000 mortgage existed on the 67.5 acres at the time of the conveyance; the mortgage was not due for another two years; only $200 was paid by the purchaser, although he stated it was "decided" $400 would be a fair payment; the lifetime lease was being held by a couple in their sixties who were dead at the time of this action in 1970; the only witness who testified as to familiarity with the property and who had bought and sold property in the locality placed a value of $100 per acre or $6,750 upon the land. We hold that the evidence required to cancel this conveyance was met by the appellant and clearly preponderates in her favor. *McEvoy* v. *Tucker, supra,* and *Campbell* v. *Lux, supra.* Furthermore, in the case at bar, even if we apply the stricter requirement of clear, cogent and convincing evidence, we hold that the appellant has also met that burden of proof.

Again we must take this occasion to reiterate, in the circumstances, our disapproval of an attorney testifying in an action in which he is an advocate. See *Montgomery* v. *1st Nat'l. Bank of Newport,* 246 Ark. 502, 439 S.W. 2d 299 (1969), *Old American Life Ins. Co.* v. *Taylor,* 244 Ark. 709, 427 S.W. 2d 23 (1968), and *Rushton* v. *First Nat'l. Bank of Magnolia,* 244 Ark. 503, 426 S.W. 2d 378 (1968).

The decree is reversed and remanded for proceedings not inconsistent with this opinion.

Reversed and remanded.

HARRIS, C.J., not participating.

TOMMY FERGUSON *v.* STATE OF ARKANSAS

CR 73-138 503 S.W. 907

Opinion delivered January 21, 1974

Donald Poe, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Alston Jennings,* Asst. Atty. Gen., for appellee.

FRANK HOLT, Justice. Appellant was convicted by a jury of the delivery of marijuana in violation of Act 590 of 1971 as amended (Ark. Stat. Ann. § 82-2617 [Repl. 1960]). A two year sentence was assessed in the Department of Corrections. Appellant contends for reversal of the

judgment that the purchaser and other youths instrumental in the purchase of the marijuana from appellant are accomplices and, therefore, their testimony must be corroborated.

Appellant is correct in asserting that "a conviction cannot be had in any case of felony upon the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense." Ark. Stat. Ann. § 43-2116 (Repl. 1964), *Moore* v. *State,* 251 Ark. 436, 472 S.W. 2d 940 (1971).

In the case at bar, however, appellant's contention for reversal was determined adversely in the recent case of *Sweatt* v. *State,* 251 Ark. 650, 473 S.W. 2d 913 (1971). There we refused to classify the purchaser in an LSD sale as an accomplice of the seller. We said:

> It is uniformly held that one who buys narcotics, intoxicating liquor, or other contraband is not an accomplice in the sale of the article, for obviously he is not selling to himself. **** [t]o be an accomplice one 'must stand in the same relation to the crime as the person charged therewith and must approach it from the same direction.' A buyer and a seller certainly approach the transaction from opposite poles. ****
>
> The reason for holding that the purchaser is not the accomplice of the seller is that the purchaser, if guilty of any crime, is guilty of a crime distinct from that for which the seller is being prosecuted.

In the instant case neither the purchaser of the marijuana nor the other witnesses *delivered* the controlled substance. Therefore, neither could be charged with that offense. Their participation would be a separate and distinct offense, if any. Consequently, the court correctly refused to give an instruction relating to the requirement that the testimony of an accomplice or accomplices must be corroborated. An instruction must be germane to the issue.

Affirmed.

HARRIS, C.J., not participating.

TRANSPORT COMPANY *v.* ARKANSAS TRANSPORTATION COMMISSION ET AL

73-129 504 S.W. 2d 366

Opinion delivered January 28, 1974

Harper, Young & Smith, for appellant.

Louis Tarlowski, for appellees.

GEORGE ROSE SMITH, Justice. The appellant, Transport Company, and its wholly owned subsidiary, Southern Transport, Inc., are motor carriers transporting petroleum products in intrastate commerce in Arkansas. Prior to the present proceedings the parent company was an authorized common carrier, but its certificate of authority limited it to the transportation of commodities along specified highways, most of which radiated from Little Rock to other parts of the state without connecting with one another at the far ends. The subsidiary company was a contract carrier engaged primarily in transporting asphalt (a petroleum product) along a different set of highways.

In this case Transport, the parent company, applied to the Arkansas Transportation Commission, a nominal appellee here, for the removal of certain restrictions in Transport's certificate, so that it could operate over any and all highways to and from all points within the state.

The applicant contemplated that its subsidiary company would be dissolved if the Commission granted the application, thereby enabling Transport to perform as a common carrier the services that the subsidiary had been performing as a contract carrier.

Transport's application was protested by two competing carriers, Arkansas Transport Company and Earl Gibbon Transport. After a hearing at which much testimony and many exhibits were introduced, the Commission granted Transport's application. Arkansas Transport appealed to the Pulaski Circuit Court, where the Commission's order was set aside as being against the weight of the evidence. Transport brings the case to us, with Arkansas Transport as the real appellee.

At the outset Arkansas Transport renews its insistence that all proof pertaining to the subsidiary company's operations be disregarded, because that corporation was not a party to Transport's application. The Commission was right in rejecting that contention. The Commission is not bound by technical rules of pleading and evidence, its mission being to ascertain the facts bearing upon the right and justice of the matters before it. Ark. Stat. Ann. § 73-127 (Repl. 1957). At the hearing the subsidiary's authorized representative announced that the subsidiary joined in Transport's application and that upon the granting of that application the subsidiary would surrender its permits to the Commission and merge assets through an appropriate plan approved by the Internal Revenue Service. Arkansas Transport did not plead surprise or ask for a continuance, doubtless because substantially all the applicant's proof had been disclosed in exhibits filed before the hearing. Thus the objection is purely a technical one, having no bearing upon the merits of the controversy.

We are firmly of the opinion that the Commission was fully justified by the weight of the evidence in granting Transport's application. It must be kept in mind that only a few years ago the appellee Arkansas Transport obtained for itself the same broad authority to operate over irregular routes throughout the state that the appel-

lant is now seeking. See *Wheeling Pipe Line* v. *Arkansas Commerce Commn.*, 249 Ark. 685, 460 S.W. 2d 784 (1970), where Arkansas Transport prevailed. In the case at bar the Commission went to the heart of the matter in these two sentences in its report and order: "The carrier that is limited to a regular route operation cannot compete cost-wise with the carrier authorized to transport the same commodities between the same points over a shorter irregular route at the same level of rates required by law to prevent undue preferences or advantages and unfair or destructive competitive practices. The carrier that is restricted to regular routes involving greater distances is subjected to unfair competitive advantage resulting, in effect, in wasted transportation and robbing him of the right to compete for traffic between the same points on the same class of traffic."

Illustrations taken from the facts in the record will demonstrate the wisdom of the Commission's position. Transport, when it filed its present petition, was authorized to pick up petroleum products at a distribution station in West Memphis, for example, and deliver them to customers in Marianna, only 48 miles away by the most direct route. But Transport was not authorized to travel that particular highway. To render that service it would have to travel west from West Memphis to Little Rock along one highway and then east to Marianna along another highway, the total distance exceeding 200 miles. It would have to travel even farther, by way of Little Rock, to make a delivery from West Memphis to Earle, although both those cities are in Crittenden county, about 25 miles apart. There is no limit to the number of similar instances that resulted from Transport's being restricted to the use of certain specified highways radiating from Little Rock.

The Commission was undeniably right in stressing the "wasted transportation" that would have continued had the application been denied. When the Commission announced its decision the threat of a national energy shortage was not as well publicized as it is today, but now the threat is a matter of such common knowledge that we cannot ignore it. Neither in its brief nor in its

oral argument has the appellee suggested any sound basis for the wasteful practices that were relieved by the Commission's order. It may well be that those practices were justified in past years, when the public rules and regulations were being developed, but the situation that exists today obviously demands a re-examination of principles that were formerly regarded as controlling.

In fairness to the appellee and the circuit court we should add that even without reference to the energy shortage we do not find the Commission's decision to be contrary to the weight of the evidence. The energy situation, however, makes it unnecessary for us to discuss at length the persuasive proof showing that the additional service proposed by the applicant will benefit the general public (*Santee* v. *Brady,* 209 Ark. 224, 189 S.W. 2d 907 [1945]) by providing a more flexible service at less cost than has been the case heretofore. Neither need we dwell in detail upon other proof that was before the Commission, such as the fact that Arkansas Transport was not itself engaged in the transportation of asphalt and the fact that at the time of the hearing Arkansas Transport had not established a terminal at Fort Smith, even though it had promised to do so four years earlier in the proceeding that reached us in the *Wheeling* case, *supra.* It is enough for us to say that we do not find the Commission's decision to be against the preponderance of the proof.

Reversed.

HARRIS, C.J., not participating.

FOGLEMAN and BYRD, JJ., concur.

JOHN A. FOGLEMAN, Justice, concurring. I concur because I think the evidence preponderated in appellant's favor, without giving any consideration to the "energy shortage" about which there is increasing debate. That matter could not have been an issue before the commission or the trial court, and our function is to review that record and the evidence and issues there presented.

FALDON INDUSTRIAL WIRING COMPANY, INC. ET AL *v.* DARIEN DOWNS

73-187 504 S.W. 2d 346

Opinion delivered January 28, 1974

Daily, West, Core & Coffman, for appellants.

Sam Sexton Jr., by: *James H. Broyles Jr.,* for appellee.

GEORGE ROSE SMITH, Justice. This is a workmen's compensation case arising from a back injury which the appellee suffered in the course of his employment. According to the medical testimony, the injury resulted in permanent partial disability of 15% as apportioned to the body as a whole. The referee and the commission increased the award to 25%, which was upheld by the circuit court. For reversal the insurance carrier contends, first, that it should not have been charged with a fee for the claimant's attorney upon the first 15% of disability, because that part of the claim was not controverted (Ark. Stat. Ann. § 81-

1332 [Repl. 1960]), and secondly, that there is no substantial evidence to support a finding of disability in excess of 15%. We agree with the carrier's first contention but not with the second.

Downs sustained his back injury in June, 1971, while carrying a heavy electric motor in the appellant Faldon's shop. Surgery was necessary. Dr. Lockhart, of the Holt-Krock Clinic, performed a laminectomy, removing an intervertebral disc. On September 27 Dr. Lockhart found that Downs was able to resume light work. The doctor, making no evaluation of permanent partial disability, instructed the patient to return for an evaluation after he had been at work for 30 days. Downs obtained light employment on October 8, but he did not return to the clinic as he had been told to do. The insurance carrier terminated its payments for total temporary disability on October 20, presumably because Downs had gone back to work. On December 8 the clinic sent a final report to the insurer, stating that the extent of permanent disability had not been assessed, because the patient did not return after October 8.

Downs, apparently without communicating either with Faldon or with the insurance carrier about a possible claim, employed an attorney, Robert Law. Law discussed the matter with the insurer or its adjuster. On January 3, 1972, Law wrote to his client, the claimant, saying in part:

> In checking into your case further, I find that apparently Dr. Lockhart when he examined you the last time either failed to make a note of your permanent-partial disability or else he wants to see you again for that purpose.
>
> At the request of the insurance company, we have made another appointment for you to see Dr. Lockhart in his office on January 20 at 9:30 a.m. At that time I think Dr. Lockhart will, perhaps, give us a permanent-partial disability rating in order that we might enter into a settlement talk with the insurance company.

Downs was examined by Dr. Lockhart on February 3. On February 22 the doctor notified the insurance carrier that he had examined Downs and that "a permanent partial disability of the body as a whole of 15% is suggested." Within less than a week the insurer accepted that evaluation by forwarding its check for the amount then due and explaining that the rest of the compensation would be paid in installments every two weeks for 48½ weeks. Mr. Law disagreed with the 15% assessment of permanent partial disability and requested a hearing, which resulted in the 25% award now before us.

We find no substantial basis for the commission's finding that the insurance carrier controverted the 15% disability claim. The Statute provides than an employer desiring to controvert a claim shall file with the commission a statement of the grounds on which the claim is controverted. Ark. Stat. Ann. § 81-1319 (d). There is no contention in the case at bar that either the employer or the carrier ever filed any such statement or made any other written or oral denial of liability.

The referee, whose finding upon this point was affirmed by the commission without comment, concluded that the carrier had controverted the claim because it made no effort to determine the claimant's disability after payments were stopped on October 20. The referee reasoned that "the fact that Dr. Lockhart had performed a hemalaminectomy and removed an intervertebral disc . . . would certainly put the respondents on notice that the claimant would receive some permanent disability." The referee observed that it was the claimant's attorney who made the appointment with Dr. Lockhart for an evaluation of permanent partial disability.

Accepting all the facts referred to by the referee, it does not follow that the carrier controverted the claim. A claim must exist before it can be controverted. On October 20 Downs had been paid in full for his total temporary disability and had obtained work. He had been instructed to return to the Holt-Krock Clinic after 30 days for an evaluation, but he failed to do so. It was he who was in default, not the insurer. When that default was finally

remedied, by the February report made by Dr. Lockhart, the carrier accepted the doctor's evaluation and at once paid the amount due. No importance can be attached to the fact that Mr. Law made the appointment with Dr. Lockhart, because Law stated in his letter to his client that he was acting at the request of the insurer.

The only remaining basis for the referee's finding is his statement that the performance of a "hemalaminectomy" and the removal of a disc should have put the carrier on notice that the claimant would receive some permanent disability. Although Dr. Lockhart testified that "the type of injury" was such that he would have assumed that the patient would have permanent partial disability, there is nothing to indicate that the insurance company should have known that fact. At the least a medical question was involved, which was plainly not such a matter of common knowledge as to be the subject of judicial notice. See Larson, Workmen's Compensation Law, § 79.54 (1971). Moreover, the claimant had completed his healing period, had gone back to work, and had disregarded Dr. Lockhart's request that he return after 30 days for an evaluation. Upon the record it cannot be said that the insurer's inaction amounted to a denial of liability.

There is, however, substantial proof to support the finding of a 25% disability. The commission, under the rule of *Glass* v. *Edens,* 233 Ark. 786, 346 S.W. 2d 685 (1961), was not limited to the medical testimony in determining the extent of disability. At the time of the hearing Downs was earning $3.00 an hour. His present employer testified in substance that if Downs had not been partially disabled he would be earning from $3.60 to $4.00 an hour. That testimony, as well as other proof in the record, amply supports the award.

Affirmed in part, reversed in part.

HARRIS, C.J., not participating.

PAULINE WOODS (PARRISH) *v.* JAMES E. BARBER AS ADMINISTRATOR OF THE ESTATE OF S. W. WOODS, DECEASED

73-189 504 S.W. 2d 355

Opinion delivered January 28, 1974

Lee Ward, for appellant.

Frierson, Walker, Snellgrove & Laser, by: *G. D. Walker,* for appellee.

LYLE BROWN, Justice. Appellant is the widow of S. W. Woods, who died intestate. Appellee is the duly qualified administrator of the estate of the deceased. The administrator filed his petition for final distribution and discharge. Among the listed disbursements was the payment of $7569.57 to the Mercantile Bank of Jonesboro. The widow filed an objection to the payment on the ground that no claim had been filed thereon, nor was any effort to foreclose any lien filed. The widow asked that the administrator be required to reimburse the estate in the amount of the payment to the bank. A hearing was conducted thereon and the probate court approved the payment "as payment of a proper debt against the estate to the bank secured by a lien on crops and equipment". On appeal it is contended that the debt should not have been paid in the absence of the filing of a claim or any effort to foreclose the lien held by the bank. It should be noted that the bank is not a party to this case.

The record shows that the administrator was authorized to continue the decedent's farming operation. In connection therewith he borrowed from the bank under a security agreement, and with the approval of the probate court, an additional sum of $6480 (in addition to what Woods owed at the time of his death) to continue the farming business. Of course in the sale of the crops the bank's security interest became liquidated. The only thing left for the bank to do under those circumstances was to apply the proceeds, so far as necessary, to the satisfaction of its security interest and to release the balance thereof to the personal representative pursuant to Ark. Stat. Ann. § 62-2609 (b) (Repl. 1967). Under the circumstances the filing of a claim by the bank or any other legal proceeding was unnecessary.

While the witnesses spoke of payment of the debt, the practical effect was the same as if the bank had liquidated the security interest pursuant to § 62-2609 (b) and turned over the excess of the proceeds to the personal representative. Consequently the trial court correctly absolved the administrator of any liability.

Affirmed.

HARRIS, C.J., not participating.

CARL HEAD *v.* STATE OF ARKANSAS

CR 73-130 504 S.W. 2d 342

Opinion delivered January 28, 1974

William C. McArthur, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Alston Jennings Jr.,* Asst. Atty. Gen., for appellee.

LYLE BROWN, Justice. Appellant was convicted of possession of marijuana with intent to deliver and sentenced to ten years imprisonment. He asserts three points as reversible error: (1) that the search warrant and the fruits of the search should have been suppressed; (2) that the contraband was improperly identified and its integrity not maintained; and (3) that the State should not have been allowed to reopen its case after resting.

Point I. We think the search warrant met the test of probable cause as set out in *Bailey* v. *State,* 246 Ark. 362, 438 S.W. 2d 321 (1969). The affidavit for a search warrant was made by Sgt. Robert B. Jones of the Little Rock Police Department. He swore there were reasonable grounds to believe that marijuana was being possessed and offered for sale at 9211 Adkins Street, Apt. 7, Little Rock; that he received his information from a confidential informant whose statement was based on personal observation; that the informant was considered reliable; and that in the preceding three months the informer

had given similar information on other suspects and his information formed the basis of felony charges being filed in such other cases. (The informer was Tom Johnston, a Little Rock city detective with five years experience.)

During the course of the trial it developed that at the precise time the informer called Sgt. Jones, the contraband was not actually inside Apartment 7; it was in the trunk of the informer's car. The recited discrepancy forms the basis of appellant's main attack on the invalidity of the search warrant. The testimony revealed that the informer, the appellant and others, drove by prearrangement to Apartment 7, and from that address it was understood the informer was to make a telephone call to his "money man". (Actually, the call was going to be made to Sgt. Jones.) Officer Johnston, the informer, testified he parked his car so that he could observe it through the apartment window and the contraband was in fact within his sight at the time the call was made; and that immediately after completing the call the parties brought the marijuana inside the apartment. We think it was sufficient that the parties had agreed to bring the contraband into the apartment—it was at all times within the view of the informer, and that it was brought into the apartment within minutes after the call. Shortly after the informer's call the police arrived at Apartment 7 and found the drugs as represented by the informer.

Point II. Under this point appellant alleges that the contraband was: (a) improperly identified, (b) its integrity was not maintained, and (c) it was improperly displayed to and inspected by the jurors. Sgt. Jones testified he removed the original wrappers from the bricks and rewrapped the material in clear plastic bags and attached numbered tags. We think the fact that the officers found it necessary for identification purposes to transfer the material to clear plastic bags was not improper or prejudicial.

Appellant argues that the integrity of the material was not maintained in that the State chemist analyzed some bricks that did not have a tag on them. We per-

ceive no prejudice. The chemist received the 98 bricks confiscated. The trunk and the box in which the material was delivered were appropriately tagged. In addition, all the bricks examined, except one, had individual tags. When Officer Royster delivered the material the chemist placed it in a vault. The chemist, along with two officers, brought the material to court.

The entire collection of material was brought into the courtroom prior to the trial and appellant's counsel noted that prospective jurors had viewed the material and that one or more jurors picked up some of the bricks. Appellant classes the procedure as prejudicial error. We do not agree. What the jurors saw and inspected was all introduced by the State. Appellant's counsel appeared to agree that his objection was probably rendered moot when the total contraband was introduced. We agree.

Point III. Appellant contends the court abused its discretion in permitting the State to reopen the case after the State had rested. We find no such error. In the first place, the court stated that the case was being reopened to permit additional testimony only with regard to appellant's co-defendants. Secondly, we are cited to no testimony whatsoever that was given to further implicate the appellant.

Affirmed.

HARRIS, C.J., not participating.

JOHN SHELTON *v.* STATE OF ARKANSAS

CR 73-156 504 S.W. 2d 348

Opinion delivered January 28, 1974

Don Langston, for appellant.

Jim Guy Tucker, Atty. Gen., by: *James W. Atkins,* Asst. Atty. Gen., for appellee.

LYLE BROWN, Justice. Appellant John Shelton was sentenced to four years confinement on a plea of guilty to grand larceny. At the time of sentencing he sought credit for time spent in jail. The trial court ordered the commitment pre-dated to give credit for only a part of the time spent in jail. The sole question on appeal is whether appellant was entitled, as a matter of right, to credit for the full time he was incarcerated.

This court has twice been faced with the same question. *Kimble* v. *State,* 246 Ark. 407, 438 S.W. 2d 705 (1969); *Harper* v. *State,* 249 Ark. 1013, 462 S.W. 2d 847 (1971). In *Kimble,* appellant received less than the maximum sentence. He sought, among other relief, credit for time served in jail prior to trial. On appeal we said: "Appellant argues that he should have been given credit on the present sentence for this amount of time. As to the days served in jail, we do not agree, for we have no statute permitting this to be done". In *Harper,* we had the same question before us and we ruled as in *Kimble.* Also. see *Gross* v. *Sarver,* 307 Fed. Supp. 1105 (E. D. Ark.,

1970). We are further persuaded by legislation on the subject. Ark. Stat. Ann. § 43-2813 (Supp. 1971). There it is provided that the sentencing judge may *in his discretion* allow credit for time served in jail. It is of considerable significance that the legislature has treated the subject and did not see fit to make the credit mandatory.

We hold that when the sentence imposed plus time served in jail awaiting trial does not exceed the maximum penalty, the prisoner is not entitled as a matter of right, to credit for full time served in jail while awaiting trial.

Affirmed.

BYRD, J., dissents.

DONALD LANGSTON *v.* ROBERT W. JOHNSON

73-191 504 S.W. 2d 349

Opinion delivered January 28, 1974

Herby Branscum Jr., for appellant.

William G. Fleming, for appellee.

JOHN A. FOGLEMAN, Justice. Appellant Langston filed with the Perry County Board of Election Commissioners a petition nominating him for the office of Mayor of Bigelow prior to the General Election in 1972. Ballots were printed and an election held on November 7, 1972. More votes were cast for Langston than for a write-in candidate named Brown. When the incumbent mayor, Johnson, continued to act as such in 1973, Langston applied to the Circuit Court of Perry County, Arkansas, for a writ of mandamus commanding Johnson to cease to act as mayor and prayed that Johnson be required to show his claim to the office and that the trial court determine which of the two parties was mayor of Bigelow. Johnson answered that he had been duly elected and qualified as mayor; and prayed dismissal of Langston's complaint. The circuit court held that Bigelow, an incorporated town, should elect a mayor only in every fourth year, commencing with 1966, and that Langston had no claim to the office.

On appeal, Langston contends the court erred in so holding and in holding there was no statutory authority for an election in Bigelow in 1972. We agree with the circuit judge. Arkansas Statutes Annotated § 19-1201.1 (Repl. 1968) provides that the qualified electors of incorporated towns shall elect a mayor on the Tuesday following the first Monday in November 1966 and every four years thereafter. An election held without statutory authority is a nullity and authority to hold an election at one time will not warrant an election at another. *McCoy* v. *Story*, 243 Ark. 1, 417 S.W. 2d 954; *McDoniel* v. *Edwards*, 198 Ark. 288, 128 S.W. 2d 1007; *Simpson* v. *Teftler*, 176 Ark. 1093, 5 S.W. 2d 350. Application of the cited authorities, particularly *McDoniel*, dictated the dismissal of Langston's complaint.

We do not understand how the provisions of Ark. Stat. Ann. § 19-1202 and Ark. Stat. Ann. § 19-1206 (Repl. 1968) required that an election for mayor be held in Bigelow in 1972. Even if these sections otherwise would have required an election in 1972, there is nothing what-

ever in this record to show that the city council appointed Johnson mayor. The prohibition in § 19-1202 against an appointed officer serving beyond the term of the council making the appointment could not be applied in this case, even if it were otherwise applicable to the office of mayor, for the further reason that nothing in this record shows that the term of the Bigelow council had expired. In order to maintain his action, appellant had the burden of showing his own entitlement to the office. Ark. Stat. Ann. § 34-2203 (Repl. 1962). See *Jones* v. *Duckett,* 234 Ark. 990, 356 S.W. 2d 5; *State* v. *Hagemeister,* 161 Neb. 475, 73 N.W. 2d 625 (1955); *Saylor* v. *Rock Castle County Board of Education,* 286 Ky. 63, 149 S.W. 2d 770 (1941); *Hermann* v. *Lampe,* 175 Ky. 109, 194 S.W. 122 (1917); *Tillman* v. *Otter,* 93 Ky. 600, 20 S.W. 1036 (1893); *State* v. *Ellington,* 117 N.C. 158, 23 S.E. 250 (1895).

Appellant also argues that the court erred in not requiring Johnson to show his entitlement to the office. It is sufficient to say that Johnson was not required to make this showing until appellant had met the burden of showing his entitlement to the office, because appellant was not otherwise entitled to maintain the action. Under the authorities above cited, appellant could only succeed upon the strength of his own title, not the weakness of Johnson's.

The judgment is affirmed.

HARRIS, C.J., not participating.

ALICE INEZ HURST *v.* REX L. HURST

73-195 504 S.W. 2d 360

Opinion delivered January 28, 1974

Brown, Compton & Prewett, Ltd., for appellant.

Haskins, Ward & Rhodes and *Bruce Bennett,* for appellee.

JOHN A. FOGLEMAN, Justice. Appellant urges two points for reversal of a decree of divorce granted her husband on the ground of desertion. Appellee filed his complaint on the 12th of January, 1973. Appellant filed a motion to dismiss, alleging that the Chancery Court of Union County had, by decree entered after a hearing held December 14, 1972, awarded her separate mainten-

ance on her petition filed August 6, 1971, to which appellee had responded by answer and later by an amended answer and cross-complaint in which he alleged that he was entitled to an absolute divorce from appellant on the ground of personal indignities. It was also alleged in the motion that appellee's cross-complaint for divorce in that suit was dismissed, that no appeal was taken from the decree and that the complaint in the present action should be dismissed because the issues were res judicata. The motion was denied and, after trial, the decree which is the subject of this appeal was entered.

Appellant asserts two points for reversal, i.e., error in denial of her motion to dismiss and error in finding that appellant had deserted appellee and remained away from his home without reasonable cause. We find no reversible error.

At the outset, we should say that res judicata is an affirmative defense, ordinarily to be raised only by answer. *Narisi* v. *Narisi,* 233 Ark. 525, 345 S.W. 2d 620; *Southern Farmers Association* v. *Wyatt,* 234 Ark. 649, 353 S.W. 2d 531. It cannot properly be raised by motion to dismiss. *Southern Farmers Association* v. *Wyatt,* supra. In any pleading raising the defense the facts upon which the plea is based must be set out. *Widmer* v. *Wood,* 243 Ark. 617, 421 S.W. 2d 872. The burden of proving this defense was upon appellant. *Southern Farmers Association* v. *Wyatt,* supra. Assuming that the defense could have been asserted by motion, it was incumbent upon appellant to produce evidence sustaining the allegations of her motion, in order to prevail on that defense. There is absolutely no evidence abstracted by either party which makes the required showing. The previous action is not mentioned in any way, other than in appellant's motion, even though it is conceded by appellee that they were separated from August to December in 1971, and that there was a divorce suit between the parties, which was heard on December 14, 1971. The chancery court could not take judicial notice of a prior proceeding between the parties, even though it was in the same court. *Lewis* v. *Lewis,* 255 Ark. 583, 502 S. W. 2d 505 It must appear, either from the record or extrinsic evidence that the particular matter involved was raised and determined. *Fisher* v. *Fisher,*

237 Ark. 321, 372 S.W. 2d 612. Unless, of course, the matter was necessarily within the issues presented and might have been litigated in the prior action. *Arkansas State Highway Commission* v. *Staples,* 239 Ark. 290, 389 S.W. 2d 432. Otherwise, the action cannot be dismissed on the ground of res judicata. *Southern Farmers Association* v. *Wyatt,* supra. A judgment relied upon as a bar cannot be considered here unless it was introduced in evidence. *Denton* v. *Young,* 145 Ark. 147, 223 S.W. 380.

Appellant concedes that res judicata applies in divorce cases only when the second suit is on the same cause of action as the first, but we are unable to say that this is the case or even that the decree in any prior case between these parties was based upon any particular finding on any issue, even the cause of the separation. Consequently, we cannot apply the rationale of the case of *McKay* v. *McKay,* 172 Ark. 918, 290 S.W. 951, wherein it was held that a decree denying a wife's prayer for divorce for cruel and inhuman treatment was conclusive, in a later suit by her on the ground of desertion, as to the question whether she had cause for leaving her husband and their home.

We do not overlook the possibility that the defense of res judicata might be established on a motion for summary judgment. But we cannot say that the pleading here was sufficiently identified as such a motion to require appellee to respond to it as such. Even if it were, and it could be said that it now appeared to us that there remained no genuine issue of material fact on the question, appellate relief from the denial of a summary judgment cannot be had, after trial on the merits. *Williams* v. *Varner,* 253 Ark. 412, 486 S.W. 2d 79; *Deposit Guaranty National Bank* v. *River Valley Company, Inc.,* 247 Ark. 226, 444 S.W. 2d 880; *American Physicians Insurance Co.* v. *Hruska,* 244 Ark. 1176, 428 S.W. 2d 622.

Little need be said about the second point. Even though there was evidence tending to show that after a brief reconciliation of the parties, whether permanent and unconditional as asserted by appellee, or temporary and conditional in accord with appellant's version, we cannot say that the chancellor's finding that the departure of appellant from appellee and his home on Decem-

ber 18, 1971, was not justified by the conduct of appellee, was clearly against the preponderance of the evidence. Appellee testified that the parties settled their differences, put them in the past and started a new life under new conditions, but that appellant left without any reason. He specifically denied having struck or threatened her in December 1971, or having made any accusations about her having had affairs with other men, as he had previously done. Mrs. Hurst equivocated in her testimony to some extent. She said they had a quarrel on December 18 and that she left after he had dragged her out of her automobile onto the driveway where they fought. She admitted, however, that after they got up he "got awful sweet" to the extent that she felt compelled to go in the house and have sexual relations with him. She testified later that they had an argument in the driveway on that occasion, and that she then had to go into the house and have sexual relations with him in order to get away from the home. She did admit that appellee did not physically force her to have sexual relations with him, but that she was afraid that he would not let her leave if she did not.

Since there is no reversible error, the decree is affirmed.

HARRIS, C.J., not participating.

CITY OF JONESBORO, A MUNICIPAL CORPORATION
v. PAUL ARNOLD

73-193 504 S.W. 2d 351

Opinion delivered January 28, 1974

Warren Dupwe, for appellant.

Lee Ward, for appellee.

J. FRED JONES, Justice. This is an appeal by the City of Jonesboro from a chancery court decree holding that the city was arbitrary in denying appellee Paul Arnold's application to rezone his 11 acre tract of land within the city limits of Jonesboro from R-1 to R-2 classification. On appeal to this court the city contends that the chancellor's finding that the city acted arbitrarily, capriciously and unreasonably in refusing the rezoning request, was contrary to the preponderance of the evidence. We do not agree with this contention.

It appears from the record that there are three classifications for residential zoning in the City of Jonesboro, and separate classifications for commercial zoning. It appears that R-1 represents the highest and most desirable residential classification; that R-2 is the next highest classification and R-3 is the lowest residential classification. The R-2 classification permits apartment buildings while R-1 is confined to single family dwellings. When land is taken into the city limits of Jonesboro, the R-1 classification automatically attaches and the property remains in the R-1 classification until rezoned by the city. It appears that commercial property is likewise classified in three categories as C-1, C-2 and C-3.

The 11 acre tract involved in this case is bounded on the west by Hester Street and on the south by Cherry Street. The record is not clear as to whether Cherry Street has been completely opened along the south boundary line of the property, but the property on the east is bounded by a drainage ditch which extends north more or less parallel with Hester Street for a distance of approximately two-thirds the length of the tract involved, at which point the drainage ditch curves to the northwest and continues as the northeast and north boundary line of the property until it is intersected at an angle by Hester Street. U.S.

Highway 63 runs in a northwest-southeast direction on the northeast side of the drainage ditch, and the drainage ditch is traversed by a bridge from the north end of Hester Street to the highway.

There are three or four lots classified as R-1 between the north end of Hester Street and the appellee's property, but the remainder of the property immediately west of Hester Street and adjacent to appellee's property is zoned R-3. The property north, east and northeast of the appellee's property is zoned C-3. The property south of the appellee's tract is still zoned R-1.

Appellee Arnold first submitted his application for rezoning to the Metropolitan Area Planning Commission. His application was approved and the rezoning was recommended by that body. The matter was then presented to the Jonesboro City Council and the application was denied.

Mr. Aubrey E. Scott, Chairman of the Metropolitan Planning Commission, testified that he is serving his sixth year on the Commission and the Commission approved Arnold's request to rezone his property from R-1 to R-2. He said he considered it to be in the best interest for future development of the city that the application be granted, because the property immediately east of Arnold's property is classified as commercial, and the property across Hester Street immediately west of Arnold's property is in an R-3 classification which is a less restrictive classification than the R-2 classification requested by Arnold. He said the property to the south of the Arnold tract is still in an R-1 classification, and that it was automatically classified R-1 when it was brought into the city limits.

Mr. Ralph King, another member of the Planning Commission, testified that in his opinion it would be to the best interest of the metropolitan area to re-classify Arnold's property from R-1 to R-2.

Mr. Roy Cooper, another member of the Planning Commission, and who is also engaged in general construction, testified that in his opinion the rezoning of Mr. Ar-

nold's property as requested, would be in the best interest for the future development of Jonesboro. He said that insofar as the terrain of the property is concerned, it would support either apartments or residential or commercial.

The appellee Paul Arnold testified that he had owned the property involved for about 15 years; that all the property across the drainage ditch east and north of his property is commercial and he is seeking an R-2 classification in order to build an apartment building on his property. He testified that it would not be economically sound business practice to build one-family homes under the R-1 classification requirements on his property immediately across Hester Street from an R-3 zone. He said that if, and when, Cherry Street is extended along the southern boundary of his property, it would divide his property from R-1 classification south of his property.

Mr. Bill Bowers, superintendent of a construction company and member of the City Council, testified that he voted to deny the request for rezoning because through his past experience as street superintendent for the City of Jonesboro, he knew there was a very narrow wooden bridge across the drainage ditch at the north end of Hester Street, and that Hester Street would be the primary means of ingress and egress to and from the property involved. He said that the bridge had been remodeled but that people in the area had requested street humps in order to slow the traffic down over Hester Street; that it was his opinion that apartment buildings would create more traffic and that it was because of the traffic problem he voted to deny the petition.

On cross-examination Mr. Bowers testified that Hester Street is relatively a residential street but could be widened if someone would give the right-of-way for that purpose. He also admitted that since he had established his attitude in the matter, the bridge from Hester Street to the highway had been repaired and is now "pretty close" to two-way traffic.

Mr. Ralph Strickland, another member of the City Council, testified that because of the petitions and attitudes of the people in the area, together with the traffic

situation requiring speed humps, he just simply had to vote against rezoning the property from R-1 to R-2. He said he did not feel that an apartment building on the land involved would be to the best interest of the city. He said that his constituents in the area expressed to him a feeling that to rezone the property would create traffic hazards and that he had not seen any specific plans as to street development or the size of apartment building Mr. Arnold was planning in the area. On cross-examination he admitted that the property east of the Arnold tract is zoned commercial, but he said that the drainage ditch between the Arnold property and the commercial property could act as a buffer between the two zones.

Bill Bowers, a practicing dentist in Jonesboro and a member of the City Council, testified that the reason he voted to override the recommendations of the Planning Commission was, first of all, the request had been presented to the Commission previously and had been denied. He said that by talking to people in the neighborhood he determined that a majority of the people who lived in the neighborhood felt it was a part of their neighborhood and did not want this land rezoned. He said that one of their objections was that rezoning would permit more people to live on the land, thereby increasing the traffic on the streets. He said that he was opposed to so-called spot zoning and that he considered Mr. Arnold's petition to be a petition for spot zoning.

On cross-examination Dr. Bowers testified that he drove the streets in the area, "knocked on a few doors" and called on people who had asked him to look into the matter. He said that the people he talked to live in the area; that they have to use the existing streets for access to and from work, and that the bridge across the drainage ditch at the end of Hester Street creates a particular problem in handling the traffic. He said that he voted against installing speed humps on Hester Street because he does not believe in speed humps. Dr. Bowers testified on cross-examination "There are [traffic] problems all over this particular area and this was one primarily because of the construction at the end of Hester."

In the case of *City of Little Rock* v. *Andres,* 237 Ark. 658, 375 S.W. 2d 370 (1964), we set out the standard for review in rezoning cases as follows:

> "If the chancellor's finding to the effect that the authorities were arbitrary in not changing the zoning is supported by a preponderance of the evidence, the decree must be affirmed. *City of Little Rock* v. *Garner,* 235 Ark. 362, 360 S.W. 2d 116; *City of Little Rock* v. *Henson,* 220 Ark. 663, 249 S.W. 2d 118; *City of Little Rock* v. *Joyner,* 212 Ark. 508, 206 S.W. 2d 446."

There is no question that the property involved in this case is bounded on the east, north and west sides by zoning classifications less restrictive than the R-2 classification requested by Arnold and recommended by the Planning Commission. We note also that none of the property owners in the area testified in the case.

In the case of *Olsen* v. *City of Little Rock,* 241 Ark. 155, 406 S.W. 2d 706, the landowner's application for rezoning his property from two-family residential to "D" apartment use, was denied by the City Administrative Agencies and the chancery court on appeal. None of the property owners in the affected area testified in that case and in reversing the chancellor's decree, we said:

> "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. *City of Little Rock* v. *Garner,* 235 Ark. 362, 360 S.W. 2d 116 (1962).
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> * * *
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> That the proposed rezoning will not adversely affect the neighborhood is confirmed by the complete absence of any protest on the part of other landowners in the area. Such apparently universal acquiescence in the proposal is decidedly unusual in zoning cases. * * * It is fair to conclude that none of the neighboring property owners—the group who would suffer the greatest damage if the reclassification is contrary

to the public interest—oppose the plaintiffs' petition. Upon the record as a whole we are convinced that the weight of the evidence lies on the appellants' side."

It is apparent from the testimony of members of the City Council that their primary objection to rezoning the property is because of the additional traffic such rezoning would likely create, especially on Hester Street. The chancellor viewed the area involved in this case with particular attention to the traffic on the streets, as well as the bridge across the drainage ditch at the end of Hester Street, and we are unable to say that the chancellor's decree is against the preponderance of the evidence.

The decree is affirmed.

HARRIS, C.J., not participating.

RALPH M. KUYKENDALL ET AL *v.*
HARROL L. NEWGENT ET UX

73-175 504 S.W. 2d 344

Opinion delivered January 28, 1974

Davis, Plegge & Lowe, for appellants.

Thomas A. Glaze and *William B. Blevins,* for appellees.

CONLEY BYRD, Justice. This is a case of slip and fall on ice and snow by a business invitee. From a judgment upon a jury verdict in favor of appellees Harrol L. Newgent and wife the appellants Ralph M. Kuykendall, Creston B. Fendley and J. D. Ashley, d/b/a Razorback Drive Inn No. 2 bring this appeal. For reversal they contend that the trial court should have directed a verdict in their favor because (1) Newgent assumed the risk; (2) there was no proof that appellants were guilty of any negligence; and (3) a landowner is not liable for open and obvious hazards due to natural accumulations of ice and snow. We find no merit in any contention.

The record shows that appellants keep their restaurant open 24 hours a day. There is a front entrance for the appellant's customers and a delivery entrance for supplies received. The delivery entrance has a slope of seven and three-quarters inches in a distance of four feet. The parking area adjacent to the delivery entrance is fairly level.

U. S. Climatological Data reflects snow and ice conditions on January 6th and 7th, 1973 with .4 inches of precipitation. The last measurable trace of precipitation of ice and snow was between 12:00 and 1:00 p.m. on January 6th.

Newgent testified that he was working for Brown Packing Company on January 7th. His duties as such employee required him to deliver meat to appellants which he did around 8:30 a.m. on January 7th. He drove the truck near the delivery entrance and carried in one box. The next box contained a hind quarter of beef weighing from 80 to 100 lbs. He placed this box on his shoulder and as he started in his feet slipped forward and the box fell on top of him. With reference to Newgent's knowledge of the conditions, the record shows:

"A. [Mr. Newgent] I started walking to the door, approaching the door, on the ice being as careful as

possible knowing the bad conditions and also ice on the steps and stepped onto the ice and snow and the box came down on top of me.

Q. [Mr. Davis] The part we're particularly interested in is that you said 'being as careful as possible knowing the bad conditions' and there's no question you say the conditions were bad?

A. Yes, sir, they were.

Q. You later told me that you felt there was approximately one inch of ice and snow all over the parking area in every part you could see in the—a picture similar to the ones we've introduced.

A. Yes, sir, it was covered with ice."

When asked on cross-examination if it was his decision to walk across the icy spot, he replied: "the only decision I had to make was to keep my job." On redirect he testified that when he fell, he did not know the delivery entrance had that much slope.

Newgent's lack of knowledge of the slope would certainly make a fact issue on the assumption of risk. That doctrine depends upon actual knowledge of the risk. See *McDonald* v. *Hickman,* 252 Ark. 300, 478 S.W. 2d 753 (1972). While Newgent may have been guilty of some negligence, we cannot say as a matter of law that such negligence exceeded that of appellants. Such issues are ordinarily a question of fact for the jury. See *McDonald* v. *Hickman, supra.*

The duties of owners and occupiers of land to business invitees usually end when the danger is either known or obvious to the invitee. However, most authorities; see Prosser on Torts, Invitee § 61 (4th ed. 1971); 2 Harper and James, The Law of Torts § 27.13 (1956), and Restatement of Torts 2d § 343A (1965); recognize that under some circumstances a possessor of land may owe a duty to the business invitee despite the knowledge of the latter. To the contrary see *Sidle* v. *Humphrey,* 13 Ohio St. 2d 45, 42 Ohio Ops. 2d 96, 233 N.E. 2d 589, 32 A.L.R. 3d 1

(1968). Prosser on Torts, supra, explains the landowner's duties under those exceptional circumstances in this language:

> ". . . In any case where the occupier, as a reasonable man, should anticipate an unreasonable risk of harm to the invitee notwithstanding his knowledge, warning, or the obvious nature of the condition, something more in the way of precautions may be required. This is true, for example, where there is reason to expect that the invitee's attention will be distracted, as by goods on display, or after lapse of time he may forget the existence of the condition, even though he has discovered it or been warned; or where the condition is one which would not reasonably be expected, and for some reason, such as an arm full of bundles, it may be anticipated that the visitor will not be looking for it. It is also true where the condition is one such as icy steps, which cannot be negotiated with reasonable safety even though the invitee is fully aware of it, and, because the premises are held open to him for his use, it is to be expected that he will nevertheless proceed to encounter it . . . "

Appellants here argue that since ice and snow in Arkansas are of an unexpected nature and short but hazardous duration we should not hold them liable as landowners for open and obvious hazards due to natural accumulations of ice and snow. We need not here determine whether a landowner would owe a duty to an invitee because of the accumulation of ice and snow on a parking lot nor whether the landowner would owe a duty to an invitee using an entrance way during such a storm or immediately thereafter, for the proof here shows that during the operation of a 24 hour business the accumulated ice and snow was permitted to remain upon a sloping entrance way for a period of some 18 to 20 hours. It would appear under those circumstances that the landowner should have anticipated that the dangerous condition would cause physical harm to one *required to use the entrance way* notwithstanding the known or obvious danger.

Affirmed.

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

AMERICAN PIONEER LIFE INSURANCE COMPANY *v.* MRS. LAWRENCE E. SMITH

73-199 504 S.W. 2d 356

Opinion delivered January 28, 1974

Davidson, Plastiras & Horne, Ltd., by: *Cyril Hollingsworth,* for appellant.

Wright, Lindsey & Jennings, by: *Ronald A. May,* for appellee.

CONLEY BYRD, Justice. Appellant American Pioneer Life Insurance Company seeks to avoid its liability upon a credit life insurance policy issued to Lawrence E. Smith upon the basis that his statement in the application that "I am now in good health" was incorrect within the meaning of Ark. Stat. Ann. § 66-3208 (Repl. 1966). It is admitted that the insured suffered from diabetes mellitus, having been hospitalized in 1956, and that he remained on medication therefore until his death. It is also admitted that he suffered a heart attack in 1968, which resulted in his receiving a disability retirement and that he continued to make regular visits to his doctor and to take three different types of medication therefor until the time of his death on September 23, 1971. The trial court held in favor of the beneficiaries.

For the reasons set forth in *Dopson* v. *Metropolitan Life Ins. Co.,* 244 Ark. 659, 432 S.W. 2d 410 (1968), *Life & Casualty Ins. Co.* v. *Smith,* 245 Ark. 934, 436 S.W. 2d 97 and *Union Life Insurance Company* v. *Davis, Adm'x.,* 247 Ark. 1054, 449 S.W. 2d 192 (1970), we reverse. Upon the admitted facts, we deem the statement "I am

now in good health" to be an incorrect statement as a matter of law. Furthermore, we deem the proof as to materiality of the incorrect statement to be undisputed. Not only did the expert testify that the policy would not have been issued had the true facts been correctly stated but the autopsy reports shows the immediate cause of death as congestive heart failure.

Reversed.

HARRIS, C.J., not participating.

DONALD C. KING *v.* STATE OF ARKANSAS

CR 73-136 504 S.W. 2d 365

Opinion delivered January 28, 1974

Harold L. Hall, for appellant.

Jim Guy Tucker, Atty. Gen., by: *James W. Atkins,* Asst. Atty. Gen., for appellee.

CONLEY BYRD, Justice. Appellant Donald C. King seeks to set aside his manslaughter conviction on the basis of evidence discovered after the verdict. We find no merit in the contention.

The record shows two altercations between appellant and the decedent, his brother, on the date of the killing. The first altercation occurred while their mother and another brother were present. After that altercation was

broken up and the decedent had started to watch television the brother and the mother departed. Thereafter appellant shot decedent at close range with a shotgun. To bolster his contention that he shot his brother because he was advancing toward him with a steak knife, appellant sought to show that decedent had a knife during the first altercation. Neither his brother nor his mother supported him on that issue during the trial. However, after the jury had retired, but before the verdict, the mother recanted and wanted to state that decedent did have a knife during the first altercation. The trial court refused to grant a mistrial before the jury returned or a new trial thereafter.

We find no abuse of discretion. See *Cooper* v. *State,* 246 Ark. 368, 438 S.W. 2d 681 (1969).

Affirmed.

HARRIS, C.J., not participating.

EDITH ANN GILL, WIDOW OF HARROLL GILL, DECEASED *v.* OZARK FOREST PRODUCTS, INC., EMPLOYERS MUTUAL LIABILITY INS. CO. OF WISCONSIN

73-256 504 S.W. 2d 357

Opinion delivered January 28, 1974

Niblock, Hipp & Odom, for appellant.

Putman, Davis & Bassett, for appellees.

FRANK HOLT, Justice. Appellant's husband was accidentally killed during the scope of his employment with appellee Ozark Forest Products, Inc. Admittedly, the claim is compensable. The appellee insurance carrier began paying appellant widow $22.38 per week and the balance of the benefits was paid to the six minor children of the deceased by a previous marriage. On appeal the widow contends that the commission, affirmed by the circuit court, should have awarded her a greater weekly sum and, further, she was entitled to a lump sum settlement which the commission denied. We first consider appellant's contention that she was entitled to a greater weekly award of benefits.

Appellant, the deceased, seldom worked a full five day week. This was due to the nature of his employment, the timber industry, which made work available to him subject to weather conditions as well as the timber supply. The number of days per week worked by the deceased was unpredictable. There was no guarantee of a full work week. However, the decedent always worked whatever number of hours available to him.

The commission, based upon the referee's findings, made their award based on the previous 52 week period as follows: the commission ignored 18 two or three day work weeks as well as a single one day work week; it then utilized only the balance of 33 four and five day work weeks performed by the deceased. The earnings for those 33 weeks totalled $2,109.50 which produced an average weekly wage of $63.93. The compensation rate is 35% of that figure or $22.38 per week benefits for the appellant widow. Appellee makes the argument that the com-

mission was most generous inasmuch as it discarded all of the two and three day work weeks.

Appellant, however, asserts that the award should have been based on a full week's pay or $80 per week which would result in $28 per week in benefits for her ($80 x .35 = $28). Appellant relies upon the first part of the statute, Ark. Stat. Ann. § 81-1312 (Repl. 1960), which reads:

> Compensation shall be computed on the average weekly wage earned by the employee under the contract of hire in force at the time of accident, and in no case shall be computed on less than a full time work week in the employment.

Appellee avers that the award was proper and invoked as controlling the latter part of the statute, which reads:

> If, because of exceptional circumstances, the average weekly wage cannot be fairly and justly determined by the above formulas, the Commission may determine the average weekly wage by a method that is just and fair to all parties concerned.

Neither party appears to contend that the other alternative provision in the statute, piece basis employment—dollars per ton, per pound, per square foot, is applicable.

The statute at first blush may appear inconsistent and ambiguous. However, we are familiar with the legislative intent in this area and we hold that the first part of the statute relied upon by appellant is clear and controlling in the case at bar. It is undisputed that the decedent's "contract of hire in force at the time" of his accident was based upon the agreed payment of $2 an hour, eight hours a day and a five day (40 hour) work week whenever work was available. He always worked when needed. In these circumstances, the statute clearly requires that a fulltime work week must be used as a basis for computing the benefits. Furthermore, it is well established in workmen's compensation cases that when doubt exists we must remember the Workmen's Compensation Act

is remedial and should be construed liberally to effectuate its purpose.

Although this case marks our initial interpretation of the problem under the present act, we note that our decision is not a novel one. We refer to our earlier Workmen's Compensation Act, Act 319 § 12, Acts of Ark. (1939), which provided:

> Except as otherwise specifically provided, the basis for compensation under this Act shall be the average weekly wages earned by the employee at the time of the injury, such wages to be determined from the earnings of the injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury divided by fifty-two; *but if the injured employee lost more than seven days during such period, although not in the same week, then the earnings for the remainder of such 52 weeks shall be divided by the number of weeks remaining after the time so lost has been deducted.* (Emphasis added.)

The result of that process, in the case at bar, would be to compensate the widow based on a full work week's pay, just as the present statute does.

In interpreting the Act of 1939, the predecessor of our present act, the court in *Mack Coal Co.* v. *Hill,* 204 Ark. 407, 162 S.W. 2d 906 (1942), was concerned with benefits for coal miners who did not work in the summer months. The coal miner was a seasonal laborer just as the timber worker is here. There we said:

> In case of doubt, recourse is had to the average an employee has earned during a fixed period. But where, as in the cases here, uniformity prevails, and the worker's capacity to earn is equal to what he did earn when employment was available, it is harsh to apply a strict rule of exclusion, the effect of which is to diminish a known basic rate of pay.

The court also characterized Act 319 as remedial and to

be construed liberally to effectuate its purpose and further said that since:

> . . . § 12 is the so-called yardstick by which compensation is to be measured, we cannot agree that periods of non-operation are not to be counted as lost time, thereby reducing the divisor to the number of weeks remaining, as contrasted with fifty-two.

As previously indicated, appellant widow's benefits should be computed on a fulltime work week. See also *Lexington Mining Co.* v. *Richardson,* 286 Ky. 418, 150 S.W. 2d 889 (1941).

However, we cannot agree with appellant's contention that the commission erred in not granting her request for a lump sum settlement as to her portion as a claimant. § 81-1319 (K) extends to the commission the authority to grant lump sum compensation "whenever the commission determines that it is for the best interests of the parties. . . ." The statute extends to the commission broad discretionary powers in granting lump sum settlements.

Appellant acknowledges that lump sum settlement is an extraordinary remedy that must be used sparingly. If there is substantial evidence to support the decision of the commission, we must affirm. *St. Michael Hospital and Argonaut Ins. Co.* v. *Wright,* 250 Ark. 539, 465 S.W. 2d 904 (1971). Appellant testified that if she were given a lump sum settlement she would pay off her debts and buy a mobile home. Her testimony indicates that would involve an expenditure of almost $7,000 of a proposed lump sum award of almost $17,000. The payment of attorney's fees, debts, and the purchase of the mobile home would take approximately one-half of the lump sum settlement. The commission might very well determine this to be against her own best interests. Her testimony reveals no plan to utilize the money for training or rehabilitation. Of course, should she die or remarry after an award of a lump sum settlement, the resulting increased benefits to the deceased's minor children would be affected. They are "parties" to this action with a definite interest and their mother objected to the settlement. We

cannot say that the denial of appellant's request for a lump sum payment constituted an abuse of discretion on behalf of the commission or the commission's action is not supported by substantial evidence. Certainly, the legislature entrusted the commission with the power and authority to determine the issue.

For the error indicated, the judgment is reversed and the cause remanded for proceedings not inconsistent with this opinion.

Affirmed in part and reversed in part.

HARRIS, C.J., not participating.

KENNETH BOYCE FIKE *v.* STATE OF ARKANSAS

CR 73-132 504 S.W. 2d 363

Opinion delivered January 28, 1974

Potter & Potter, for appellant.

Jim Guy Tucker, Atty. Gen., by: *O. H. Hargraves,* Dep. Atty. Gen., for appellee.

FRANK HOLT, Justice. A jury found appellant guilty of assault with the intent to rape and fixed his punishment at five years in the Department of Corrections, after having found him guilty also as a habitual criminal (one previous conviction). For reversal appellant first contends that the trial court erred in refusing to permit the prosecutrix to be interrogated on cross-examination as to a particular act of immoral conduct; i.e., giving birth to an illegitimate child.

Our cases are somewhat in conflict concerning the admissibility of specific prior acts of immorality. The state cites *Pleasant* v. *The State,* 15 Ark. 624 (1854-5), and *Jackson* v. *State,* 92 Ark. 71, 122 S.W. 101 (1909), to the effect that in rape or related cases it is impermissible to attack the credibility of the prosecutrix by eliciting on cross-examination evidence of particular acts of unchastity; however, her credibility can be impeached by evidence of her general reputation as to truth and morality. To the contrary is *King* v. *State,* 106 Ark. 160, 152 S.W. 990 (1913), an assault with intent to rape case, where we said that it is permissible on cross-examination to ask the prosecutrix if she had had sexual intercourse with someone other than the defendant. See also *Lockett* v. *State,* 136 Ark. 473, 207 S.W. 55 (1918). In *King* v. *State, supra,* Justice Frank Smith, speaking for a unanimous court, detailed the guidelines. There we held, however, that no prejudice resulted from the refusal to allow an answer to the permissible question inasmuch as it did not "*** affirmatively [appear] that the defendant believed that the witness would make an admission favorable to his defense, if she answered the question truthfully***." Likewise, in the case at bar, no prejudice was demonstrated inasmuch as the appellant did not comply with this requirement by stating to the court that he believed in a favorable response. The appellant would be bound by the prosecutrix's answer. Additionally, as abstracted, the appellant made no objections to the court's ruling and appears to have acquiesced in the court's action. We deem unnecessary a further discussion of the divergent views.

Appellant next contends for reversal that the trial court erred in refusing appellant's proffered instruction to the jury that if they found him not guilty of assault with intent to rape they could find him guilty of assault. We must agree with appellant's contention. We briefly summarize the evidence since the sufficiency to support the verdict of assault with intent to rape is not in issue. The prosecutrix testified that as she left a local night club, after a dispute with her divorced husband, the defendant offered her a ride home. After driving around a short time, he made improper advances toward her, which she refused. Outside town he stopped the car and persisted. She got out and started walking. He threw her into a ditch and attempted to have intercourse with her despite her resistance. When she succeeded in repelling him, he persuaded her to get back in the car, promising he would take her wherever she desired. He then drove her back to the parking lot of the night club where she jumped out of the car. She stated that the appellant never struck or raped her and that the scratches she received were caused by the gravel on the roadside when he threw her down. The appellant did not testify.

We have recently said "*** in order to find error in the refusal of the trial court to give a requested lesser offense instruction it must appear that the offense in the requested instruction was one necessarily contained within the higher offense and the evidence showed the existence of all the elements of the lesser offense." *Flaherty and Whipple* v. *State,* 255 Ark. 187, 500 S.W. 2d 87 (1973). See *Caton and Headley* v. *State,* 252 Ark. 420, 479 S.W. 2d 537 (1972), for a thorough analysis of our cases involving lesser included offense instructions. It appears that the offense must be of the same generic class; all elements of the lesser offense must be contained in the greater offense, so that commission of the higher offense must involve commission of the lower; and the charge must contain all substantive allegations necessary to let in proof of the lesser offense.

In the case at bar, all of these elements coexist. Certainly, assault is of the same generic class as assault with intent to rape. *Wills* v. *State,* 193 Ark. 182, 98 S.W.

2d 72 (1936). The charge and commission of assault with intent to rape (Ark. Stat. Ann. § 41-607 [Repl. 1964]) inherently involve the element of assault (§ 41-601). The charge of assault with intent to rape is a sufficient allegation to permit proof alone of only an assault.

In the case at bar, it is not questioned that the prosecutrix's testimony is sufficient to sustain the verdict of assault with intent to rape. However, the jury has the sole prerogative to accept all or any part of a witness' testimony whether controverted or not. Therefore, the jury had the absolute right, as trier of the facts, to evaluate the evidence and consider whether only an unlawful assault was committed upon her by appellant or even acquit him. The trial court should have given the instruction relating to the lesser included offense. *Flaherty and Whipple* v. *State, supra,* and *Caton and Headley* v. *State, supra.*

Appellant next contends that the state did not meet its burden of proof in establishing a previous conviction after the jury found him guilty of assault with intent to rape. The enhancement of the sentence is permitted by § 43-2330. The proof adduced by the state consisted of a penitentiary commitment, identified by the local circuit clerk, reflecting that appellant was previously convicted there of a felony. This evidence was supported by the testimony of the present sheriff who was circuit clerk at the time of appellant's conviction. This witness also identified appellant as the one named in the document. Appellant asserts that this evidence is deficient inasmuch as neither the penitentiary commitment nor other evidence indicated he was represented by counsel or had waived legal assistance.

An indigent's conviction prior to *Gideon* v. *Wainwright,* 372 U.S. 335 (1962), cannot be utilized for habitual offender purposes if the accused was not provided counsel. *Burgett* v. *Texas,* 389 U.S. 109 (1967). Appellant introduced no testimony to establish that he was not represented by counsel. The appellant could have inquired by cross-examination of the witnesses presented by the state or by tendering other proof, without personally testifying, that he was not the person referred to in the com-

mitment. *Henson* v. *State,* 248 Ark. 992, 455 S.W. 2d 101 (1970), and *Higgins* v. *State,* 235 Ark. 153, 357 S.W. 2d 499 (1962). Additionally, there was no objection to the allegedly infirm previous conviction and we cannot consider it for the first time on appeal.

The judgment is reversed and the cause remanded for the error indicated.

Reversed and remanded.

HARRIS, C.J., not participating.

HERVEY MIZELL *v.* GARNER CARTER, MILDRED CARTER, WANDA HYATT, RALPH HYATT, HARRY C. HALL AND MRS. HARRY C. HALL

73-204 504 S.W. 2d 743

Opinion delivered February 4, 1974

Batchelor & Batchelor, for appellant.

Carl Creekmore, for appellees.

CARLETON HARRIS, Chief Justice. On December 19, 1967, appellees Garner and Mildred Carter, husband and wife,

executed a deed to appellant Hervey Mizell and his wife to a tract of land purporting to convey 10.38 acres, which deed was thereafter duly recorded on January 10, 1968. On April 25, 1972, the Carters executed a deed to Wanda Hyatt, one of the appellees herein, to the northerly 3 1/2 acres of the land which had been deeded to Mizell, this deed being subsequently recorded. Thereafter, at various times, Mrs. Hyatt's husband took a dozer upon this 3 1/2 acre tract, removing vegetation and rock, and constructed a road across a portion of the land connecting up with an earlier road that had been constructed before Mizell ever purchased the property. In the first part of July, appellant complained to Hyatt, at which time both parties apparently learned that the other (actually Hyatt's wife)[1] had a deed to the same 3 1/2 acres. Mizell instituted suit on July 13, 1972, against the Carters, the Hyatts, and Harry C. Hall and wife, the Hyatts having sold the property to the Halls, but no deed being recorded since the property had not been completely paid for, seeking judgment against the Carters and Hyatts for $2,500 damages,[1a] asking that the deed from the Carters to Hyatts be cancelled and set aside, and seeking an injunction against all defendants from trespassing on the property in any manner.

The Hyatts and Halls answered, pleading laches, estoppel and unjust enrichment as a defense and the former further prayed judgment against the Carters for breach of warranty in case judgment was entered against them. By separate answer, the Carters asserted that the deed should be reformed because of mutual mistake, or a mistake by the Carters and fraud by Mizell, and stated that they were not aware that any of the property conveyed to Wanda Hyatt included land which had previously been deeded to the Mizells.

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[1]The record is not clear why the deed was made to Wanda Hyatt. Carter testified that he sold and conveyed to Hyatt and wife, the consideration being work done by Hyatt on Carter's property.

[1a] In addition to the other allegations, claim for damages was also based on a contention that a dam which had been constructed by Hyatt on Hyatt's own property had caused a creek on the 3 1/2 acres in dispute to fill up with dirt and further, had caused an erosion of the creek bank. The contention was really that the damage occurred because Hyatt had failed to properly maintain his dam.

On trial, the court held that there was no question but what the parties had agreed upon a price of $100.00 per acre for the land and that appellant had paid at that rate for 10.38 acres. But the court held that the parties knew that the land which was to be purchased "was that land up to the first bluff upon which the plaintiff has his house trailer and that the lands below the bluff and fronting on the creek were the lands of the Carters to be specifically retained by them", and that a mutual mistake had been made as to the exact description of the land. The court held that Mizell should have received 3.9 acres as the agreed conveyance from the Carters and it thereupon ordered the deed reformed to that effect and held that Mizell should be reimbursed for the additional amount he had paid for the ten plus acreage together with interest from the date of the initial payment to the Carters until the conclusion of the trial. The court also found that Mizell was entitled to no damages against any of the defendants; further, that the work done by appellee Hyatt on the stream or creek property was done upon property belonging to Hyatt and others upstream from the land in controversy and that this work did not damage any lands of Mizell or anyone else. In accordance with these views, the court ordered reformation of the deed from the Carters to the Mizells as set out in this paragraph and denied damages. From the decree so entered, appellants bring this appeal. Several points are urged for reversal, but the litigation can be disposed of without a discussion of each.

Let it first be remembered that we have clearly stated many, many, times that parol evidence of a mistake must be clear and convincing before reformation is justified. In *Mitchell* v. *Martindill,* 209 Ark. 66, 189 S.W. 2d 662, quoting an earlier case[2], the court said:

> "The authorities all require that the parol evidence of the mistake, and of the alleged modification, must be most clear and convincing, . . . or else the mistake must be admitted by the opposite party; the resulting proof must be established beyond a reasonable doubt. Courts of equity do not grant the high remedy of reformation upon a probability, nor even

[2]*Sewell* v. *Umsted,* 169 Ark. 1102, 278 S.W. 36.

upon a mere preponderance of the evidence, but only upon a certainty of the error."

In *Hicks, Special Administratrix* v. *Rankin,* 214 Ark. 77, 214 S.W. 2d 490, this court said:

"Appellant's answer filed in the trial court, plead the statute of limitations, laches and estoppel, but we deem it unnecessary to discuss these pleas, for, on the whole, the evidence in this case is not sufficient to meet the rule early adopted and long followed by this court and well expressed in the case of *Goodrum* v. *Merchants & Planters Bank,* 102 Ark. 326, 144 S.W. 198, 202 Ann. Cas. 1914A, 511: 'It is true that this is a suit instituted in a court of chancery, and is to be determined by principles enforceable in such court, and that equity will reform a written contract on the ground of mistake. But, to entitle a party to reform a written instrument upon the ground of mistake, it is essential that the mistake be mutual and common to both parties; in other words, it must be found from the testimony that the instrument as written does not express the contract of either of the parties thereto. It is also necessary to prove such mutual mistake by testimony which is clear and decisive before a court of equity will add to or change by reformation the solemn terms of a written instrument." ***

"The evidence necessary to impeach the solemn recitations of the deed must be clear and convincing. As was said in *Bevens* v. *Brown* (196 Ark. 1177), 120 S. W. 2d 574, such evidence 'must be so clear that reasonable minds will have no doubt that such an agreement was executed. It must be so convincing that serious argument cannot be urged against it by reasonable people.' "

We think the proof in the case before us falls far short of the quantum of proof required for reformation. The evidence shows that the deed conveyed 10.38 acres of land, being a part of two 40 acre tracts. Undisputedly, neither man, when the oral agreement to sell was made, knew just how much acreage was involved, but it is also

undisputed that their agreement was that, following a survey, Mizell would pay $100.00 per acre.

The surveyor was obtained by Mizell, and although Carter was not present when the survey was made, he had every opportunity to be present, but voluntarily chose not to go. He said he saw them (Mizell and surveyor) out surveying the property that was to be sold, but didn't go up to where the survey was taking place. The finding of 10.38 acres was not disputed and Carter and wife executed the deed and received the sum of $1,038 in payment therefor. Within two months, and over four years before Hyatt obtained the land from Carter, the Mizells recorded their deed.

Of course, under the provisions of Ark. Stat. Ann. § 16-114 (Repl. 1968), the recording of a deed is constructive notice to all persons from the time it is filed for record in the office of the recorder of the proper county, and it thus appears that the Mizells did all that was required to protect their title. The deed itself was prepared at the instance of Mizell, but by Carter's then attorney, and Carter testified that he might have suggested that Mizell go to that particular lawyer. Not only that, but Carter testified that he had in the past done some surveying in rough territory, and it is extremely difficult to understand how one, who had lived in the area for 12 or 13 years, and who had experience in surveying, would not be able to know the difference between 3 1/2 acres and 10 1/2 acres; in fact, Carter testified that he did know the difference.

As to the Hyatts, the testimony reflects that no attorney examined the title, no abstract was obtained covering the property, nor was any check made of records at the courthouse.

With the matters which we have herein set out, it would not appear there is much further need to discuss the evidence. Carter testified that he had walked over the property with Mizell that was to be sold at various times in the past, although Mizell testified that they walked over the area which he actually purchased.

There was also disputed testimony as to which had possession of the property during the approximately four-year period from the time of the purchase by Mizell to the time of the purchase by Hyatt. The Carters testified that they used the property for a cow and calf to graze, but Mizell testified that this was with his permission. Mizell also testified that he used the land to raise oats and graze his horse, which Carter admitted, but the latter said that this was with his permission.

Fred Millican testified that he was acquainted with the property, didn't know the exact boundary lines, but had walked over it with Mizell many times during the last four years, the two hunting and fishing together. He said that no one objected to their being on the property and he knew that Mizell had claimed up to, and across, the creek[3], which was a portion of the property here in dispute.

Summarizing, Mizell received a deed to 10.38 acres of land, paid for that amount of acreage at an agreed price per acre[4], the purchase being made from an individual familiar with land surveys, recorded his deed about four years before the purchase by Hyatt, the latter making no effort to ascertain the status of the title. We certainly cannot agree that the evidence was clear, cogent and convincing that a mutual mistake was made, nor did the evidence establish fraud on the part of Mizell.

As far as damages are concerned, we find no preponderance of evidence that would enable us to say the chancellor was incorrect in that finding.

Reversed as to the title of the property; affirmed as to the failure to award damages. The decree is thus

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[3]Ron Hatfield testified on behalf of Hyatt, but his testimony dealt with damages.

[4]From the evidence of Mrs. Carter:

"Q. He did pay you $100.00 an acre I believe for that land?
A. Yes, for 10 3/4 acres.
Q. And you want him to have this 10 3/4 acres?
A. I certainly do."

reversed, and the cause remanded to the chancery court for further proceedings not inconsistent with this opinion.

It is so ordered.

FOGLEMAN, J., concurs.

JOHN A. FOGLEMAN, Justice, concurring. I concur because I think that the decree and the findings on which it is based are clearly against the preponderance of the evidence.

ALVIE DAVIS ET AL *v.* CLARENCE MAYWEATHER ET AL

73-206 504 S.W. 2d 741

Opinion delivered February 4, 1974

Wayne R. Foster, for appellants.

Moses, McClellan, Arnold, Owen & McDermott, by: *William L. Owen,* for appellees.

GEORGE ROSE SMITH, Justice. This is a dispute between two sets of tenants in common concerning the title to the south half of a certain lot in Little Rock. The trial court, sitting without a jury, held that the appellees had acquired title to the appellants' undivided one-half interest in the property by adverse possession. For reversal the appellants contend that there is no substantial evidence in the record to support the court's finding. We agree with that contention.

The property was formerly owned by William L. Patterson, who died in about 1933, without descendants. At Patterson's death an undivided one-half interest in the property passed to his widow. That interest eventually vested in the appellees. The other undivided one-half interest passed to the descendants of Patterson's deceased sister. That interest eventually vested in the appellants.

The appellees or their predecessors in title took possession of the property at least as early as 1954 and continued to live upon it until the present eminent domain proceeding was filed by the Little Rock Housing Authority in November, 1971. The Housing Authority, in seeking to acquire the fee simple title to the property, joined all the cotenants as defendants. The appellants filed their answer on January 10, 1972, asserting title to a half interest in the property. Later on the appellees filed an answer asserting title to the whole parcel by adverse possession.

Although the appellees or their predecessors were in possession of the property from 1954 until 1971, the continuity of their possession was effectively interrupted by a partition suit which resulted in a judgment entered in the Pulaski Circuit Court on July 30, 1964. Apparently the trial court in the case at bar failed to give proper weight to that judgment. The earlier judgment found specifically that the successors in interest of William L. Patterson's widow were the owners of a half interest in the land and that the successors in interest of Patterson's

sister were the owners of the other half interest. Upon that finding the court ordered a partition of the property and appointed three commissioners for that purpose. As far as this record shows, the partition order was never carried into effect.

It is familiar law that a judgment establishing the ownership of land is conclusive upon the parties with respect to all questions that were or should have been put in issue in the case. *Lillie* v. *Nunnally,* 211 Ark. 202, 199 S.W. 2d 751 (1947). Hence the effect of the 1964 judgment was to extinguish any claim of adverse possession that might then have been asserted and to establish that the two sets of heirs were tenants in common of their respective half interests in the property.

There is no substantial evidence in this record to support a finding that the appellees acquired title by adverse possession after the entry of the 1964 judgment. The appellees' proof merely shows that they continued in possession of the land and paid the taxes upon it. As between tenants in common those facts do not establish hostility of possession. *Smith* v. *Kappler,* 220 Ark. 10, 245 S.W. 2d 809 (1952). "For possession by one tenant [in common] to be adverse to his co-tenants, the knowledge of such adverse claim must be brought home to the co-tenants, either directly or by such acts that notice may be presumed." *Woolfolk* v. *Davis,* 225 Ark. 722, 285 S.W. 2d 321 (1955). There is no proof that the appellees brought home to the appellants any such notice of an adverse claim between July 30, 1964, the date of the former judgment, and January 10, 1965, the date which was seven years before the appellants asserted their claim of title in the case at bar. Quite the contrary, Edgar Mayweather, the only one of the appellees who testified in the court below, stated that the judgment of partition was not carried into effect because the appellees were trying to buy out the owners of the other half interest. That attitude was of course a recognition of the cotenants' ownership rather than a denial of it.

The judgment is reversed, and since the title to land is involved the cause is remanded for the entry of a judgment consistent with this opinion.

WILLIAM M. SPARKS ET AL *v.* THOMAS J. SHEPHERD ET UX

73-194 504 S.W. 2d 716

Opinion delivered February 4, 1974

Evans, Farrar, Callahan & Cook, for appellants.

McMillan & McMillan, for appellees.

LYLE BROWN, Justice. Essentially this is a land title dispute between two neighbors. The Shepherds instituted a suit for damages against the Sparkses alleging trespass. Later the case developed into a contest over title and the Shepherds prevailed. Appellants advance five points for reversal.

Between the two tracts of land occupied by the parties is an old fence running north and south. To the east

of the fence and on what we shall call the Shepherds side is a private road running parallel with the fence and on out to a county road to the north. The Sparkses proceeded to locate a mobile home on their side of the fence and facing the private road. In order to obtain ingress and egress to the mobile home the Sparkses proceeded to cut the fence and clear underbrush on the Shepherds side of the fence, the object being to connect a passageway with the private road. Those actions by the Sparkses resulted in the filing by the Shepherds of cause numbered 7170 in the Clark Chancery Court. They sought to enjoin the Sparkses from trespass and prayed for damages. A separate answer on behalf of William M. Sparks, incompetent, contained a counter-claim, alleged that the two acres claimed by the Shepherds contained two void deeds in the chain of title and that in fact the record title was vested in the Sparkses.

The title of both parties was deraigned from a common source. In 1953 O. H. Haltom executed a deed to one Stanford for two acres out of his forty acre tract by metes and bounds description. The description was defective in that it did not close. In 1956 Haltom deeded four acres to the Sparkses out of the same forty. That deed described six acres by metes and bounds but excepted therefrom the two acres previously deeded to Stanford and "recorded in Book 220, page 460 of the deed records of Clark County." Then in 1962 Stanford deeded to Shepherd and wife the two acres previously mentioned and under the same void description as was in the Haltom to Stanford deed. On the basis of the defective description in the Shepherd title, the Sparkses claimed the Shepherds took nothing by their conveyance and asked for ejectment in their counterclaim. That was on the theory that the record title was in the Sparkses. The counterclaim also sought damages.

The Shepherds' reply conceded that two calls had been omitted from the deeds as heretofore described. They then purported to make the Haltom and Stanford heirs parties to the suit. The Shepherds additionally asked for reformation.

The Sparkses demurred to the reply and filed motion for summary judgment on the issue of liability. At

a hearing on January 10, 1972, the chancellor informally stated his intention to dismiss the complaint as to the Sparkses on the theory that possession by the Shepherds had not been pleaded. Thereupon the Shepherds requested and were granted a nonsuit. That left the counterclaim as the only issue before the court.

Shortly after the dismissal without prejudice the Shepherds filed a new cause of action against the same parties, cause number 7240. An answer containing counterclaim and alternate affirmative defenses was timely filed. After the statutory period for filing a reply to the counterclaim and affirmative defenses had expired the Sparkses filed a motion for default judgment. The chancellor held that the pleading filed by the Sparkses was more in the nature of an answer than of a counterclaim and did not require a response by the Shepherds, and the motion for summary judgment was denied. Motions in both cases for summary judgment filed by and for the Sparkses were denied and the causes consolidated for trial.

The chancellor ordered the void deeds reformed. As to costs in the case the parties were ordered to pay their respective witnesses, the costs of a survey made by the county surveyor were divided and the balance of the costs was adjudged against the Sparkses.

Other pertinent facts will be related as the points for reversal are enumerated and discussed.

Point I. *The court erred in granting the Shepherds' motion for nonsuit and in dismissing the Shepherds' complaint in 7170 without prejudice when the Sparkses had a counterclaim pending.* Only two Arkansas cases on the subject come to our attention. In *Pickett* v. *Ferguson,* 45 Ark. 177 (1885), this court sustained the trial court in refusing to dismiss a complaint without prejudice after a cross-bill had been filed. The other case is *Rowell* v. *Rowell,* 184 Ark. 643, 43 S.W. 2d 243 (1931). Again, the trial court refused to dismiss a complaint where a cross-complaint had been filed. This court said: "It was within the sound discretion of the chancellor at this stage of the proceedings to grant or refuse the motion, and his action

will not be reviewed, unless that discretion was abused". We find no abuse of discretion in the case at bar.

Point II. *The court erred in denying the Sparkses' motion for a default judgment in 7240.* The Shepherds failed to file within the statutory period a reply to the Sparkses' counterclaim in 7240. The Shepherds responded out of time and their attorney stated that he was not aware that the counter-claim had been filed or that he had received a copy. The trial court denied the Sparkses' motion for default judgment. We sustain the action of the trial court.

Ark. Stat. Ann. § 29-401 (Repl. 1962) providing for entry of default judgment against one from whom affirmative relief is sought and who has failed to file a responsive pleading, specifically recognizes that a default judgment entered should be set aside for unavoidable casualty, excusable neglect or other just cause. It is only logical that if a court can set aside a default judgment for those reasons, it will not abuse its discretion if it refuses to enter a judgment for any of the same reasons. *Easley* v. *Inglis,* 233 Ark. 589, 346 S.W. 2d 206 (1961); *Fitzwater* v. *Harris,* 231 Ark. 173, 328 S.W. 2d 501 (19959).

Although we are not persuaded that there was a clear showing of unavoidable casualty we do find justification for a finding of excusable neglect or "other just cause" in the circumstances prevailing because the very issues raised by appellants were already an issue in the first case (7170) by virtue of the pleadings then extant, i.e., the counterclaim and reply thereto. This result seems to be indicated by our decisions in the cases above cited and in *Barkis* v. *Bell,* 238 Ark. 683, 384 S.W. 2d 269 (1964). In all of these cases the attorneys for the party in default had some reason to feel secure in the belief that pleading was either unnecessary or that pleading requirements had been met. The major consideration seems to have been that in each case there was every indication that the issues would be contested. That is also the case here, so we find no abuse of discretion in the court's denial of a default judgment.

Point III. *The court erred in denying the Sparkses' motions for summary judgment in both cases.* Under this

point the argument is advanced that by reason of the indefinite description in the Shepherds' chain of title, nothing was conveyed and therefore the Shepherds are not entitled to reformation. The Sparkses overlook the fact that adverse possession was pleaded in 7240; and in 7170 the Shepherds controverted the counterclaim filed by the Sparkses.

Point IV. *The court erred in reforming the two void deeds in the Shepherds' chain of title to the two acre tract.* The point is based on the fact that all of the heirs in the Shepherds' chain of title were not before the court. *McClelland* v. *McClelland,* 219 Ark. 255, 241 S.W. 2d 264 (1951). The point is rendered moot by our holding, later to be discussed, that the Shepherds are entitled to recover under adverse possession.

Point V. *The court erred in the division of the costs.* It was held that the costs of the survey by the county surveyor would be divided equally between the parties; that each party would pay its own witnesses; and that the other costs would be imposed on the Sparkses. This was an equitable division. The court said there was an agreement made early in the proceedings that the survey would be made and the cost divided equally.

We now come to the plea of adverse possession made by the Shepherds. The plea is specifically made in cause number 7240; proof was introduced thereon and it is argued here. Thomas Shepherd testified he obtained his deed in 1962; that in 1963 he cleared the land and has been farming it since then, all but a small parcel which is wet, but which he kept "bushhogged"; that he was in possession of the disputed acreage up to the fences on the south, west, and east sides, and to the county road on the north side; that he built a new road all the way across the two acres on the east side near the quarter section line; and that he regularly paid taxes on the property. He said Mr. and Mrs. Sparks observed him clearing the land in 1963. Mrs. Sparks said they began claiming the two acres when attorney Cook checked the deeds. That had to be about the time this litigation was instigated. She also conceded that Mr. Haltom "told us he had sold some of it to a Mr. Stanford". In addition, the proof show-

ed the Stanford family exercised control over the land from 1953 until 1962, using it as a means of access from their home on the south to the county road on the north. Mr. Sparks was declared incompetent on May 28, 1963.

It is argued that adverse possession cannot run against one who is non compos mentis. This general rule is stated in 2 C.J.S. Adverse Possession § 195: "In the absence of statutory provision to the contrary, the accrual of disabilities to the true owner of the land after the commencement of adverse possession will not fatally interrupt the continuity of adverse possession so begun." Our statute on adverse possession of land makes no provision to the contrary; in fact, the reasonable interpretation of the statute coincides with the C.J.S. statement; Ark. Stat. Ann. § 37-101 (Repl. 1962). Also see *Denton* v. *Brownlee,* 24 Ark. 556 (1867); *Bozeman* v. *Browning,* 31 Ark. 364 (1876); *Freer* v. *Less,* 159 Ark. 509, 252 S.W. 354 (1923).

Affirmed.

HARRIS, C.J., not participating.

PAUL NAHLEN ET AL *v.* HENRY WOODS ET AL

73-228 504 S.W. 2d 749

Opinion delivered February 4, 1974

Sam Hilburn, for appellants.

Smith, Williams, Friday, Eldredge & Clark, by: *James A. Buttry* and *Thomas P. Leggett,* for appellee, Arkansas Bar Foundation.

Henry Ginger, Deputy Pros. Atty., 6th Judicial Circuit and *Wilson & Hodge,* for plaintiff-appellees.

LYLE BROWN, Justice. The appellants in this case are five officials of the city of North Little Rock: the finance director, the purchasing agent, the clerks of the municipal courts, and the city clerk. The appellees are the members of the Pulaski County Law Library Board and of the Arkansas Bar Foundation, the latter being an intervenor. The action arose as a result of the passage by the North Little Rock Council of an ordinance prohibiting the collection of court costs imposed by two Acts of the General Assembly, Acts 685 and 284 of 1971. Those Acts imposed a tax of $1.00 to support a county law library and $1.00 towards a law library building. The ordinance substituted a tax of $1.00 in cases processed in North Little Rock Municipal Courts to go into a North Little Rock law library book fund to be administered by a municipal law library board. The trial court issued a writ of mandamus sought by appellees which directed appellants to disregard the city ordinance and to comply with the State Acts heretofore described. The contentions on appeal are (1) that the city council properly repealed the two Acts of the General Assembly, that action being permitted by Act 266 of 1971, and (2) a mandamus was improper because it compelled the appellants to perform legal duties of a discretionary nature.

The three Arkansas Acts above mentioned are of course directly involved in this appeal and a more detailed description of them should be helpful:

1. Act 266 of 1971 which has been codified as Ark. Stat. Ann. § 19-1042 et seq. (Supp. 1971). Subject to restrictions in enumerated fields, cities of the first class are given certain legislative powers over municipal affairs. It is sometimes referred to as the "Home Rule Act".

2. Act 284 of 1971 which has been codified as Ark. Stat. Ann. § 25-504 et seq. (Supp. 1971). It authorizes the charging of $1.00 court costs per case in all counties for a county law library. If the Act is implemented by the county bar association and by the county court order the collection becomes mandatory. This Act is sometimes referred to as the "Book Fund Act".

3. Act 685 of 1971 which has been codified as Ark. Stat. Ann. § 25-508 (Supp. 1971). The Act authorizes the charging of $1.00 court costs in all counties having a population of at least 84,000 for a county law library building. If the Act is implemented by the county bar association and by the county court order the collection becomes mandatory. This Act is sometimes referred to as the "Building Fund Act".

North Little Rock is of course located in Pulaski County. It is undisputed that both the Book Fund Act and the Building Fund Act have been properly implemented by the appropriate bar association and by the county court.

We first deal with appellants' argument that North Little Rock, acting under Act 266, the Home Rule Act, properly repealed Acts 284 and 685, the Book Fund Act and the Building Fund Act. We cannot agree with appellants. In the first place, the legislature is prohibited by our constitution from delegating such authority of repeal. "No municipal corporation shall be authorized to pass any law contrary to the general laws of the State . . . . " Art. XII, § 4. *McLaughlin* v. *Retherford,* 207 Ark. 1094, 184 S.W. 2d 461 (1944); *Morrilton* v. *Comes,* 75 Ark. 458, 87 S.W. 1024 (1905); *State* v. *Lindsay,* 34 Ark. 372

(1879). Secondly, the Book Fund Act and the Building Fund Act were approved *subsequent* to the Home Rule Act. The legislature certainly did not, and could not constitutionally, surrender its inherent power to repeal or modify prior legislative acts on the subject. The effect of our constitution is to make Arkansas a *legislative* home rule state as compared to those few states known as *constitutional* home rule states because home rule is provided in their constitutions. Since we are a legislative home rule state our legislature possesses plenary power over the municipalities. See 1 Antieau, Municipal Corporation Law, § 3.08 (Supp. 1973); and *Hobart* v. *Duvall,* 297 A. 2d 667 (N.H. 1972).

Appellants next contend it was error to issue a writ of mandamus because the writ is not appropriate when it involves duties of public officials which are of a discretionary nature. We find no merit in the argument. In view of the fact that some costs might not be collected—due to the fact that the trial court might suspend the fine and costs, or permit the defendant to work out the penalty—§ 25-505 (1) provides that the county or municipality would not be liable for those costs which were not collected. That provision did not vest discretionary powers in the officers who are appellants; it was simply an exemption in those situations and in favor of the county or municipality in cases wherein the costs are not collected.

In their reply brief appellants make the assertion that Acts No. 284 and 685 of 1971 are special acts within the meaning of amendment No. 14 to the Arkansas Constitution. As best we can tell from the abstract the point was raised for the first time on appeal and in the reply brief. Ordinarily we would not consider the point; however, its merit was discussed in oral argument by both sides, so rather than ignore the point and cast an aura of doubt as to how the point, if properly raised, would have affected this litigation, we have no hesitancy in saying the contention is without merit. *Whittaker* v. *Carter,* 238 Ark. 1074, 386 S.W. 2d 498 (1965).

Affirmed.

FOGLEMAN, J., not participating.

B. FRANK MACKEY ET AL *v.* STEVE McDONALD JR.

73-128 504 S.W. 2d 726

Opinion delivered February 4, 1974

Lee Munson, Pros. Atty., and *Henry Ginger,* Dep. Pros. Atty., for appellants.

Eubanks, Files & Hurley, for appellee.

JOHN A. FOGLEMAN, Justice. This action was instituted by appellee Steve McDonald, Jr., (a justice of the peace for Big Rock Township in Pulaski County) as a citizen, taxpayer and property owner of Pulaski County, on behalf of himself and all others similarly situated. The suit was a proceeding against B. Frank Mackey, individually and as County Judge of Pulaski County, and William L. Tedford, individually and as County Treasurer of Pulaski County. Appellee sought to have certain appropriations made by the county's levying court, commonly called the quorum court, declared void and to have Mackey, individually and as county judge, and Tedford, individually and as county treasurer, enjoined from authorizing, issuing, paying or disbursing any county warrants or otherwise expending any public funds under the authority thereof.

The appropriations questioned by appellee were made at meetings of the levying court held on January 12, 1973, and March 5, 1973. At the January meeting, the court made an appropriation to "County Court" for a "Contingent Fund" in the amount of $63,410.61. On March 5, 1973, the court made an appropriation of $222,265 from Federal Revenue Sharing Funds designated only as "Contingent Fund." The chancery court held that both appropriations were unlawful and unauthorized, and granted an injunction against Mackey, in his capacity as county judge or individuallv, from initiating, directing or authorizing any expenditure from either "Contingent Fund" and against the county treasurer from paying out any monies from these funds.

Judge B. Frank Mackey was called as a witness by

appellee. His testimony reveals he has a rather good grasp of the functions of the judge of the county court with reference to county liabilities and appropriations. He said the contingent fund was for emergency purposes to cover legitimate county expenses for which there is no appropriation. He classified these as: (1) financial obligations, placed on the county by legislative enactment, for which no appropriation has been made by the quorum court or the appropriation made is inadequate; (2) obligations of the county for proper county purposes, the payment of which results in allowances in excess of appropriations made by the quorum court. As examples, Judge Mackey mentioned a legislative increase in the allowance for operating the office of the prosecuting attorney amounting to $100,000 more than the appropriation theretofore made by the quorum court, and increased obligation on the county for the payment to court reporters for transcripts to be used for appeal purposes by indigent persons convicted in the criminal courts, for which no appropriation had been made, and obligations arising after appropriations made have been exhausted. Judge Mackey made it quite clear that no contingent fund appropriation was made to the county judge, that all payments from the contingent fund were made through the regular process of county court action on claims filed and that no payments were made in any other manner. Judge Mackey stated that he felt legally bound to allow expenses incurred pursuant to legislative enactments, both when no appropriation had been made for the purpose by the quorum court and when the quorum court's appropriation was not sufficient to meet all obligations so established. Judge Mackey testified the claims were processed through the county comptroller who audited the claims before their submission to him for approval. As we understand Judge Mackey's testimony, the comptroller indicates to the county court those claims which must be paid from the contingent fund. Mackey said the comptroller worked under his direction. There is nothing in the record to indicate that Mackey has ever acted individually or in any capacity except as judge of the county court in any of these matters. There is no contention that there has been any fraudulent action or lack of good faith on the part of either of the county officials who are defendants in the action. The appropriation was not made to or for the benefit of the county judge but clearly was placed as an item under the general heading "County Court."

The situation is a little different as to the federal revenue sharing funds. Those funds were appropriated by adoption of allocations proposed by the budget committee of the quorum court. These allocations fall into three general categories, none of which mentioned the county court and one of which was simply "contingent fund." Judge Mackey was aware that Pulaski County is required to assure the Secretary of the Treasury that these funds will be used by the county only in accordance with laws and procedures governing the county's own revenues and that misapplied funds must be repaid along with a 10% penalty. He stated that, at the time of the trial, these funds had been placed in a separate trust account and that none of the money had been spent.

Appellants filed a general demurrer to appellee's pleading, which was styled "Petition for Injunction," and specifically alleged that the chancery court was without jurisdiction under Art. 16, Sec. 13, of the Constitution of Arkansas over federal revenue sharing funds.

After hearing the matter, the chancellor expressed grave concern about the jurisdiction of the chancery court to act in the matter, as well he might. In view of the disposition we make of the case, however, we need not concern ourselves too much with the serious doubt about the jurisdiction of the chancery court over this action, which basically would appear to fall within the jurisdiction of the circuit court under Art. 7, Sec. 14. The county treasurer, however, is a party to the action. It is the duty of the county treasurer to pay and disburse monies payable into the county treasury on warrants drawn by order of the county court. Ark. Stat. Ann. § 12-1310 (Repl. 1968). If he neglects or refuses to pay any warrant drawn on him by order of the county court, when he has in his hands money available for the payment thereof, the law requires him to forfeit to the holder fourfold the amount of the warrant. Ark. Stat. Ann. § 12-1311 (Repl. 1968). Furthermore, the refusal constitutes a misdemeanor in office, and subjects the treasurer to removal. Ark. Stat. Ann. § 12-1312 (Repl. 1968). Clearly, the treasurer is a ministerial officer of the county, who is not vested with discretion in such matters.

It is true that appellee had the right to appeal from the appropriations made by the quorum court. *Lee Coun-*

ty v. *Robertson,* 66 Ark. 82, 48 S.W. 901. It is not clear, however, that his remedy at law was plain, adequate and complete. Under similar circumstances, this court has held that the chancery court properly exercised jurisdiction in an action against the county clerk to restrain the clerk from issuing warrants based on allegedly unauthorized orders of the county court. *Worthen* v. *Roots,* 34 Ark. 356. We consider this case to be controlling authority as to the chancery court's jurisdiction, at least insofar as the county treasurer is concerned. See also, *Farrell* v. *Oliver,* 146 Ark. 599, 226 S.W. 529. Under the authority of the cited cases, it seems that all the issues here raised may be adequately treated within the jurisdiction of the chancery court.

Appellants' first point for reversal is based upon their contention that the court had no jurisdiction insofar as the federal revenue sharing funds are concerned. They base their argument upon the assertion that Art. 16, Sec. 13, of our Constitution applies only to county tax funds but not to federal funds and that jurisdiction of misuse of federal funds is governed by the Federal Revenue Sharing Act which does not place jurisdiction in any state or local court. We do not agree with appellants.

At the outset, we should say that the application of Art. 16, Sec. 13, has not been strictly limited to exactions of county, town or city tax funds. See, e.g., *Eddy* v. *Schuman,* 206 Ark. 849, 177 S.W. 2d 918; *City of Bentonville* v. *Browne,* 108 Ark. 306, 158 S.W. 161; *McCain* v. *Hammock,* 204 Ark. 163, 161 S.W. 2d 192; *Nelson* v. *Berry Petroleum Co.,* 242 Ark. 273, 413 S.W. 2d 46; *Parker* v. *Laws,* 249 Ark. 632, 460 S.W. 2d 337; *Price* v. *Edmonds,* 231 Ark. 332, 330 S.W. 2d 82; *Cunningham* v. *Stockton,* 235 Ark. 345, 359 S.W. 2d 808; *Needham* v. *Garner,* 233 Ark. 1006, 350 S.W. 2d 194. It seems that, under this section of the constitution, equitable remedies are accorded the taxpayer to prevent misapplication of funds when the taxpayer may be required to replenish those funds if exhausted through the misapplication. *Eddy* v. *Schuman,* supra. It also seems clear that this constitutional provision is applicable in every case where taxpayers will bear the burden of replenishing funds exhausted by misapplication. *McLellan* v. *Pledger,* 209 Ark. 159, 189 S.W. 2d 789; *Samples* v. *Grady,* 207 Ark. 724, 182 S.W. 2d 875; *Farrell* v. *Oliver,* 146 Ark. 599, 226 S.W. 529. The cited cases make it quite

clear that a citizen and taxpayer may maintain a suit to prevent a misapplication of funds or to protect against unlawful official acts which could logically result in illegal exaction as well as to require reparation for that which has been done. See also, *Grooms* v. *Bartlett,* 123 Ark. 255, 185 S.W. 282. We do not consider the case of *Gipson* v. *Ingram,* 215 Ark. 812, 223 S.W. 2d 595, relied upon by appellants to be applicable here. The opinion in that case clearly points out that it was shown that the cash funds involved, admittedly public funds, were not derived from taxes but from the operation of the state agencies and institutions involved. For the purposes of the opinion in that case, these cash funds were treated as those received by the state agencies and institutions from sources other than taxes, as the term "taxes" is ordinarily used. It is also significant that in *Gipson,* none of the funds ever reached the public treasury. Quite a different situation prevails here.

Under the State and Local Fiscal Assistance Act of 1972 funds received by units of local government may be used only for specified priority expenditures enumerated in the act. See 31 U.S.C.A. § 1222. They are:

> (1) ordinary and necessary maintenance and operating expenses for—
>
> (A) public safety (including law enforcement, fire protection, and building code enforcement),
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> (B) environmental protection (including sewage disposal, sanitation, and pollution abatement),
>
> (C) public transportation (including transit systems and streets and roads),
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> (D) health,
>
> (E) recreation,
>
> (F) libraries,
>
> (G) social services for the poor or aged, and
>
> (H) financial administration; and

(2) ordinary and necessary capital expenditures authorized by law.

In order to qualify for funds under the act, a unit of local government must show that it will establish a trust fund in which it will deposit all payments it receives and use the fund only for the prescribed priority expenditures and pay over to the Secretary of the Treasury an amount equal to 110% of any amount expended out of such fund in violation of the limitations on expenditures, if such amount is not promptly repaid to the trust fund. 31 U.S.C.A. § 1243. The local government unit is also required, under the same section, to provide for the expenditure of the funds received only in accordance with laws and procedures applicable to the expenditures of its own revenues. Thus, it is quite clear that the county general revenues would be the source of any reimbursements for unauthorized expenditures. Clearly, the taxpayer who would bear a part of the burden of reimbursement has a right under Art. 16, Sec. 13, to prevent an improper application of these funds. If the funds are to be disbursed in accordance with laws and procedures applicable to the expenditures of county revenues, clearly the courts of the state have jurisdiction to prevent expenditures which are not in accordance with state laws and procedures, even if the federal courts or other federal agencies should also have jurisidction. Nothing in the federal act pretends to limit jurisdiction of such preventive action to either federal courts or federal administrative agencies.

Appellants also contend that the chancery court erred in applying illegal exaction principles to this case, basing their argument largely on the fact that no fraud or bad faith is involved. We agree with the chancellor's finding that no fraud or bad faith had been shown. The illegal exaction principle, however, is not confined to such cases, even though there have been several occasions where these elements were the bases of findings that there had been illegal exactions. A good faith misapplication of funds in a manner or for a purpose not authorized by law constitutes an exaction from the taxpayers which is illegal even though not fraudulent. In *Lee County* v. *Robertson,* 66 Ark. 82, 48 S.W. 901, one of the earliest cases arising under this section, there was no issue of fraud or bad faith, but, at the suit of a taxpayer, the court held that an unauthorized appropriation by the quorum court was

tantamount to an allowance and enforcement of an illegal exaction against every taxpayer in the county. It has also been held that an appropriation of funds not made in the manner required by the constitution is a proper basis for taxpayer relief against an illegal exaction. *Farrell* v. *Oliver,* 146 Ark. 599, 226 S.W. 529. The making of a contract not authorized by law which would result in the taking of money from the public treasury may also be the basis for taxpayer action under this section. *Green* v. *Jones,* 164 Ark. 118, 261 S.W. 43. See also, *Price* v. *Edmonds,* 231 Ark. 332, 330 S.W. 2d 82. The anticipated payment of salaries by a city pursuant to an ordinance which was contrary to the constitution and statutes of the state was held to be appropriate basis for taxpayer relief from an illegal exaction. *Laman* v. *Moore,* 193 Ark. 446, 100 S.W. 2d 971. We have upheld a decree for recovery of salary paid to a de facto officer in a taxpayer's action under this provision of our constitution, because our law does not permit payment of salaries to such officers. *Sitton* v. *Burnett,* 216 Ark. 574, 226 S.W. 2d 544. In short, an illegal exaction, in the sense of Art. 16, Sec. 13, of our Constitution, is an exaction that either is not authorized by law or is contrary to law.

We do agree, however, with appellants in their contention that "the contingent fund" appropriation to the county court was not illegal. In this respect we disagree with the chancellor. We do not believe that the authorities relied upon by the chancellor in reaching his conclusions in this respect are applicable to the facts in this case. In *Pressley* v. *Deal,* 192 Ark. 217, 90 S.W. 2d 757, we simply held that an appropriation for expenses of the county judge was not authorized under Subdivision 6, Paragraph 7, of Crawford & Moses Digest 1982 [now Ark. Stat. Ann. § 17-409 (Repl. 1968)], because such expenses were not allowed by the laws of this state in view of the fact that a county-initiated salary act did not provide for the payment of any expenses of the county judge. It was further noted that no law of this state gave authority to the quorum court to appropriate money to pay expenses of the county judge for work done outside his official duties. The circuit court, from which that appeal was taken, had made a specific finding that this appropriation was for such a purpose. Even there we recognized that the quorum court had the power to make an appropriation to defray county government expenses allowed by the laws of the

state in addition to those specifically mentioned under the first six items of the subdivision in question.

In *Martin* v. *Bratton,* 223 Ark. 159, 264 S.W. 2d 635, there was an attempted appropriation of $20,000 ". . . from the county general fund to allow the county judge to use it as he sees fit and deems necessary." Clearly, this appropriation was not authorized under our statutes, and we characterized it as an attempt to entirely bypass the functions of the county court, because the appropriation was to be used by the county judge, rather than by the county court. But that is not the case here. Even though the county judge, when asked who would make the decision as to disbursements from this contingent fund, responded that he would, he immediately stated that guidelines were set out under the law, and in later testimony made it quite clear that payments out of this contingent fund were made on claims presented to the county court and that he, as county judge, did not make fully independent decisions without the processing of claims through the county court. It seems quite clear to us that the appropriation is not one to be expended by the county judge but by the county court, and that the defects in the appropriations involved in *Pressley* and *Martin* are absent here.

We agree with appellants and the chancellor that the county is required to pay obligations imposed upon it by law which have not been the subject of an appropriation. A review of our law in that respect would be helpful to an understanding of the disposition of this case. It is true that Art. 16, Sec. 12, of the Arkansas Constitution prohibits the payment of money out of the treasury until the same shall have been appropriated by law and then only in accordance with the appropriation. This section has been held applicable to the counties. *Nevada County* v. *News Printing Company,* 139 Ark. 502, 206 S.W. 899. See also, *Sadler* v. *Craven,* 93 Ark. 11, 123 S.W. 365.

The specified order for making appropriations by the quorum court is set out in § 17-409 as follows:

1. To defray the lawful expenses of the several courts of record of the county or district and the lawful ex-

penses of criminal proceedings in magistrate's courts, stating the expenses of each of said courts separately.

2. To defray the expenses of keeping persons accused or convicted of crime in the county jail.

3. To defray the expenses of making the assessments and tax books and collecting taxes on real and personal property.

4. To defray the lawful expense of public records of the county or district.

5. To defray the expenses of keeping paupers of the county or district.

6. To defray the expense of building and repairing public roads and bridges and repairing and taking care of public property.

7. To defray such other expenses of county government as are allowed by the laws of this State.

These purposes were first classified in the case of *Worthen* v. *Roots,* 34 Ark. 356, where we said that the first four are of an indispensable nature, essential to the support of the government, since they are for services that must be performed, else the business of the counties must stop. The last three were said not to be imposed by necessity, but to be matters of contract. The matter was gone into rather extensively in *Polk County* v. *Mena Star Co.,* 175 Ark. 76, 298 S.W. 1002. There we said that quorum or levying courts should follow the provisions of this statute strictly in making appropriations, and first make ample provision for those necessary expenses imposed upon the counties by law, after which they were at liberty to make appropriations of the whole or part of the remainder of the revenue for the second class of items, that is, those that relate to matters of contract regarding the internal affairs of the county or internal improvement thereof over which the county court has discretionary power. It was said that the first class of obligations was imposed on the counties by law and that the county court is substantially

without any discretion with respect thereto. In that case, we said:

> The holding of elections, printing ballots, pollbooks, tally sheets, and other election supplies, the feeding of prisoners confined in the county jail, the holding of courts of record and fees of justices of the peace, the salaries and fees of county officers, including the prosecuting attorneys, the making of assessments and tax books, and collecting taxes are all necessary county expenses imposed by law, over which the county court has no control or discretion except possibly the amount to be allowed for the service rendered, as all compensation is either fixed by law, or is provided for.

As indicated in the *Polk County* case, the different manner of treatment of the two classes of appropriations was first demonstrated by this court in *Worthen* v. *Roots,* supra. This court there pointed out that by the third section of an act of March 18, 1879, (the same act setting out the order for making appropriations, which now constitutes a part of Ark. Stat. Ann. § 17-409) the legislature prohibited the county court or any agent of any county from making any *contract* on behalf of the county unless an appropriation had previously been made and wholly or in part unexpended. It should be noted that this is really the effect of Ark. Stat. Ann. § 17-416. This section seems, without question, to apply to Pulaski County. The court then observed that the legislature had designedly omitted any restrictions upon allowances, as distinguished from contracts. In this respect, the court said:

> The nature and reason of this distinction, and, indeed, the full scope of the operation of the constitution itself, will become apparent from a consideration of the various purposes for which the tax is to be levied. Reverting to them, it will be seen that the first four are of an indispensable nature, essential to the support of the government. They are for services that *must* be performed, or the business of the counties must stop. The last three are not supposed to be imposed by necessity, but are matters of contract. It is well that appropriations be made for all pur-

> poses, but of great consequence that in the matter of *contracts* the expenses of the counties should be limited to the amounts appropriated. This is impossible in cases of positive service required by law, and expenses incident to them; and in accordance with this view the legislature did not reimpose upon the county any disability as to allowances. Indeed, it is plain that any other view of the case would place the county court in the attiude of dealing oppressively and unjustly with those citizens who render her involuntary or indispensable services.
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> There is nothing in the twelfth section to restrain the court from making allowances upon exhausted funds, in the face of the marked removal of that restraint in another section.
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> The irresistible conclusion, upon a review of all the legislation, is, that the act of March 18, 1879, is the result of an effort (perhaps imperfectly accomplished) to return to the true policy indicated by the constitution of 1874: To require all appropriations to be made and taxes to be levied by a full court of justices, and that no money should be paid out of the treasury except on appropriation; and to restrain the county court, or its agents, from making any contracts until money may be appropriated to meet them.
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> We search in vain for any prohibition, in the act of 1879, against allowing claims by the county court beyond the appropriations. A large class of the claims *ought* to be allowed, and with regard to those depending on *contracts made* in excess of appropriations, if it be error to allow them, any citizen may appeal and correct the error. There is room for the operation of the whole constitution in all its aspects.

It is, of course, true that Amendment 10 to our State Constitution has prohibited the county court from making any allowance for any purpose in excess of the revenue

from all sources for the fiscal year in which the allowance is made. This limitation, however, was not effective to prevent the county court from allowing claims for the essential governmental services, said to be of an indispensable nature, in excess of the appropriations made. We have not materially deviated from the principles of *Worthen*. Since the adoption of Ark. Stat. Ann. § 17-416 (Repl. 1968), which was Sec. 3 of Act 217 of 1917, this court has held that the county court may not make contracts for items 5, 6 and 7, specified in Ark. Stat. Ann. § 17-409, in excess of the appropriations made for the purposes set out, but that appropriations for the indispensable services of county government set out in the first four items do not constitute a limitation upon the power of the county court or other agents of the county to contract. *State* v. *E. F. Leathem & Co.,* 170 Ark. 1004, 282 S.W. 367. It has been said that as to the first class of obligations, the county court is substantially without discretion, but that court has discretionary power as to the second class. *Polk County* v. *Mena Star Co.,* supra. However, it is equally clear that whenever an obligation is legally imposed upon a county by legislative enactment within the power of the General Assembly, it must be paid without regard to the existence or exhaustion of a specific appropriation so long as the county general fund is not exhausted. *Adams* v. *Whitaker,* 210 Ark. 298, 195 S.W. 2d 634; *Polk County* v. *Mena Star Co.,* supra; *Crawford County* v. *City of Van Buren,* 201 Ark. 798, 146 S.W. 2d 914; *Burrow* v. *Batchelor,* 193 Ark. 229, 98 S.W. 2d 946. This rule does not apply, however, to any obligation incurred by reason of a contract even though the making of the contract is required by statute. *Jeffery* v. *Trevathan,* 215 Ark. 311, 220 S.W. 2d 412; *Nevada County* v. *News Printing Co.,* 139 Ark. 502, 206 S.W. 899. When the amount of the obligation is fixed by law, the county court is left without any discretion, and it may be compelled to make the payment by mandamus in the circuit court. *Burrow* v. *Batchelor,* supra; *Crawford County* v. *City of Van Buren,* supra. So long as the county general funds are not exhausted, the quorum court can be compelled by mandamus to make appropriations for such obligations. *Jeffery* v. *Trevathan,* supra. See also, *Walsh* v. *Campbell,* 240 Ark. 1034, 405 S.W. 2d 264. It has been said that if the law were otherwise, not only could the county court defy the legislature, but it

could obstruct the necessary and ordinary affairs of the county. *Green* v. *Shell,* 239 Ark. 1161, 397 S.W. 2d 363; *Jeffery* v. *Trevathan,* supra; *Burrow* v. *Batchelor,* supra.

If an appropriation has been made "to defray other expenses of County government as are allowed by the laws of this State" pursuant to item 7 under the sixth subdivision of Ark. Stat. Ann. § 17-409, and it has not been exhausted, any obligation imposed upon the county by statute may be paid from that appropriation, even though no specific appropriation has been made to cover the particular obligation, regardless of whether the governing statute was passed before or after the appropriation was made. *Nevada County* v. *News Printing Co.,* supra; *Jackson County* v. *Pickens,* 208 Ark. 15, 184 S.W. 2d 591; *Jeffery* v. *Trevathan,* supra. See also, *Craig* v. *Grady,* 166 Ark. 344, 266 S.W. 267. In addition, if the legislative mandate specifically requires payment from the county general fund, no appropriation is necessary. *Green* v. *Shell,* supra; *Crawford County* v. *City of Van Buren,* supra. And if the obligation is for necessary expenses for indispensable county government purposes (the first four items of the sixth subdivision of § 17-409), no appropriation is necessary as long as there is money in the county general fund to pay it. *Burrow* v. *Batchelor,* supra.

The nature of the appropriation for general county purposes under item 7 of the sixth subdivision of Ark. Stat. Ann. § 17-409 is discussed in *Pressley* v. *Deal,* 192 Ark. 217, 90 S.W. 2d 757, where we said:

> In other words, the quorum court has the power to make an appropriation to defray such other county government expenses as are allowed by the laws of this state in addition to those specifically mentioned under the six preceding subdivisions.

We again discussed it in *Adams* v. *Whittaker,* 210 Ark. 298, 195 S.W. 2d 634, saying:

> This is in the nature of a "lest we forget" provision and covers any and all other expenses of the county government fixed by the laws of the state, and though

no specific reference is made to elections, these expenses have always been paid and the obligation and power to pay them has never been questioned.

Although we feel that the quorum court's intentions as to the intended use and purposes of the fund could have been more clearly expressed, the "contingent fund" appropriation made to the county court in this case seems to substantially meet these requirements, and in this respect we disagree with the chancellor.

Much of what we have heretofore said has application to the federal revenue sharing funds. It is clear, that once these funds reach the county treasury, they must be appropriated as other funds are, in view of Art. 16, Sec. 12, of the Arkansas Constitution and the federal statutory requirement that the county will provide for the expenditure of the funds in accordance with laws and procedures applicable to its own revenues. 31 U.S.C.A. 1243 (a)(4). The only evidence relating to the intention of the quorum court in making this appropriation is the testimony of Mackey that it will be used for emergency purposes and to cover any category where the county may run out of funds on a particular appropriation. This is not sufficiently definite for us to say that the appropriation was proper, unless it is considered to be an appropriation under item 7 of subdivision 6 of § 17-409 and to be used for any purpose for which county general funds could be used if the purpose is within the purview of "priority expenditures" enumerated in 31 U.S.C.A. § 1222. We do think it proper within the limitations just stated. We agree with the chancellor, however, that no expenditure of funds beyond these limitations is authorized by this appropriation.

Appellants contend that the court erred in granting injunctive relief, saying that the court was indirectly accomplishing what it could not do directly, i.e., enjoin Mackey, individually and as county judge, and Tedford, as county treasurer, and thereby effectively enjoin the county court. We will not dwell upon this matter, because we see no necessity for an injunction. The power of the court to enjoin the treasurer is clear under the authority of *Worthen* v. *Roots,* supra, as previously pointed out in

this case. The power to enjoin the county judge as judge of the county court is at least doubtful. But neither of the officials involved here appears to have any disposition or inclination to evade or avoid the governing law.[1] It seems inappropriate, under these circumstances, to enjoin these officials, in any capacity. It is quite sufficient at this time to treat the action as one for a declaratory judgment. See *Arkansas Association of County Judges* v. *Green,* 232 Ark. 438, 338 S.W. 2d 672.

Accordingly, the injunction is dissolved and that part of the court's decree declaring the appropriations unlawful is reversed and the cause remanded for the entry of a declaratory decree limiting allowances from the contingent fund appropriation of county general revenues to claims based upon obligations of the county for indispensable services of county government (described in Items 1, 2, 3 and 4 of Ark. Stat. Ann. § 17-409) in excess of appropriations made or obligations imposed upon the county by legislative enactment where the amount of the obligation is not left to the discretion of the county court and prohibiting the payment of any claim for a contractual obligation for any other governmental purpose for which a separate, specific appropriation was made by the quorum court, unless such contract was made pursuant to legislative direction or requirement and the specific appropriation made has been exhausted. The decree shall apply the same limitations to the contingent fund appropriation of federal revenue sharing funds and the additional requirement that claims paid out of this appropriation must also be limited to obligations for priority expenditures enumerated in 31 U.S.C.A. § 1222.

GEORGE ROSE SMITH, J., concurs.

BYRD, J., dissents.

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[1]We do not overlook the two items relied upon by appellee to show previous use of the "contingent fund." They are payments to charities and payment for moving the sewer line for the courthouse, necessitated by construction of a convention center across the street. The latter is a non-recurring expenditure. Although the propriety of these items may be subject to serious doubt, we do not believe that these matters contravene our statement regarding the intentions of the officials.

CONLEY BYRD, Justice, dissenting. I disagree with that portion of the majority opinion that holds the "Contingent Fund" appropriation to be legal. I also disagree with the majority's conclusion that the record shows that only expenses or obligations imposed by law were being allowed on the "Contingent Fund."

This court has recognized in *Nevada County* v. *News Printing Company,* 139 Ark. 502, 206 S.W. 899 (1918), that Art. 16, § 12 of our Constitution is applicable to the several counties. That provision of the Constitution provides:

> "No money shall be paid out of the treasury until the same shall have been appropriated by law, and then only in accordance with said Appropriation."

In *Worthen* v. *Roots,* 34 Ark. 356 (1879), while construing Ark. Stat. Ann. § 17-409, set out at page 10 of the majority opinion, we held:

> ". . . [I]t will be seen that the first four [provisions] are of an indispensable nature, essential to the support of the government. They are for services that *must* be performed, or the business of the counties must stop. The last three are not supposed to be imposed by necessity, but are matters of contract. It is well that appropriations be made for all purposes, but of great consequence that in the matter of *contracts* the expenses of the counties should be limited to the amounts appropriated. This is impossible in cases of positive service required by law and expenses incident to them; and in accordance with this view the legislature did not reimpose upon the county court any disability as to allowances . . . ."

In *Fones Hardware Co.* v. *Erb,* 54 Ark. 645, 17 S.W. 7, 13 L.R.A. 353 (1891), we held that a contract for building a county bridge made without a previous appropriation therefor by the levying court was void.

In *Nevada County* v. *News Printing Co.,* 139 Ark. 502, 206 S.W. 899 (1918), we held that a valid contract, entered

into by the county clerk in accordance with an act of the legislature could not be paid by the county court without an appropriation.

In *Pressley* v. *Deal,* 192 Ark. 217, 90 S.W. 2d 757 (1936), we had before us a quorum court appropriation allowing the county judge $300 for unusual expenses. We there held that those expenses could not be paid out of the appropriations under the seventh subdivision of Ark. Stat. Ann. § 17-409, *supra,* which provides: " . . . to defray such other expenses as are allowed by laws of this State." The theory was that no law of this State authorized the allowance of the expenses.

In *Martin* v. *Bratton,* 223 Ark. 159, 264 S.W. 2d 635 (1954), there was before us a quorum court appropriation " . . . from the County General Fund to allow the County Judge to use it as he sees fit and deems necessary." In holding this appropriation invalid, we said:

> "Counsel for appellees have cited us to no Statute or case and our search has likewise failed to discover any —that allows the Quorum Court to turn over $20,000, or any other amount, to the County Judge 'to use as he sees fit and deems necessary.' That such an appropriation is not within the purview or spirit of our Statutes is shown by a study of § 17-412 and § 17-414, Ark. Stats. These provisions clearly envision (1) that all appropriations by the Quorum Court must be for a specific purpose allowed by law; (2) that after the appropriation is made, then any allowance of a claim against that appropriation must be by the *County Court* and not by the *County Judge;* and (3) that the County Court order of allowance must specify the appropriation against which the claim is allowed before the money can be drawn out of the Treasury. Although the County Judge presides over the County Court, it is the *County Court* that makes the order of allowance, and not the *County Judge.* Art. 7, § 28, of the Constitution so provides. See also *Lyons* v. *Pike County,* 192 Ark. 531, 93 S.W. 2d 130. In the case at bar, the Quorum Court by its appropriation of the $20,000 'to allow the County Judge to use it as he

> sees fit and deems necessary,' attempted to entirely by-pass the functions of the County Court, because the appropriation was to be used by the County Judge, rather than by the County Court." *Id.* 223 Ark., at 161-162.

Judge Mackey testified that he had made payments from the "Contingent Fund" in past years for charities and for the moving of a sewer line from the courthouse for the construction of the convention center. On direct examination the record at page 88 shows the following testimony by Judge Mackey:

> "Q. Do you have a set of—the budget makes no guide line that I can see as to how these contingent funds are to be spent. Is that your understanding?
>
> A. It is set up for emergency purposes, sir. If we run out of funds in one of the categories set out—we don't know how much we are going to spend. Fact of the matter, not a dime of the Federal Revenue Sharing money has been spent yet. We have not paid out a dime against this. The contingent fund is simply if we run out of funds in one of the categories which it is appropriated, we can reach in the contingent fund and supplement that.
>
> Q. Who will make that decision?
>
> A. I will."

The Chancellor who observed the witnesses as they testified in a written opinion made the following observation:

> "The 'Contingency Fund' of the General Revenues in this case does not meet the tests for lawful appropriations laid down by the Supreme Court of Arkansas. This fund is not authorized by any statute; it is not being limited to the expenses of the administration of the County Court; it is not for a specific purpose in accordance with the law; and it is being used for all sorts of county expenses."

It would appear that his finding on the fact issue is entitled to some weight.

Thus, if we consider the "Contingency Fund" without the evidence as to the allowances made therefrom, it appears to me that it is nothing more nor less than an attempt to entirely by-pass the functions of the county quorum court contrary to Article 16, § 12 of our Constitution. If we consider the testimony then it certainly appears evident that the County Judge is using the "Contingency Fund" to defray deficiencies under any appropriation authorized by Ark. Stat. Ann. § 17-409 including those that are discretionary. The latter results in the payment of claims without an appropriation by the county quorum court or in excess thereof, contrary to the many decisions of this court that have construed the same constitutional provisions and laws here involved.

For the reasons stated, I respectfully dissent.

JERRY LEON GIBBS *v.* STATE OF ARKANSAS

73-159 504 S.W. 2d 719

Opinion delivered February 4, 1974

Robert D. Ridgeway, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Philip M. Wilson,* Asst. Atty. Gen., for appellee.

John Wesley Hall Jr., for *Lee Munson,* Pros. Atty., 6th Judicial Circuit, *Amicus Curiae.*

JOHN A. FOGLEMAN, Justice. This appeal results from the conviction of Jerry Leon Gibbs for violation of Ark. Stat. Ann. § 41-2729 (Supp. 1973), which prohibits the exhibition or possession of any obscene film. After he was found guilty by the Municipal Court of the City of Hot Springs, he appealed to the Circuit Court of Garland County, where he was again found guilty. He asserts five points for reversal. We find reversible error in the denial of appellant's motion to suppress film seized by a police officer. We will first treat that ground and later discuss other points which would probably arise on a retrial.

Appellant moved to "quash" six Peep-show Machines, and the film contained therein, various photographs, two rolls of 8 mm. film and five paper-bound books. He alleged that this property was taken by police officers acting without a search warrant or other court order for its seizure.

On October 18, 1971, Lieutenant Norman Hall of the Hot Springs Police Department noticed signs on the window at Paris Book Store, 258 Central Avenue, advertising "nude movies." He and Sergeant Griffith, another police officer, entered the building and went to a rear room, where they found six or seven machines called "Peep Show Machines" set up. Neither officer had a search warrant, and none had been issued. Hall had gone to this place to investigate upon advice of the Mayor. He observed the films displayed by these machines. It was stipulated those which they saw depicted simulated sex acts; no penetration or actual intercourse was shown. The machines were coin-operated and Hall viewed the films as any patron of the establishment would, i.e., by placing the required coins into the machine. The officers were directed to the room where the machines were located by Gibbs when Hall asked him where the nude movies were. After viewing the film, he arrested Gibbs, who was then the only person in the store, and seized the machines and the films in them. There was no adversary hearing as to the obscenity of the film before the seizure or before Gibbs' trial. The record does not disclose whether the film was shown at his municipal court trial.

A similar question was presented in *Bullard* v. *State,* 252 Ark. 806, 481 S.W. 2d 363. We then recognized, upon the authority of *Lee Art Theater, Inc.* v. *Virginia,* 392 U.S. 636, 88 S. Ct. 2103, 20 L. Ed. 2d 1313 (1968); A *Quantity of Copies of Books* v. *Kansas,* 378 U.S. 205, 84 S. Ct. 1723, 12 L. Ed. 2d 809 (1964); *Marcus* v. *Search Warrants,* 367 U.S. 717, 81 S. Ct. 1708, 6 L. Ed. 2d 1127 (1961), the establishment by the Supreme Court of the United States of a rule that seizure of an allegedly obscene film by a police officer without a prior adversary hearing at which the obscene quality of the film is independently determined by a judicial officer is unreasonable. We also pointed out that, in this respect, the court had found a difference between the seizure of ordinary contraband and matter that, if not obscene, is subject to First Amendment protection. In *Bullard,* we held the court erred in failing to suppress the seizure of film by a police officer who had viewed it because there was no prior adversary hearing. Nothing has changed the rule applied in *Bullard.* It is true that the United States Supreme Court has stated, in

Heller v. *New York,* 413 U.S. 483, 93 S. Ct. 2789, 37 L. Ed. 2d 745 (1973), and *Roaden* v. *Kentucky,* 413 U.S. 496, 93 S. Ct. 2769, 37 L. Ed. 2d 757 (1973), that the right to a prior adversary hearing as to obscenity of material arguably protected by the First Amendment is not absolute in all cases, particularly where there is a seizure pursuant to a warrant for preservation of the material as evidence. It is clear, however, from these cases and those upon which we relied in *Bullard,* that there must at least be a determination of probable cause by a neutral magistrate before seizure of allegedly obscene material followed by a prompt post-seizure judicial determination of the obscenity issue at the request of an interested party. It also appears that, under these authorities, the seizure of a film must not prevent continued showing of a film.

In *Roaden,* virtually indistinguishable upon the facts from the case before us, it was held that a seizure such as this is plainly a form of prior restraint and unreasonable under Fourth Amendment standards. The court recognized, however, that there might be exigent circumstances requiring immediate police action to prevent destruction of evidence which would make action without prior judicial evaluation reasonable, but found no such circumstances to exist there. It is not suggested that they existed here.

The state's contention that there was consent, express or implied, to the search through Gibbs' directing Hall and Griffin to the room where the nude movies were being shown merits little attention. It overlooks the lack of evidentiary support, because there is nothing to show that Gibbs even suspected that Hall and Griffith were police officers. It also ignores the fact that it is the seizure, not the search, that is attacked as unreasonable. The state's assertion that the material, since it was actually obscene, was not protected by the First Amendment is likewise without merit. The full impact of the rule declared by decisions of the United States Supreme Court cited above, and those relied upon in *Bullard,* quite clearly applies to material which would be subject to First Amendment protection, except for its obscentiy.

The brief of amicus curiae on this point is based upon

an argument that unlawfulness of the search and seizure does not require suppression of the film because the search and seizure did not lead to the discovery of the crime and because the primary right involved was First Amendment right of access rather than Fourth Amendment immunity from search and seizure. A short answer is that such a position is clearly contrary to the result in *Roaden,* where the reversal was based solely upon the admission of the film in evidence. Cases cited by amicus in support of this argument are pre-*Roaden* decisions.

Amicus also proposes we should not apply the exclusionary rule because it is under severe attack to which it may well succumb. Presently, it is sufficient to say that this court recognized the desirability of the rule before it was imposed upon state courts by the United States Supreme Court. See *Clubb* v. *State,* 230 Ark. 688, 326 S.W. 2d 816; *Burke* v. *State,* 235 Ark. 882, 362 S.W. 2d 695; *Mann* v. *City of Heber Springs,* 239 Ark. 969, 395 S.W. 2d 557, 559 (Johnson, J., concurring). The propriety of the exclusionary rule, in general, has not yet been subjected to frontal attack in this court. Furthermore, the mere fact that the United States Supreme Court has accepted cases for review in which an assault on the exclusionary rule has been mounted is inadequate basis for a clairvoyant prediction that the rule is in the throes of death. There could be no clearer demonstration of our inability to do so, or of the foolhardiness of indulging in such speculation, than the declination by the court of an invitation to abrogate the rule in two of those cases. See *United States* v. *Robinson,* —U.S.— 94 S. Ct. 467 38 L. Ed. 2d 427, and *Gustafson* v. *Florida,* —U.S.—, — 94 S. Ct. 488, 38 L. Ed. 2d 456 (both decided December 11, 1973, subsequent to the original submission of this case). Not only was there no consideration of the advisability of the abandonment of the rule in these cases, it is treated as viable in *Robinson.* It seems that the disposition of both cases would have been simpler if the court had chosen to recede from its exclusionary rule. In another such case, *United States* v. *Calandra,* —U.S. —, 94 S. Ct. 613, 38 L. Ed. 2d —, the court on January 8, this year, simply refused to extend the exclusionary rule to grand jury proceedings upon the premises that a grand jury, unrestrained by evidentiary rules governing criminal trials, may even

consider incompetent evidence and that one has standing to invoke the rule only when evidence illegally obtained, or the fruits thereof, is offered to incriminate the victim of the search. Although the court there deliberately avoided discussion of the rule's efficacy in criminal trials, this case, too, could easily have afforded a vehicle for abandonment of the rule. Certainly, this trio, all under submission at the same time, and argued within a three-day period, would have afforded an ideal vehicle for abandonment of the rule, if such a step is imminent.

Reversal on this point, however, does not require dismissal because of the availability of such procedures as are suggested in *Bullard.*

Appellant's second point for reversal is a contention that the trial court erred by taking judicial notice of contemporary community standards. We think appellant misconstrues the action of the trial court. His argument is based upon the fact that there was no evidence in the record as to these standards, except for the testimony of a police officer who based his opinion upon his own personal feelings and upon the fact that people in the community "were hot about the bookstores" at the time. The circuit judge, who sat as trier of the facts, after waiver of jury trial, in his final opinion, stated his familiarity with community standards in 41 of the 50 states and found the film to go beyond contemporary community standards of "this community, this state and this country." Among other statements of the trial judge in delivering his opinion are these:

> It is inconceivable that the community standards of any average community in this or any other state could approve or condone the activities of the two people shown in this film. * * * A person would have to be deaf, dumb and blind not to understand what this film was about and why people might observe it. The public is neither deaf, dumb nor blind. This film appeals to the animal sex desire and instinct of people and obviously is so intended.

We do not conceive of this procedure as involving judicial notice at all. It must be remembered that the cir-

cuit judge sat as trier of the facts, a jury trial having been waived. As such, he was required to determine: (a) whether the average person applying contemporary standards would find that the material exhibited by appellant, taken as a whole, appealed to the prurient interest; (b) whether the material depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value. *Miller* v. *California,* 413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973). In making that determination, the state law to be applied prohibited exhibition of film, the dominant theme of which, when taken as a whole, to the average person applying contemporary community standards, appeals to prurient interest. Ark. Stat. Ann. §§ 41-2729—2731 (Supp. 1971).

In making this determination the judge had the stipulation of the parties, the testimony of the police officer and the films themselves, which he viewed. There was no indication in *Miller* that testimony, either expert or non-expert, was necessary to the fact-finder's determination of the average person's concept of community standards. It was suggested there, however, that reliance must be placed on the jury system to resolve the sensitive questions arising. The court unequivocally held that jury evaluation of materials with reference to community standards adequately served the essential purpose of assuring that, in applying community standards, material be judged by its impact on the average person and not upon either a particularly sensitive or totally insensitive person. In *Paris Adult Theatre I* v. *Slaton,* 413 U.S. 49, 93 S. Ct. 2628, 37 L. Ed. 2d 446 (1973), there was a jury-waived trial. The films were exhibited to the trial court. No other evidence was presented from which the critical fact determinations could have been made. It was there held that the films themselves are the best evidence of what they represent and that, when they are placed in evidence, no "expert" testimony is necessary to establish that they were obscene, when they are not directed at such a bizarre, deviant group that the experience of the trier-of-fact would be plainly inadequate to judge whether the material appeals to the prurient interest.

Of course, the application of community standards is a part of the fact-finding process in making a determination of obscenity. While *Slaton* was a civil proceeding to restrain exhibition of films as obscene, the authorities there cited in support of this principle are all criminal cases. The principles are applied in *Kaplan* v. *California,* 413 U.S. 115, 93 S. Ct. 2680, 37 L. Ed. 2d 492 (1973), which was a criminal prosecution. The appellate court in California had held that the circumstances surrounding the sale of the book in question there and the nature of the book itself constituted sufficient evidence to sustain Kaplan's conviction. The United States Supreme Court said that in cases decided since *Roth* v. *United States,* 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957), it had regarded the questioned materials to be sufficient in themselves for determination of the question whether they are obscene. That court then specifically held that there was no need for "expert" testimony or any other ancillary evidence of obscenity, once the allegedly obscene materials themselves are placed in evidence. The trial judge, as the fact-finder, did not take judicial notice of community standards, but applied them as a fact-finder, just as a jury could do.

What we have said disposes of appellant's contention that the evidence was insufficient to show either community standards or appeal to prurient interest. The only remaining question is the constitutionality of the statute under which Gibbs was convicted. Appellant contends that, in the light of *Miller* v. *California,* supra, Ark. Stat. Ann. §§ 41-2729—2731, being Act 411 of 1967, are unconstitutionally overbroad, vague and indefinite. In addition to the guidelines stated in *Miller,* he relies upon the following language from the opinion:

> We acknowledge, however, the inherent dangers of undertaking to regulate any form of expression. State statutes designed to regulate obscene materials must be carefully limited. See Interstate Circuit, Inc. v. Dallas, supra, 390 U.S., at 682—685, 88 S. Ct., at 1302—1305 (1968). As a result, we now confine the permissible scope of such regulation to works which depict or describe sexual conduct. That conduct must be specifically defined by the applicable state law, as

> written or authoritatively construed. A state offense must also be limited to works which, taken as a whole, appeal to the prurient interest in sex, which portray sexual conduct in a patently offensive way, and which, taken as a whole, do not have serious literary, artistic, political, or scientific value.

Appellant contends that because of this language and the words "sexual conduct specifically defined by the applicable state law," the statute must fall because it neither mentions nor defines sexual conduct. He reads *Miller* as requiring that the sexual conduct which is obscene be spelled out in the statute itself, wholly overlooking the provision that such conduct may be defined by authoritative construction. In *Miller,* the court said that no one could be prosecuted for exposure of obscene materials unless the materials depict or describe patently offensive "hard core" sexual conduct specifically defined by the regulating state law, as written or construed.

On this point, amicus curiae notes that the statute in question meets *Roth* standards, the only constitutional guidelines for the state legislature when the statute was passed. In *Miller,* the court specifically emphasized that there was no necessity for state legislatures to pass new statutes because existing statutes may be determined to be constitutionally adequate, when considered as theretofore or thereafter construed. In *United States* v. *Twelve 200-Foot Reels,* 413 U.S. 123, 93 S. Ct. 2665, 37 L. Ed. 2d 500 (1973), the court in reviewing a United States District Court holding that 19 U.S.C. § 1305 (a) was unconstitutional on its face, recognized its duty to authoritatively construe federal statutes where a serious doubt of constitutionality is raised and a construction of the statute by which the question may be avoided is fairly possible. The court also recognized that it must leave to state courts the construction of state legislation in this respect but emphatically announced its intention, where there is a serious doubt as to the vagueness of such words as "obscene," to construe those words as limiting regulated material to patently offensive representations or descriptions of that specific "hard core" sexual conduct given as examples in *Miller,* all the while conceding that Congress might define other specific "hard core" conduct. The examples are thus stated in *Miller*:

(a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated.

(b) Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.

Obviously, these examples fall within the common understanding of the meaning of the word. See *State* v. *J-R Distributors, Inc.,* 82 Wash. 2d 584, 512 P. 2d 1049 (1973).

It is quite clear in *Miller* that a definition may be given by the courts as well as by the legislature insofar as federal constitutional standards are concerned. See also, *People* v. *Enskat,* 33 Cal. App. 3d 900, 109 Cal. Rptr. 433 (1973). We also note that in *Roth,* the United States Supreme Court recognized that such terms as "obscene" are not precise, but that lack of precision is not itself offensive to the requirements of due process if the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. Such words, when *applied* according to the proper standard for judging obscenity were said to give adequate warning of the conduct proscribed and mark boundaries sufficiently distinct for judges and juries fairly to administer the law. The court added that the fact that there might be marginal cases in which it is difficult to determine the side of the line upon which a particular fact situation might fall is not sufficient reason to hold the language too ambiguous to define a criminal offense. The statutes upheld in *Roth* as against claims of unconstitutional vagueness were even less specific in defining obscene material than is the statute questioned here. See also, *State* v. *J-R Distributors, Inc.,* 82 Wash. 2d 584, 512 P. 2d 1049 (1973).

It seems to us that the Florida Supreme Court overextended the invitation for judicial construction by actually changing definitions it had used in amplification of the definition of the word "obscene" in a statute using words very similar to the language of ours. That court found no difficulty in changing its construction of the statute to fit *Miller* standards, holding that the language

of the statute made it susceptible to judicial construction compatible with *Miller* standards and definitions. See *Papp* v. *State,* 281 So. 2d 600 (Fla. App. 1973). The Florida court recognized its own definitions were being changed by holding that the new definition could only have prospective effect and that Papp's conviction must be reversed.

We do not have the apparent obstacles to such a construction that the Florida court sought to avoid. We have not construed the definition of obscene material in the statute applied in this case. As amicus points out, our decision in *Bullard* v. *State,* 252 Ark. 806, 481 S.W. 2d 363, wherein we held the definition of the word "obscene" in Ark. Stat. Ann. § 41-2730 sufficiently fair and comprehensive to meet the test of constitutionality, left us with sufficient flexibility for the application of *Miller* standards to our statute. We held in *Bullard* the absence of a requirement that material be "utterly without redeeming social value" before it could be obscene under Ark. Stat. Ann. § 41-2729, did not render the statute constitutionally deficient, because it is not essential that a statute incorporate every constitutional nuance.[1] Also, we are dedicated to the proposition that we must give an act a construction that would meet constitutional tests, if it is reasonably possible to do so. *Stone* v. *State,* 254 Ark. 1011, 498 S.W. 2d 634.

Since we have not construed the act, except in *Bullard,* we follow the pattern established by the United States Supreme Court and followed in *Papp* v. *State,* supra, and hold that obscene film regulated by Ark. Stat. Ann. § 41-2729—2731 is limited to that which constitutes (a) patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated and (b) patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals. See also, *State* v. *J-R Distributors, Inc.,* supra.

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[1]At that time we thought that this requirement constituted one of the criteria for testing the constitutionality of the statute under *Memoirs* v. *Massachusetts,* 383 U.S. 413, 86 S. Ct. 975, 16 L. Ed. 2d 1 (1966). The application of the principle by which we found our act constitutional was indicated in *Roth* v. *United States,* 354 U.S. 476, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957).

Appellant's contention that the statute falls upon the authority of *Stanley* v. *Georgia,* 394 U.S. 557, 89 S. Ct. 1243, 22 L. Ed. 542 (1969), must likewise be rejected. He argues that the failure of the legislature to specifically except possession of obscene film by one in his own home renders the act unconstitutional. An easy answer to this argument is that appellant has no standing to raise it. *May* v. *State,* 254 Ark. 194, 492 S.W. 2d 888. But, in any event, this argument was rejected in *Paris Adult Theatre I* v. *Slaton,* supra.

The judgment is reversed and the cause remanded for further proceedings pursuant to *Bullard.*

DONNA MARIE SCHENCK, A MINOR, ET AL *v.* JANET KNIGHT, DIRECTOR OF FAMILY SERVICES

73-185 505 S.W. 2d 192

Opinion delivered February 4, 1974
[Rehearing denied March 11, 1974.]

Frances T. Donovan, for appellants.

Ivan H. Smith and *Louis Watts,* for appellee.

J. FRED JONES, Justice. This is an appeal by Donna Marie Schenck, the minor mother of Patrick Daniel Schenck, and Donna's mother, Mary Ann Brown, as next friend of Donna Marie and grandmother of the infant child, Patrick Daniel Schenck, from a decree of the Garland County Chancery Court denying their petition

for habeas corpus in connection with the custody of the infant child, Patrick Daniel Schenck.

The rather sordid background is somewhat immaterial to the question before us on appeal and much of the evidence is indicative of strong feelings so easily generated in child custody cases of this kind. The appellants' brief begins with the statement: "This is the case of the stolen child, Patrick Daniel Schenck, . . . who was spirited away to a foster home by the Welfare Department, under an illegal order of the Pulaski Juvenile Court." From our examination of the entire record, we do not find this case as simple as the appellants' above statement would indicate.

From the recorded background for this litigation, it appears that Mary Ann Brown is a resident of Faulkner County and is the adopted daughter of Mr. and Mrs. Julian Nabholz who are also residents of Faulkner County. Mrs. Brown is 34 years of age and was first married to Tyrone Presley and they were divorced after two years of marriage. She then married Lawrence Schenck in August, 1957, and four children were born of the union. Upon her divorce from Schenck in 1965, she married Joe Brown from whom she is now separated.

Donna Marie is the oldest of Mrs. Brown's four children and even prior to her separation from Brown, she and her children were dependent upon her elderly mother and father and on state welfare assistance for the bare necessities of life. From Mrs. Brown's own testimony and other evidence in the record, it appears that her youngest child is afflicted with cerebral palsy, and her son, one year younger than Donna Marie, is afflicted with epilepsy.

It appears from the record that by the middle of 1970 Donna Marie was physically developing into young womanhood at an exceptionally early age and was having considerable difficulty with her reading in school. According to Mrs. Brown, Donna Marie had become "boy crazy" and Mrs. Brown became apprehensive about Donna Marie's future welfare in her then surroundings and she sought aid and assistance from the Child Welfare Divi-

sion of the state Welfare Department, which resulted in her relinquishing legal custody of Donna Marie to the Welfare Department with the understanding that Donna Marie would be placed in a suitable orphanage where she would obtain spiritual guidance as well as assistance with her schoolwork. Transfer of custody was accomplished through the written consent of Mrs. Brown and very informal juvenile court proceedings in the Faulkner County Juvenile Court. Through the efforts of the Welfare Department as well as the efforts of Mrs. Brown's mother and father, Donna Marie was placed in a parochial orphanage in Pulaski County where she continued her schooling in public school and was permitted to visit her relatives in Faulkner County occasionally on weekends.

While Donna Marie was still a ward of the state, she became pregnant and was transferred from the orphanage to the Florence Crittenton Home for unwed mothers, where she remained during the last several months of her gestation period. Donna Marie was transferred to St. Vincent Infirmary where her child, Patrick Daniel Schenck, was delivered by caesarean section on October 6, 1971, when Donna Marie was 14 years of age.

The greatest conflict of the evidence in this case has to do with agreements pertaining to the custody of the infant, Patrick Daniel Schenck, prior to and following its birth. Numerous caseworkers and Welfare Department personnel and personnel from the Florence Crittenton Home testified that Mrs. Brown, as well as Donna Marie, and Mrs. Brown's mother and father, agreed, prior to the birth of the child, that it would be to the best interest of all concerned that the child be released for adoption. They testified that Mrs. Brown's mother and father only requested that the adoptive parents should be of the Catholic faith. They testified that clear up until the time of the child's birth, they were under the impression that everyone concerned, including Donna Marie and Mrs. Brown, was agreeable to releasing the child for adoption. This testimony was denied by Mrs. Brown and Donna Marie. They both testified to rather extreme pressure exerted by the personnel of the child Welfare Division of the Welfare Department directed toward the release of the child for

adoption, even to threats of retaining permanent custody of Donna Marie and never permitting her to return home unless they did agree to release the child for adoption.

In any event, following the birth of the child at St. Vincent Infirmary in Little Rock, the Child Welfare personnel went to the hospital to present release papers for Donna Marie to sign. They testified that when they arrived at the hospital, Donna Marie and her nother, Mrs. Brown, had just seen the baby for the first time; that they were both upset and crying and the release papers were not submitted to them for signing. Both Donna Marie and Mrs. Brown opposed the release of the child for adoption and they both testified they had never agreed to release the child for adoption and never had any intention of doing so.

On October 20, 1971, a petition signed by Jamie Newson was filed in the Pulaski County Juvenile Court alleging Patrick Daniel Schenck to be a dependent and neglected child for the reason:

> "That he is without proper parental care and supervision and dependent upon the public for support."

The form petition then prayed that the court declare said child to be dependent and neglected and to:

> "[M]ake an order for the welfare of Patrick Daniel Schenck, placing him in the legal custody of the Director of Family and Children's Services, State Department of Public Welfare."

On the same date, October 20, 1971, an order designated "Order of Temporary Custody" was signed by the judge and a referee of the Pulaski County Juvenile Court and it recited as follows:

> "This cause coming on for hearing and the Court finds that the said Patrick Daniel Schenck is a dependent and neglected child in that he is without proper parental care and supervision and dependent upon the public for support.
>
> WHEREFORE it is hereby ordered by this Court that the said Patrick Daniel Schenck, be placed in

> the temporary custody of the Director of Family and Children's Services, State Department of Public Welfare, and that said Family and Children's Services, State Department of Public Welfare, be authorized to secure proper medical and surgical care for said child until hearing and further order of the Pulaski County Juvenile Court. Said child not to be removed from temporary custody of the Family and Children's Services without permission of the Pulaski County Juvenile Court."

Apparently, under authority of this order, the director of the Family and Children's Services of the state Department of Public Welfare took custody of the infant child; removed it from St. Vincent Infirmary and placed it in a foster home in Garland County, Arkansas. There are no further proceedings in the record before us pertaining to the Pulaski County Juvenile Court order of October 20, and apparently no appeal was perfected therefrom. (Ark. Stat. Ann. § 45-208 [Repl. 1964]).

On January 11, 1972, upon petition filed by Mrs. Brown in the Faulkner County Juvenile Court, that court's previous order of August 28, 1970, pertaining to the custody of Donna Marie, was set aside and custody reinvested in Mrs. Brown. Then on January 26, 1972, Donna Marie and Mrs. Brown instituted the present litigation by filing their petition for habeas corpus in the Faulkner County Chancery Court against Janet Knight, Director of Family and Children's Services, state Department of Public Welfare. Upon being advised that the child was in a foster home in Garland County, the Chancery Court of Faulkner County dismissed the petition for want of jurisdiction and, in effect, transferred the matter to the Garland County Chancery Court.

The matter proceeded to hearing on the petition for habeas corpus in the Garland County Chancery Court where the appellants attacked the validity of the temporary custody order of the Pulaski County Juvenile Court for want of formal hearing and notice of a hearing to Donna Marie or Mrs. Brown, and without waiver from them as to notice of hearing. The validity of the Pulaski County Juvenile Court order placing temporary custody of the

child in the state Welfare Department is not actually before us on this appeal. No appeal was taken from that order but it would appear from the record before us, that the order was certainly open to attack. Even though Donna Marie was herself in apparent legal custody of the Welfare Department at the time the order was entered, she or her legal guardian was entitled to notice of hearing; she had no legal guardian and the juvenile court had no authority to appoint one for her. *Cude* v. *State,* 237 Ark. 927, 377 S.W. 2d 816. We hasten to point out that this is not an adoption case in any sense of the word and is not a proceeding for the appointment of a guardian. This is simply a habeas corpus case and we think the chancellor was correct in giving primary consideration to the best interest of the infant child.

Ths issues before the Garland County Chancery Court and the issues to which we address this opinion were clearly framed by the chancellor and agreed to by the appellants' counsel in language from the record as follows:

> "THE COURT: All right. The Court is of the opinion in the first place that it has jurisdiction, not only to look into the validity of the Pulaski County proceeding on the habeas corpus but also to go beyond that and look into what is of the best interest of the child and I think that this is a different situation not one of the ordinary causes of habeas corpus where a man is imprisoned and in this issue there is more at stake than whether or not the Pulaski County Juvenile Court took proper action in what it did.
>
> MR. DONOVAN: That's right.
>
> THE COURT: So the Court is prepared to go into the whole matter. I'd like for all those who are to testify to please stand and be sworn."

At the hearing in chancery court Mrs. Brown testified that she herself was an adopted child of Julian and Marie Nabholz, having been adopted in 1937. She testified that she was 34 years of age; that she first married Tyrone Presley from whom she was divorced after two

years. She said she married Lawrence Schenck on August 14, 1957, lived with him eight years and was divorced from him in 1965. She said that following her divorce from Schenck and subsequent unsuccessful marriage to Joe Brown, she almost had a complete nervous breakdown requiring one week's hospitalization. She said that Donna Marie developed a reading problem in the second grade which retarded her progress in school, and did not improve in subsequent grades. She said she was concerned about Donna Marie "because she was at the stage of being boy crazy and was concerned that something could happen in that field," so she contacted the Child Welfare Department in connection with the problem. She said that she was told there was more than a possibility that Donna Marie could be gotten into "a reading foundation" if she was at the orphanage in Pulaski County, so she signed papers for Donna Marie to become a ward of the Child Welfare Division. On this point she said:

> "I signed the papers at the Court House so that they could take Donna. And like I said—Faulkner County. I did not go before a Judge or anything. There was no hearing on that. I just like a lot of people did not read the papers I signed. I believed they were telling me the truth."

Mrs. Brown then testified to visiting Donna Marie in the Florence Crittenton Home, where she remained until after she was delivered of child by caesarean section. She said she requested that Donna Marie be permitted to come home after the birth of the child but that the Welfare Department personnel threatened to not let Donna Marie come home at all unless she and Donna Marie signed papers releasing the child for adoption.

Mrs. Brown said that during the pendency of this litigation well-wishers in Faulkner County have given over $100 worth of baby clothes, a brand new baby bed and playpen, a stroller, a walker, jumpseat, baby bottles and a complete layette for a baby, and that she and Donna Marie are ready, able and willing to properly care for the infant child if it is returned to them. She said that she and her children are being supported by public welfare; that Donna Marie was born on

December 18, 1957, and is 14 years of age; that her next oldest child Edward, was born January 11, 1959 and is now 13 years of age; that her next oldest child Debra Lynn, was born December 26, 1960, and is now 11 years of age, and her youngest child, Julia Ann, was born March 17, 1963, and is now 9 years of age.

As to the health of her children, Mrs. Brown testified on direct examination as follows:

> "A. Well, starting with Donna her health is perfrct. The only problem she has is her reading problem. She has a few little problems now that she—from childbirth—but she has no disease nor sickness that would keep her from school or anything. Eddie right now is having trouble. The doctor says that there is a possibility that he is on the seizure disorder, but they are trying to take a EEG if it's a possibility that it could be a brain tumor or blood clot. The boy did go into a seizure after he had one of his severe headaches that he's been having. Debbie—Eddie wears glasses. Debbie wears glasses. There's nothing else wrong with her. Eddie went—until he went out of school because of being sick, was a straight A student in school. Debbie doesn't do well in school but she's at the age where she's not interested. But sickness—Debbie just doesn't get sick. The only child that I have that's really sick is Julia Ann Schenck and she attends Faulkner County Day School for Crippled Children. She has cerebral palsy and she—her legs are weak and she has lost the use of one arm, but she's attended school for three years. She's been on medication ever since she was two years old. And she lives the life of a normal child actually.
>
> Q. Have you spent considerable time taking this child to the Children's Clinic for braces and things of that kind?
>
> A. Yes, sir, we took her to Greenville, South Carolina, one year, and she got her braces there at the Shriner's Hospital in Greenville, South Carolina. She's now

under the care of the Arkansas Crippled Children Clinic. She just had an eye operation, and it was very successful at the the Children's Hospital. She doesn't have to wear glasses any more. And she's seen at the University of Arkansas Medical Center besides the Arkansas Crippled Children's Clinic.

Q. And Eddie, was it yesterday that you took Eddie to the neurologist?

A. No, that was the day before. We called yesterday morning since the man who gives the EEG was unable to administer it. The Neurology Clinic said they'd have to wait till they get the result of this before they could actually give, you know, any definite answer on Eddie. That they needed the EEG, and I was promised that as soon as the man came back that they would get it as soon as possible."

On cross-examination Mrs. Brown testified that she was pregnant with Donna Marie when she was divorced from Pressley and married Schenck. She said she had been married to Presley for a period of two years when he got in jail and she obtained a divorce. She said she had been receiving food stamps from the Welfare Department when she and her children were living in a trailer furnished by her parents, but that she only started receiving cash payments from the Welfare Department in 1971. She said that her husband, Joe Brown, was hospitalized for serious injuries he sustained in a fight; that she is now separated from Brown and will obtain a divorce as soon as she can afford one. She said that since receiving cash money together with food stamps she has rented a nicer trailer in a better environment than the one furnished by her parents. She said it is her understanding that the money she receives from the Welfare Department is based on the number of dependents and that her cash payments now amount to $116 per month. She said she was paying $100 a month for rent on the trailer; that her child with cerebral palsy is in a special school and is required to take phenabarbital and tridione daily. She said her son Eddie has been placed on phenabarbital therapy and was given a three month supply of the medicine until it is thoroughly determined that it is what he needs for

his condition. She said her parents help out on the medical bills.

The substance of Mrs. Brown's testimony pertinent to Donna Marie's ability to care for her child is to the effect that in her opinion Donna Marie is thoroughly capable of being a mother to the infant child; that there is no question that she and Donna Marie together can do a good job of caring for the child; that the kind people of Conway have given her a baby bed and clothing for the child and with the continued assistance of the Welfare Department in food stamps and cash money, she feels that she and Donna Marie can make a satisfactory home in the trailer space she has available for the child, and that it would be to the best interest of all concerned if Donna Marie was awarded the custody of the child. Mrs. Brown said that besides the $116 in cash she receives from the Welfare Department, she also receives $148 worth of food stamps per month. She said that the trailer she now rents has two bedrooms with a couch that makes into a full bed. She said Donna Marie shares the double bed with her; that Debby and Julie, the two youngest children, share the other bedroom, and the livingroom couch is made into a bed for Eddie.

Donna Marie testified that she was born December 18, 1957, and was 14 years of age at the time she testified. She said that she never did get to hold her baby after it was born but that she would like to. She said she already knows how to do most things necessary in caring for a baby and that her mother would help her. She said if given the custody of the child, her mother could take care of it in the daytime while she is in school and that she could take care of it at night. She said she loves her child dearly and wants possession and custody of it.

Mr. Julian Nabholz testified that he adopted Mrs. Brown in 1937 when she was five weeks old; that she graduated from high school and attended Arkansas State Teacher's College. He testified as to Mrs. Brown's marriage to Schenck, the birth of the four children and the divorce from Schenck. He was then asked and answered the following questions:

"Q. How would this new baby if the court gives it to them today, how would it fit into the home?

A. Well, right now, I think they are just in the temporary ah—motel—I mean, house trailer.

Q. Yes, sir?

A. And until they find a bigger house, and I've got some property up on Beaver Fork Lake that I'd be willing to give them a deed with it.

Q. To build a home?

A. Build about a three bedroom house."

Mr. Nabholz testified that it was necessary for him and his wife to contribute substantially to Mrs. Brown and her children for food and clothing until they started receiving money from the Welfare Department, and that his and his wife's burden has been considerably relieved by the Welfare Department.

Mrs. Winburn, Social Worker for the state Welfare Department in Faulkner County, Dick Deitz, Child Services Field Supervisor in Faulkner County, Mrs. Mary Jane Moix, Social Worker in the Arkansas Department of Social Services for Faulkner County, Mr. Bryan David Cordell, Field Supervisor for the Family and Children's Division of the Arkansas Social Services, and Mrs. Darla Byers, Case Worker for the Family and Children's Services of the state Welfare Department, Mrs. Mary Jane Madigan, Supervisor of unmarried mothers for the Family and Children's Services, and Bobbie Smith, Executive Director of the Florence Crittenton Home, as well as Dr. John E. Peters and Cleo Goolsby, who interviewed Mrs. Brown and Donna Marie under direction of the chancellor, all testified under questioning by the chancellor as well as the attorneys. It would only lengthen this opinion to set out their testimony in detail but the substance of all of it is to the effect that Mrs. Brown is an unemployed mother of four dependent children, two of whom are afflicted, as already set out; that Mrs. Brown is totally over-

whelmed by the problems she already has, including her own marital problems past and present and, is totally unprepared mentally, physically and financially to take on the additional responsibility of properly caring for an infant child in her present surroundings. None of the social workers who have been involved in this case recommended awarding custody of the child to its mother and they all testified emphatically that it would be to the best interest of the child, and to the best interest of all parties concerned, that the custody of the infant not be awarded to the mother in this case. They all agreed that Donna Marie appears to have the normal intelligence of a 14 year old child but they all agree that she is less mature than the average child of her age, and is thoroughly incompetent to properly mother an infant child in her present circumstances and surroundings.

The chancellor's final order from whence comes this appeal recites as follows:

> "Now on this 5th day of January, 1973, the Chancery Court of Garland County having received the depositions of Dr. John Peters and Miss Cleo Goolsby of the University of Arkansas Medical Center, Division of Child-Adolescent Psychiatry, and having given the depositions due consideration, and the Court having taken under advisement the evidence in this case and considering the evidence of Nancy L. Winburn, Richard Dietz, Mary Jane Moix, Bryan Cordell, Darla Byers, Mary Jane Madigan, Bobbie Smith, Estelene Duke, Mrs. Blake Browning, Donna Marie Schenck, Mary Ann Brown, Mr. Julian Nabholz, and other matters and things, this Court finds as follows:
>
> 1. The actual issue to be decided by this Court is the determination of ultimate custody, based upon the best interests of the child.
>
> 2. From the testimony and the Court's personal observations of the witnesses, the Court is of the opinion that Donna Marie Schenck is completely immature and unable to care for her child properly.
>
> 3. The court is of the opinion that Donna Marie Schenck would not in any way have objected to adop-

tion proceedings or otherwise attempted to regain custody of her child except for the pressure applied by her mother, Mary Ann Brown.

4. From the testimony and personal observations of Mary Ann Brown, the Court is of the opinion that she manifests substantial instability and is unable to cope with her past and present problems and would be unable to provide proper care for the child.

5. It would not be for the best interest of the child that it be raised in a family consisting of an unstable grandmother with marital problems, an immature fourteen year old mother, a thirteen year old uncle subject to epileptic seizures, an eleven year old aunt who is failing in school, and a nine year old aunt with cerebral palsy, all living in a mobile home and supported by Arkansas Social Services.

WHEREFORE, the Court finds that the petition for a Writ of Habeas Corpus should be denied and is hereby denied and custody of Patrick Daniel Schneck is confirmed in the Arkansas Social Services."

From the record before us we are unable to say that the chancellor's findings and order are against the preponderance of the evidence in this case. In the appellants' brief their attorney argues that the basic problem of the family is poverty and we are urged to grant the petition for habeas corpus on trial de novo. He argues as follows:

"Habeas Corpus should be granted, and the Order of the Chancellor denying the writ should be reversed, together with an immediate mandate vesting custody of Patrick Daniel Schenck in his mother, Donna Marie Schenck, as she is now 16 years of age, *and married.*" (Our emphasis).

At another point in appellants' brief appears this statement:

"She is now two years older, and is now 16 years of age, and, is now married."

If Donna Marie has married and now has a home of her own, such evidence is not in the record now before us and we, of course, are confined to the record. If Donna Marie's present age and marital status have brought about such change in condition that would justify a change in custody, there is nothing to prevent her from presenting such evidence as may now be available but, from the record before us, it would appear that the Chancery Court of Garland County would be the proper forum in which to present such evidence.

The order of the chancery court is affirmed on the record now before us.

Affirmed.

BYRD, J., dissents.

CONLEY BYRD, Justice, dissenting. Sometime ago I employed a contractor to do some clearing for me with a bulldozer. The hire of the machine together with an operator was approximately fifty cents per minute. During the clearing operation a mother hen, of the bantam variety, attacked the bulldozer with such ferociousness that it attracted not only my attention but that of my dogs and a horse in the vicinity. I still remember how my heart leaped with joy when the operator, with a kindly smile, stopped the dozer for three or four minutes to let the hen remove her day-old brood from the path of the dozer. It was such a graphic demonstration of the unselfish devotion of motherhood to its offspring that it reminded me of the incident before King Solomon where the real mother quickly consented that her child be given to an impostor rather than have it split between the mother and the other claimant of the child. I'm sure that my brethren in the majority have all had as many graphic demonstrations as I of the response of motherhood and that in reaching their conclusions they have done as much soul searching in arriving at their conclusions. Having heard their discussions in this matter, I must admit that there is some practicality to their approach. I probably would have acquiesced in their considered judgment had the majority opinion given visitation rights to Donna Marie.

However, in my conscience, the Child Welfare Department's protestations of benevolence and goodness cause me to wake up at night. I keep thinking to myself that if a thief had secretly taken Donna Marie's baby from the hospital without her knowledge, every lawman, judge and householder in this state would have looked far and wide for Donna Marie's baby, and, when it was found, each and every citizen would have expected and wanted the baby to be returned to Donna Marie. Yet, when the Child Welfare Department, an arm of the State of Arkansas, without notice or due process obtains a spurious probate order and just as silently takes Donna Marie's baby, we as judges, instead of seeing that Donna Marie's baby is returned to her, stop to see if Donna Marie is a fit and proper mother and whether she can properly care for the child. It may be that Donna Marie appears too immature to properly care for her baby, but the record amply illustrates that she has that something which, despite her poverty and immaturity, has pulled together some friends and a capable lawyer to give their time to try to help her get her baby that was silently taken from her by a prestigious agency bespeaking goodness and benevolence. In making this appraisal I hope that I'm not overlooking the practical effects of life for the sympathy that I find in my heart and conscience.

One other reason impels me to register a dissent to the procedures here approved—*i.e.,* there will just as surely be other Donna Maries but now the Child Welfare Department will have one more lever to coerce the next Donna Marie to sign a "consent to adoption." The Department can now authoritatively point to this decision and tell all future Donna Maries that they may as well sign the "consent to adoption" because if they don't, the Department can take the baby anyway.

Perhaps I am too sympathetic toward motherhood, however, as between the mother and one who takes her baby away without her consent and without notice it appears that some law of nature ought to favor the mother and discourage those who unlawfully take a baby whether the latter be a common thief or a prestigious state agency

—at least until such time as the mother has had an opportunity to demonstrate her fitness or unfitness.

For the reasons herein stated, I respectfully dissent.

ARTIE G. BURNETT *v.* ST. MARY'S HOSPITAL AND ARGONAUT INSURANCE COMPANY

73-209 505 S.W. 2d 24

Opinion delivered February 4, 1974

Bullock & Shermer, for appellant.

Smith, Williams, Friday, Eldredge & Clark, by: *Michael G. Thompson,* for appellees.

CONLEY BYRD, Justice. Appellant Artie G. Burnett filed a claim for workmen's compensation claiming that she was twice injured in the employment of appellee St. Mary's Hospital in October-November 1970. The October injury was alleged to be a fall down a stairway and the November injury was alleged to have occurred while lifting a bed rail. Before commencement of the hearing before the referee she amended her claim to state that the fall occurred during November and that the bed rail incident occurred in March 1971. The hospital admitted that claimant fell on the stairs in November but denied that her present condition was a result of the fall.

Appellant testified as to the fall and the bed rail incident and stated that her present complaints were a result of those incidents. She stated that she worked

regularly from the time she began work in August of 1970 until the date of her fall. She also stated that she previously worked for Russellville Nursing Home and had a good record there. She denied that she had been involved in an automobile accident or that she had hurt her back off the job.

Proof on the part of the treating doctors showed that she had injured her back in her yard while bending over to pick up an egg and that subsequent to the date of the claimed injuries she had been involved in an automobile collision. None of the treating physicians could relate her back problems to her alleged work injuries.

The records from the Hospital and the Hursing Home demonstrated an erratic work history allegedly due to headaches.

The Commission in denying the claim laid much stress upon appellant's credibility. The circuit court affirmed the Commission. We find evidence in the record upon which the Commission could have either approved or denied the claim depending upon the credibility of the witnesses. This being true we are unable to say that there was no substantial evidence to support the Commission's findings. See *May* v. *Crompton-Arkansas Mills, Inc.,* 253 Ark. 1080, 490 S.W. 2d 794 (1973).

Affirmed.

INTERNATIONAL PAPER COMPANY
v. MICHAEL B. McGOOGAN

73-220 504 S.W. 2d 739

Opinion delivered February 4, 1974

Bridges, Young, Matthews & Davis, for appellant.

Youngdahl, Brewer, Huckabay, Funk & Larrison, for appellee.

FRANK HOLT, Justice. Appellee was an employee of appellant when he suffered an injury to the thunb of his left hand. The commission awarded temporary total disability benefits and the circuit court affirmed. On appeal appellant asserts for reversal that the facts found by the commission do not support the award. The issue presented is stipulated by the parties as to "[W]hether or not a student who is injured while in fulltime employment, and who subsequently returns to school as he intended at the time of his employment, and who is still in his healing period, is entitled to temporary total disability benefits during the school term." The injury is admittedly compensable.

Appellee worked for appellant during the summer months to earn wages for the announced purpose of attending the University of Arkansas at the beginning of the 1970 fall semester. As planned, he attended the University that academic year, during which time the appellant suspended payments of temporary total disability benefits for loss of wages. The appellee was a fulltime student and neither sought nor performed any employment during the school year. He made numerous trips to Little Rock for medical treatments for which he was compensated by appellant. At the beginning of the summer of 1971, the healing period not having ended, the appellant renewed payment of disability benefits for wage losses. Appellant only controverts temporary total disability payments to the appellee during the time he is a student. It was agreed that appellant is liable for permanent partial disability benefits whenever that can be determined. Therefore, the sole issue presented for our determination concerns the extent to which the appellee is entitled to temporary total disability compensation. This issue is one of first impression.

It is the appellee's position that his eligibility for temporary total disability benefits is solely a medical fact question. It is agreed that the healing period has not ended and the medical testimony is to that effect. Appellant, to the contrary, takes the position that temporary total disability benefits are intended for actual wage losses. To resolve this issue we first resort to the applicable statutory provisions of our Workmen's Compensation Act. Ark. Stat. Ann. § 81-1302 (e) (Repl. 1960) provides:

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

See also § 81-1313 (c) which provides that an injured employee who sustains a scheduled permanent injury shall receive compensation during the healing period.

In construing our Workmen's Compensation Act, it is well settled that we recognize it was enacted for

beneficent and humane purposes and in giving effect to these purposes, we construe the statutory provisions liberally in favor of the claimant, resolving doubtful cases in favor of the claimant. This rule of statutory construction was recently recognized in *Hartz Seed Co.* v. *Thomas,* 253 Ark. 176, 485 S.W. 2d 200 (1972), citing *International Paper Co.* v. *Tidwell,* 250 Ark. 623, 466 S.W. 2d 488 (1971), and to the same effect is *Cummings* v. *United Motor Exchange,* 236 Ark. 735, 468 S.W. 2d 82 (1963). Had the drafters of our Workmen's Compensation Act intended an exemption, as claimed in the case at bar, appropriate language could have easily removed any doubt by so stating. The Act does not prohibit the controverted payment.

In *McKenzie* v. *Campbell & Dann Mfg. Co.,* 209 Tenn. 475, 354 S.W. 2d 440 (1962), the Tennessee court held that temporary total disability benefits are payable without any interruption from the time of the injury to the time at which the degree of permanent disability is ascertainable. Cf. *Khachgdoorian's Case,* 329 Mass. 625, 110 N.E. 2d 115 (1963) and *Underwood* v. *Terminal-Frouge Builders,* 128 So. 2d 605 (Fla. 1961). In *Underwood* we think it was aptly stated:

> Neither do we think it should be held that because a claimant, during a period of disability, becomes a full-time student he should be precluded from receiving compensation, if he is in fact disabled. Such a rule would not only be unsupported by any provision of Workmen's Compensation Law, it would, we believe, also violate the spirit and intent of the Workmen's Compensation Law by penalizing a claimant for attempting through the furtherance of his education to limit the effect of his disability.

In the case at bar, appellant persuasively presents the argument that it is unjust to require payment during the school year based upon temporary total disability; however, when we construe the applicable portions of the Workmen's Compensation Act, as previously discussed, in accordance with the beneficent purpose of the act and resolve all doubts in favor of the claimant, as we must do, we are of the view the commission was correct.

Affirmed.

A. J. BUTLER *v.* STATE OF ARKANSAS

CR 73-146 504 S.W. 2d 747

Opinion delivered February 4, 1974

Robert A. Newcomb, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Richard Mattison,* Asst. Atty. Gen., for appellee.

FRANK HOLT, Justice. Appellant was convicted of first degree murder by a jury and sentenced to life imprisonment in the Arkansas Department of Correction. Appellant's only contention for reversal is that the trial court erred in not granting a requested mistrial after the appellant, on cross-examination, was asked:

> Q. A. J., are you guilty of shooting a man in Pine Bluff on December the 22nd, 1970?
>
> A. Was I guilty?
>
> Q. Did you shoot him?
>
> A. Yes, sir, I shot him.

On re-direct appellant stated the shooting was in self-defense which resulted in no prosecution.

Appellant's counsel forcefully presents the argument that the word "guilty" implies an accusation of a crimi-

nal wrongdoing or of having committed a crime. Even so, we cannot agree with appellant that the question was not proper. We have long approved the format of this question, on cross-examination, when asked in good faith, as being permissible to test the credibility of a witness, the state being bound by the answer. *Polk* v. *State,* 252 Ark. 320, 478 S.W. 2d 738 (1972), *Harrington* v. *State,* 251 Ark. 587, 473 S.W. 2d 911 (1972), *Black* v. *State,* 250 Ark. 604, 466 S.W. 2d 463 (1971), *Hughes & Bridges* v. *State,* 249 Ark. 805, 461 S.W. 2d 940 (1971), and *McAlister* v. *State,* 99 Ark. 604, 139 S.W. 684 (1911). In *Polk,* the defendant was asked if he was guilty of robbing a filling station; in *Harrington,* if he was guilty of interstate transportation of stolen property; in *Black,* if he was guilty of raping a woman at a certain time and place; in *Hughes & Bridges,* "Did you take some money off Bobby Horne;" and in *McAlister,* if the witness had "assassinated" another person. In each of these cases we held it was proper cross-examination of the witness.

We think the question was particularly appropriate, in the case at bar, inasmuch as the state adduced evidence that the victim, lying unarmed on the floor, was shot five times by the appellant. The appellant insisted that he shot in defense of his brother and that the deceased was armed. Certainly the credibility of the appellant was a crucial issue.

Affirmed.

HARRIS, C.J., not participating.

W. N. RASMUSSEN AND PEARL E. RASMUSSEN, HIS WIFE *v.* C. J. HORNER COMPANY, INC.

73-216 505 S.W. 2d 225

Opinion delivered February 11, 1974

Rasmussen and Hogue, by: *Sigun Rasmussen,* for appellants.

Glover and Sanders, by: *R. Julian Glover,* for appellee.

CARLETON HARRIS, Chief Justice. Don Kymes, a building contractor, entered into a contract to build a house for W. N. Rasmussen and his wife, Pearle E. Rasmussen, appellants herein. Appellee, C. J. Horner Company, Inc. supplied certain materials provided within the contract for the alleged sum of $1,789.89. Kymes took bankruptcy and appellee sought recovery from the Rasmussens under the lien statutes. Appellants defended on the basis that appellee had failed to comply with the statutory requirements of Ark. Stat. Ann. § 51-613 (Repl. 1971). On trial, the court held that materials from Horner in the amount of $987.28 had been used in the Rasmussen house and judgment was granted for that amount; it was further provided that if the judgment be not paid, one acre of appellants' property described by metes and bounds should be sold as a matter of enforcing the lien. From the judgment so entered, appellants bring this appeal. For reversal, it is first asserted that the purported lien was defective because it was not sworn to as required by the statute. In

the alternative, it is asserted that certain items for materials were erroneously allowed by the court, it not being established by the evidence that these materials were used in the Rasmussen house.

Under the view that we take, there is no need to discuss the second point, for we are firmly of the opinion that the decree must be reversed because of the failure of Horner to make the required affidavit.

Ark. Stat. Ann. § 51-613 (Repl. 1971) provides:

> "It shall be the duty of every person who wishes to avail himself of this act (§§ 51-601, 51-604—51-626) to file with the clerk of the circuit court[1] of the county in which the building, erection or other improvement is to be charged with the lien is situated, and within one hundred and twenty (120) days after the things aforesaid shall have been furnished or the work or labor done or performed, a just and true account of the demand due or owing to him, after allowing all credits, and containing a correct description of the property to be charged with said lien, *verified by affidavit.*" [Our emphasis].

While we apparently have no cases exactly in point on the matter presently before us, we have held that substantial compliance with the lien statutes is sufficient for recovery; however, our cases clearly indicate that the making and filing of the affidavit are essential to the validity of a lien. In *Georgia State Savings Association* v. *Marrs,* 178 Ark. 18, 9 S.W. 2d 785, the question was whether a proper affidavit had been executed on behalf of W. T. Marrs who sought to enforce a materialmen's and laborer's lien upon several properties, and the question in the litigation was whether his lien was superior to certain mortgages held by the appellant company. There, the affidavit was made by Mrs. R. B. Amos, who was the bookkeeper for Mr. Marrs, and this court held that her

[1] Chancery courts may foreclose mechanics' and materialmen's liens. See *Martin* v. *Blytheville Water Co.* (1914), 115 Ark. 230, 170 S.W. 1019; *Carr* v. *Hahn,* (1917), 126 Ark. 609, 191 S.W. 232; and *Sims* v. *Hammans* (1922), 152 Ark. 616, 239 S.W. 19.

affidavit was sufficient to meet the requirement of the law. The court then said:

> "The applicable statute (§ 6922, C. & M. Digest) requires the lien claimant to file 'a just and true account of the demand due or owing to him,' and that it be 'verified by affidavit.' But it is not required that the affidavit be made by the claimant himself. It is a sufficient compliance with the law if the affidavit is made and filed."

The court cited the case of *Terry* v. *Klein,* 133 Ark. 366, 201 S.W. 801, stating:

> "The claim of lien made by the interveners, Hayes-McKean Hardware Company, was sworn to before Bob Canton, who attached his seal as a notary public as a part of the jurat, but did not affix the words, 'notary public,' after his name, and did not give the venue of the affidavit by reciting where it was taken.
>
> "We think the case of *Railway Co.* v. *Deane,* 60 Ark. 524, 31 S.W. 42, is decisive of this question. It was there held (to quote the syllabus): 'Where, to an affidavit for appeal from a justice's court otherwise sufficient, but expressing no venue, there is attached a proper jurat showing that the oath was administered to the affiant by a notary public, it will be presumed that the notary acted within his jurisdiction.' "

Subsequently, it was stated:

> "The court said that *swearing the affiant was the essential fact* [our emphasis], and that if this were done and the officer administering the oath neglected to attest the fact, this would not render the affidavit a nullity, but that the defect might be cured by amendment. *Fortenheim* v. *Claflin, Allen & Co.,* 47 Ark. 49, 14 S.W. 462."

So, it is apparent that this court has consistently considered the making of the affidavit to be essential. On direct examination, Mr. Horner testified that he personal-

ly took the account for lien to the clerk, and that he had signed it.[2] The evidence of Horner on direct examination reveals the following:

> "Q Did you ask that it be verified or signed where the Clerk's signature is to appear?
>
> A Well, I don't know. The Clerk always signed them when I took them down there.
>
> Q Did you make a request that he sign it or did you depend on the Clerk to sign it?
>
> A I made the request, but I don't know whether he did it or not. He didn't?
>
> Q No, it's not signed. Did you make a request to the Clerk that he sign it?
>
> A Yes, sir.
>
> Q And file it?
>
> A Yes, sir.
>
> Q Did you pay cash for it or do you have a credit account?
>
> A I paid in cash for it."

On cross-examination, when Horner asked what he did when he walked into the clerk's office, the record reveals the following:

> "A I just went up to the front of the counter and laid it down and told them I wanted to file it.
>
> Q Told who?
>
> A The clerk.

[2]The signature does not appear, but testimony reflected that the description of the property which was attached covered his signature.

Q Which clerk?

A I don't know. One of them down there in the office.

Q Male or female?

A I guess it was a female.

Q But you don't remember, do you?

A No, sir, this has been two or three years ago.

Q That's right. But do you specifically remember what you said to the clerk or the clerk said to you and what you did?

A I took it in there and laid it down and ask her how much money she needed to file it and she told me a dollar. I paid it and went on back to the office.

Q And that's all you did the whole time you were there? In other words you laid it down in the form that it's there and ask her how much that it was and she said a dollar, and you gave her the dollar and then you walked out?

A Yeah."

The re-direct examination reveals the following:

"Q. Mr. Horner, I ask you if you made a request of the clerk at the time that you b[r]ought the lien in that he verify or did you ask him, do you remember, did you ask him specifically, to him or her—or whoever it was—to verify or did you depend on them to verify it?

A Well, I guess I just depended on them to verify it."

The lien account is neither verified by the clerk nor does the evidence show that any oath was given. Without question, under our cases, one or the other was essential. In *Cox* v. *State,* 164 Ark. 126, 261 S.W. 303 Justice Frank

Smith, in quoting from Section 8 of the chapter on Affidavits in 1 R.C.L., p. 765, said:

> "To make a valid oath or affirmation there must be some overt act which shows that there was an intention to take an oath or affirmation on the one hand and an intention to administer it on the other; for, even though such intention actually did exist, if it was not manifested by an unambiguous act, perjury could not be based thereon. If the attention of the person making the affidavit is called to the fact that it must be sworn to, and, in recognition of this, he is asked to do some corporal act, and he does it, the instrument constitutes a statement under oath, irrespective of any other formalities."[3]

To present the picture clearly, let us say that the account filed by Horner contained a claim for some items which he knew he had not furnished to Rasmussen, such fact being provable by the prosecuting attorney. Could Horner have been convicted for perjury under the evidence heretofore set out of what transpired in the clerk's office? To ask the question is but to answer it, for it is obvious that under the proof it could never be shown that he had sworn to a false material statement.

Actually, to hold with appellee in this litigation, would have the effect of doing away with the requirement of the statute for verification of the lien account, and we have neither the authority, nor the desire, to do this.

Reversed and dismissed.

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[3]The same quote appears in *Thompson* v. *Self*, 197 Ark. 70, 122 S.W. 2d 182.

HOME INSURANCE COMPANY ET AL *v.* CHARLES R. LOGAN

73-232 505 S.W. 2d 25

Opinion delivered February 11, 1974

Matthews, Purtle, Osterloh & Weber, by: *John I. Purtle,* for appellants.

Harkey and Walmsley, by: *Bill H. Walmsley,* for appellee.

GEORGE ROSE SMITH, Justice. This is a claim for an increase in permanent partial disability benefits under the workman's compensation act. In 1967 Logan, the claimant, sustained a back injury at work while lifting a piece of furniture. After surgery—a laminectomy and disc fusion—and after the completion of his healing period, Logan was awarded a 20% permanent partial disability. In 1971 Logan's physician, Dr. Millard, found that the disability had increased to 35% as related to the body as a whole. The Commission accepted Dr. Millard's evaluation and increased the award accordingly. The insurance carrier contends that there is no substantial

evidence to sustain a finding that Logan's enhanced disability was attributable to the 1967 injury.

Interpreting the testimony in the light most favorable to the Commission's decision, as is our rule, we find sufficient substantial evidence to support the increased award. We have previously quoted from Larson's treatise on workmen's compensation law the rule that is applicable here: "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." *Aluminum Co. of America* v. *Williams,* 232 Ark. 216, 335 S.W. 2d 315 (1960). Hence the question is whether Logan's heightened disability could be found upon the evidence to be attributable to the original 1967 injury.

Dr. Millard's testimony amply supports the Commission's award. He stated at the outset that when he released Logan from medical treatment in 1967, he anticipated that the patient might have additional difficulty with his back. "This type of back trouble sometimes does have further trouble. . . . Well, it might arise by just turning over in bed, tying his shoe, it might arise from walking, or standing on his feet eight hours a day working, or something of this sort." Later in his testimony Dr. Millard made such statements as: "It all dates back to the original injury. . . . Now, as far as I'm concerned, the symptoms he was having at that time [1971], and the myelogram findings, subsequently date back eventually to the original injury. I can't pinpoint any one time that this [increased disability] started or happened."

After the termination of Logan's original healing period he obtained work with other employers and was involved in an automobile accident. The appellants argue in effect that Dr. Millard could not say with reasonable medical certainty that Logan's worsened condition was due to the first injury rather than to later incidents.

We cannot say that Dr. Millard's testimony lacks substance. The most serious later incident, upon which the dissenting commissioner relied heavily, occurred about August 1, 1970. Logan consulted Dr. Millard a few days later. In reporting to the insurance carrier Dr. Millard wrote in part: "I saw Mr. Logan again on August 7, 1970, because of a renewal of symptoms. He gave a history of about one week ago lifting a butane tank and twisting to one side and feeling a pop and pain in the back, but particularly with the symptoms being particularly painful in both legs." At the end of his letter the doctor said: "I explained to Mr. Logan that his present symptoms, in my opinion, are due to primarily fatigue from attempting to do too much at one time and not get enough rest. I also advised him to wear his brace, for instance in the afternoon, try to get more rest and try to avoid twisting injuries to his spine. I do not feel that he has any significantly severe injury at the present time."

Thus even at the time Dr. Millard did not attach causative importance to the butane tank incident. Moreover, it was not until the expiration of a full year, during which Logan was usually able to work, that Dr. Millard reached the conclusion that Logan's disability had increased to 35%. Logan himself testified that the pop and pain in his back didn't hurt any more than a lot of other things.

As we have indicated, Dr. Millard anticipated from the beginning that Logan might experience additional back trouble, which could result from such everyday activities as walking, tying a shoe, or turning over in bed. Under the rule that we follow, such aggravations of the original disability are compensable in the absence of an independent intervening cause. We have frequently said that it is the Commission's duty to draw all legitimate inferences in favor of the claimant and to give him the benefit of the doubt in making determinations of fact. *Herman Wilson Lbr. Co.* v. *Hughes,* 245 Ark. 168, 431 S.W. 2d 487 (1968); *Burrow Constr. Co.* v. *Langley,* 238 Ark. 992, 386 S.W. 2d 484 (1965); *Herron Lbr. Co.* v. *Neal,* 205 Ark. 1093, 172 S.W. 2d 252 (1943). In the case

at bar we find adequate substantial evidence to support the Commission's decision.

Affirmed.

RAY G. VANDEVIER *v.* GLADYS CHAPMAN

73-217 505 S.W. 2d 495

Opinion delivered February 11, 1974
[Rehearing denied March 18, 1974.]

Hobbs and Longinotti, for appellant.

Laser, Sharp, Haley, Young & Boswell, P.A., for appellee.

LYLE BROWN, Justice. A personal injury action was instituted by appellant, Vandevier, against appellee, Chapman. At the time suit was filed, appellee was living in Arizona and service was had upon the Secretary of State. The trial court sustained a demurrer to appellant's complaint and the appeal is from that order. Appellant

contends that the complaint stated a cause of action; alternatively, appellant avers that if the complaint did not state a cause of action, the unanswered request for admissions supplies the deficiency.

Appellant alleged that on the date of the incident he was visiting in the home of appellee in Garland County; that appellee explained to appellant that appellee was planning to sell her car; and that appellee requested appellant to check the condition of the car. Appellant alleged that while he was checking the car it began rolling and knocked him to the ground, causing specified injuries. Then the paragraph alleging negligence is as follows:

> That the injuries and ultimate damages suffered by the plaintiff (appellant) were the direct and proximate result of the negligence of defendant (appellee) in that she had failed to advise the plaintiff (appellant) that the automobile in question had not been placed in gear and had failed to advise the plaintiff (appellant) that the emergency brake had not been set on the automobile.

The complaint was demurrable for failure to state facts which would constitute a cause of action. Ark. Stat. Ann. § 27-1115 (Repl. 1962). The allegations are more in the nature of conclusions rather than facts; it is not alleged that appellee had knowledge of the facts alleged with respect to the car being out of gear and the brake not being set; and it is not alleged as to specifically what incident caused the car to roll.

The basic infirmity in the pleading is the stating of conclusions and we have held such to be insufficient to state a cause of action. *Ready* v. *Ozan Investment Co.*, 190 Ark. 506, 79 S.W. 2d 433 (1935).

This brings us to the allegation that the unanswered request for admissions supplies any deficiency in the complaint. The trial court held that the request for admissions could not be considered because there was no certificate of service attached. On July 2, 1973, the court ruled that

the request for admissions could not be considered by the court for the reason that there was no certificate of service attached to the copy of the request filed in the court. On the date of the ruling there was nothing in the record to show that the request for admissions had been received by the appellee or her attorney. We do find that subsequent to the ruling there was filed a receipt showing that appellee had signed for a registered document from appellant's counsel; however, that evidence came too late because it had already been ruled upon. It is also noted that no copy of the request was delivered to appellee's counsel, notwithstanding he had filed an answer. In fairness, however, to counsel for appellant it should be stated that counsel insisted he never received a copy of the answer. Finally, we note that the request for admissions is not set out in the abstract; we are not obliged to ferret the request out of the transcript.

Affirmed.

JOHN O. MAY *v.* DELL EDWARDS

73-252 505 S.W. 2d 13

Opinion delivered February 11, 1974

Jack L. Lessenberry, for appellant.

Clifton H. Hoofman, John M. Fincher and *John T. Harmon,* for appellee.

JOHN A. FOGLEMAN, Justice. John O. May was serving as a duly elected and qualified alderman for the second ward of the City of North Little Rock when he was found guilty of the crime of abortion after a jury trial in the Circuit Court of Pulaski County. A sentence of four years' imprisonment and $1,000 fine was entered on May 23, 1972. On June 26, 1972, the North Little Rock City Council elected Dell Edwards to the position theretofore held by May. May promptly instituted a suit against Edwards and the council in the Circuit Court of Pulaski County, seeking to oust Edwards. It is stipulated that the judgment entered in that case declared that May was ineligible to serve as alderman and that Dell Edwards was the properly installed alderman of the second ward. No appeal was taken from that judgment, so it has become final.

The judgment of conviction in the abortion case was reversed here on April 9, 1973, and the case was remanded for a new trial. See *May* v. *State,* 254 Ark. 194,

492 S.W. 2d 888. On April 12, 1973, May instituted this suit against Edwards, seeking reinstatement to the office, and alleging that the election of Edwards was void. Edwards answered, pleading that the judgment in the first case was res judicata, that since he was the incumbent duly elected to the office, no vacancy existed, that he was not subject to removal and that there was no authority for the reinstatement of May. The circuit court dismissed May's complaint, holding that from and after June 26, 1972, Edwards was the duly elected and qualified holder of the position, that there was neither evidentiary nor legal basis which would justify his removal and no provision of law for May's reinstatement. We agree with the circuit judge.

The disposition we make of this case renders the question whether appellant invoked the proper remedy or attempted to invoke the common law remedy of quo warranto moot. We shall consider this proceeding, for the purposes of this opinion, as if it were properly brought under Ark. Stat. Ann. §§ 34-2201, 2203 and 2209 (Repl. 1962).

Appellant contends Edwards has no right to the office and the trial court erred in failing to reinstate May. Appellant challenges Edwards' title to the office, arguing there is a grave question as to Edwards' official status, because there was no judicial declaration or affirmative finding by the city council that May was ineligible to serve before the council elected Edwards, and that the council's action was based only upon a declaration by the City Attorney of North Little Rock that a vacancy existed. Appellant overlooks the fact that the judgment in the first case is res judicata of these issues. According to the stipulation of the parties, these very issues were determined by a final judgment of the circuit court, and he was precluded from raising them in this proceeding. *Walthour* v. *Finley,* 237 Ark. 106, 372 S.W. 2d 390; *Morrow* v. *Raper,* 222 Ark. 414, 259 S.W. 2d 499. That judgment, however, was conclusive only upon the issues presented and facts existing at the time and not upon any particular matter which was not necessarily within the issues presented or which could not have been litigated

in the prior proceeding. *Arkansas State Highway Commission* v. *Staples,* 239 Ark. 290, 389 S.W. 2d 432; *Swanson* v. *Johnson,* 212 Ark. 340, 205 S.W. 2d 702; *Coleman* v. *Mitchell,* 172 Ark. 619, 290 S.W. 64. Insofar as the record discloses, there was no issue in that proceeding as to the tenure of Edwards or the possible reinstatement of May, and it does not appear these matters could have been litigated at that time. Inasmuch as appellee has not shown that these issues were or could have been raised in the earlier proceeding, we cannot say appellant is barred from raising them now. *Crow Oil & Gas Co.* v. *Drain,* 171 Ark. 817, 286 S.W. 971. In determining the issues presented here, however, May must rely upon the strength of his own title to the office and not upon the weakness of Edwards'. *Langston* v. *Johnson,* 255 Ark. 933, 504 S.W. 2d 349. In this instance, Edwards is the incumbent and will continue in office unless May is entitled to reinstatement.

There seems to be no precedent on the exact circumstances prevailing here. Our constitution provides that no person convicted of an infamous crime shall be capable of holding any office of trust or profit. Article 5, Sec. 9. We have said this language means the fact of conviction disqualifies one from holding public office. *Ridgeway* v. *Catlett,* 238 Ark. 323, 379 S.W. 2d 277. We need not consider whether, in May's case, the conviction, even though reversed, would forever bar him from holding public office. Although no enabling legislation seems to have ever been passed, there is no occasion for our considering whether the constitutional provison is self-executing. We must accept the premise that, as between these litigants, these matters were concluded by the earlier litigation.

The North Little Rock Council, acting upon the premise that a vacancy existed, proceeded to elect an alderman. Apparently the only applicable statute is Ark. Stat. Ann. § 19-1026 (Repl. 1968). That statute provides that whenever a vacancy shall occur, by any reason, in the office of alderman in a city of the first class, the council shall elect an alderman to serve for the unexpired term. We take this statute to govern in this case, which means

that Edwards was elected for May's unexpired term and that he will serve for that term, unless unforeseen events should earlier end his tenure. It is agreed there is no basis for his removal from office for cause. The only contention is, in effect, that his tenure ended when May's conviction was reversed.

As conceded by appellee's attorney in oral argument, either result we might reach would have harsh consequences, either to May, the duly elected alderman, who is again presumed to be innocent of the charges against him, or to the people of North Little Rock because of the uncertainty which would result if Edwards could serve only upon condition that May's conviction was not reversed. Not only would there be an undesirable confusion if May should be reinstated, but it would be compounded if, while again serving, he should be found guilty upon retrial before the same term expired.

May takes the position that the reversal of his conviction made that judgment a nullity, and that the matter must be viewed as if there had never been a trial or any other action on the charges against him in that case, and that he is restored to all rights he had before the rendition of that judgment. There is certainly some support for that view in our cases. See *Palmer* v. *Carden,* 239 Ark. 336, 389 S.W. 2d 428; *Hartford Fire Ins. Co.* v. *Enoch,* 79 Ark. 475, 96 S.W. 393; *Heard* v. *Ewan,* 73 Ark. 513, 85 S.W. 240; *Clark* v. *Arkansas Democrat Co.,* 242 Ark. 133, 413 S.W. 2d 629, supplemental opinion, 242 Ark. 497, 413 S.W. 2d 633; *Morgan Engineering Co.* v. *Cache R. Drainage Dist.,* 122 Ark. 491, 184 S.W. 57. It must be remembered, however, that the rights said to be restored are ordinarily those existing between the parties only, unaffected by any overriding public interest.

The only Arkansas cases having any bearing whatever on the reinstatement of a removed public official are *Winfrey* v. *State,* 133 Ark. 357, 202 S.W. 23, and *Gray* v. *Independence County,* 166 Ark. 502, 266 S.W. 456. Both are readily distinguishable, and there is little comfort to either May or Edwards in them. In *Winfrey,* the re-

moval was itself a part of the final judgment reversed on appeal. We there declared that our reversal disposed of the order of removal, but not of a preliminary suspension which, if valid, would remain in effect, because it was mandatory, under the applicable statute, after indictment of an officer charging certain offenses. Although we held the suspension to be void because the charges were not of the type covered by the statute, we did not consider any question of reinstatement or removal of an incumbent selected to fill a vacancy, temporarily or otherwise. In *Gray,* we also treated the status of an officer under a suspension pursuant to a statute specifically requiring suspension of a county or township officer, indicted for any of certain specified crimes, *until the charge was tried.* We only held that the suspended officer, after his acquittal, was not entitled to recover from the county the salary of the office accruing during the period of his suspension. We used language in *Gray,* however, which points toward the result we reach here. There we said:

> In the case of Allen v. State [32 Ark. 241], the court said:
>
> > Offices are not regarded in this country as grants or contracts, the obligation of which cannot be impaired, but rather as trusts or agencies for the public. They are within the power of the Legislature, except so far as the Constitution may forbid interference with them. Coffin v. State ex rel. Norton, 7 Ind. 157.
>
> In the case of Sumpter v. State [81 Ark. 60, 98 S.W. 719], the court quoted with approval from a decision of the Supreme Court of the United States, to the effect that the nature of a relation of a public officer to the public is inconsistent with either a property or contract right, and that the salary is not compensation for services secured by contract, but compensation for services actually rendered. The general rule is that, if the office is vacant, it becomes, as to the suspended person, for the time being, as though it did not exist, and, as to the public, the person appointed to fill the last vacancy is the sole incumbent of the office.

Cases from other jurisdictions are of little more assistance. They are based upon constitutional provisions and statutes differing from ours. We can give no regard to those holding that an officer *improperly* removed is entitled to reinstatement. Such was the case in *Winfrey*. But as previously pointed out, the right of May to question the propriety of his removal has been foreclosed. Cases such as *Hayes* v. *Hudson County Board of Chosen Freeholders,* 116 N.J. Super. 21, 280 A. 2d 838 (1971), based upon specific statutes providing for or requiring reinstatement upon reversal of a conviction are certainly inapposite.

We find the case of *State* v. *Chapman,* 187 Wash. 327, 60 P. 2d 245 (1936), persuasive here, although there are distinctions which can be made. There was, at the time, a Washington statute declaring that conviction of a felony entailed forfeiture of office as a part of the penalty and disqualified the officer convicted from ever holding public office. Another statute provided that a vacancy in office should result upon the officeholder's conviction of an infamous crime. There the officeholder was convicted of grand larceny and then ousted by a judgment in a separate proceeding, from which he did not appeal. Subsequently, his conviction was reversed on appeal. The officer then brought suit for reinstatement. The Washington court held that, insofar as this officer was concerned, the office became extinct when the judgment of ouster was rendered, that, under a statute strikingly similar to Sec. 19-1026, it was the duty of the board of county commissioners to fill the vacancy and that the successor chosen by them filled the office until the next general election or until his successor was duly elected and qualified. The court justified its statutory construction by these considerations:

> (1) The public interest demands that public affairs be administered by officers upon whom rests no stigma of conviction for infamous crimes; and (2) the proper administration of public business requires a constancy and continuity of service and therefore demands that it shall not be subjected to the hazards of frequent and uncertain changes of officers during a specified term of office.

Assuming that the original judgment of conviction created a vacancy in the office, as we must by application of res judicata, we also find the case of *Becker* v. *Green County,* 176 Wis. 120, 184 N.W. 715 (1921), heavily relied upon by the circuit judge, to be highly persuasive. There the court found that reversal of a conviction of an infamous crime did not entitle the officer involved to recover the salary of the office for the period between his ouster and the end of his term prior to the reversal, because there was no applicable statute providing for restoration to office or for payment of the salary upon reversal of such a conviction. Other cases, distinguishable upon the facts, but nevertheless persuasive on the ultimate issue here include *State* v. *Jurgensen,* 135 Neb. 136, 280 N.W. 886 (1938); *McKannay* v. *Horton,* 151 Cal. 711, 91 P. 598 (1907); and *Smith* v. *Noeppel,* 120 N.Y.S. 2d 466 (1953). The prime consideration governing those decisions was the recognition that the public interest is paramount to that of the unfortunate incumbent. Throughout these cases, as well as *Jolliff* v. *State,* 215 So. 2d 234 (Miss. 1968), where an opposite result was reached,[1] the courts view a removal of one convicted as imposed in the interest of the public and sound government, and the public office as the property of the people and not of the officeholder.

Sound policy expressed in the language of our own decisions and the logic of the cases above cited compel us to the conclusion that, harsh as the result may be insofar as May's rights are concerned, the interest of the public lies in avoiding a vacancy and in having a degree of stability in the administration of the public business unlikely to exist when an incumbent serves an indefinite and speculative term and the office is subjected to frequent and uncertain changes during a specified term.

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[1]While in *Jolliff* the Mississippi court directed reinstatement of the officer whose conviction was reversed, that court based its decision upon the fact that only an interim successor had been named and that a successor had not been elected to fill the vacancy which had existed. The court took great pains to point out not only that its ruling was based entirely upon the unusual and peculiar facts and posture of the case but that an entirely different situation would have been presented if a successor had been regularly elected to the office according to law.

We must consider the public interest as paramount. In the absence of any statute providing for reinstatement or restoration to office under these circumstances and upon the basis of the facts and issues presented in this case, we hold that May is not entitled to reinstatement and that Edwards' term extends for the remainder of May's unexpired term.

The judgment is affirmed.

LINDA ELLEN SNOW AND MRS. DALE LOYD SMITH *v.* MARJORIE T. MARTENSEN

73-223 505 S.W. 2d 20

Opinion delivered February 11, 1974

Crouch, Blair, Cypert & Waters, for appellants.

Wade, McAllister, Wade & Burke, P.A., for appellee.

J. FRED JONES, Justice. Blanche M. Box died testate having named a daughter, Mrs. Martensen, and two

grandchildren, Miss Snow and Mrs. Smith, as sole beneficiaries under her will. Mrs. Box willed her jewelry to her daughter Mrs. Martensen, and the remainder of her estate one-half to Mrs. Martensen and the other half to Miss Snow and Mrs. Smith.

Upon the death of Mrs. Box, Mrs. Martensen filed the will for probate and obtained her own appointment as personal representative. On May 10, 1973, she filed her inventory listing the assets of the estate as totaling $786.

Miss Snow and Mrs. Smith filed a petition challenging the inventory and alleging that funds in an account at the First Federal Savings and Loan Association in Fayetteville, Arkansas, were assets of Mrs. Box's estate and should be included in the inventory of the decedent's estate. They prayed for the removal of Mrs. Martensen as personal representative and for an accounting of withdrawals she had made from the savings account, both before and after the death of Mrs. Box.

As grounds for a special motion to dismiss, Mrs. Martensen alleged that she claimed the savings account in question as the sole owner; not as an heir or beneficiary having an interest in the estate, but in her own personal right as a stranger to the estate. She alleged that the savings account in question was a joint account with right of survivorship and so listed on the records of the First Federal Savings and Loan Association, and she demurred to the petition on the grounds that the probate court was without jurisdiction to determine the ownership of the funds in the savings account.

The appellants' petition for the removal of Mrs. Martensen as administratrix and their request for certain admissions were denied by the trial court, but since the case turns on the question of whether the probate court had jurisdiction of the subject matter under the facts and pleadings in this case, we confine our discussion to that issue.

The probate court sustained the demurrer and dismissed the petition for want of jurisdiction of the subject matter. On appeal to this court Miss Snow and Mrs. Smith

have designated one point they rely on for reversal. In substance they contend that the trial court erred in ruling that it did not have jurisdiction to hear the subject matter of their petition and in sustaining the demurrer thereto.

The trial court set out a clear and concise memorandum for precedent and as to jurisdiction, said:

> "The point raised by demurrer here is that probate court has no jurisdiction to try title to property (the joint savings account) under the facts thus far made apparent. The demurrer admits the allegation of petitioners that there was, and is, a joint savings account in the names of testatrix and administratrix. The demurrer does *not* admit petitioners' assertion that the apparent joint savings account is not, *as a matter of law,* a survivorship account.
>
> Thus, the contest as to the savings account emerges as one between administratrix, claiming ownership, not as administratrix, but in her own right, and the petitioners, claiming, in behalf of the estate, that the account belongs to the estate.
>
> This posture brings the matter squarely within the aegis of the rules announced in *Hartman* v. *Hartman,* 228 Ark. 692, and cases there cited and discussed. Broadly stated, the rule is that probate court has jurisdiction to settle ownership of estate property as between or among contending heirs, devisees and interested persons, on a sort of 'in house' basis; but where, as here, a person who is otherwise an heir or devisee claims title *in his own right,* and not stemming from the will, such person is claiming *adversely* to the estate and as to other heirs and distributees, and as a stranger to the estate.
>
> Such controversy, thus, must be resolved, not in probate court, but in the forum, either at law or in equity, which would have jurisdiction to try title."

As above indicated, the trial court relied on our decision in *Hartman* v. *Hartman,* 228 Ark. 692, 309 S.W. 2d 737.

We do not disagree with the trial court as to the rules announced in *Hartman,* but we do not agree that rules in *Hartman* apply to facts in the case at bar. In *Hartman* the decedent had sold real property prior to his death and had taken in part payment a series of promissory notes falling due annually. The notes were made payable to both Mr. and Mrs. Hartman who were husband and wife. Mrs. Hartman apparently entered into an agreement whereby she assigned her interest in some of the notes to Mr. Hartman in exchange for some remaining land owned by Mr. Hartman and the validity of the assignment was a part of the matter in litigation. Mrs. Hartman admitted by stipulation that the notes had been assigned to the estate of Mr. Hartman, but she apparently had retained possession of the notes. The probate court made no attempt to determine the validity of the assignment but it ordered Mrs. Hartman to deliver the notes in question to the administrator of the estate. We held that the probate court had jurisdiction to order the delivery of the notes to the administrator, and in that case we said:

> "This leads to a discussion of the jurisdiction of the probate court in a discovery proceeding. Ark. Stat. § 62-413 provides for a discovery proceeding by the probate court in regard to alleged assets of an estate. Section 62-415 (Rev. Stat., ch. 4, § 50) provided for an attachment of any property found in such proceeding to belong to the estate.
>
> In *Moss* v. *Sandefur,* 15 Ark. 381, it appears that if the person in possession of the property in issue has color of title thereto, the probate court does not have jurisdiction to order the delivery of the property to the administrator. And in *Ellsworth* v. *Cornes,* 204 Ark. 756, 165 S.W. 2d 57 (1942), it is held that the probate court does not have jurisdiction to determine title to contested property, *but it is pointed out that where the contest is between the executor or administrator and parties who claim as heirs or beneficiaries having some interest in the estate and who do not claim adversely or are strangers to it, the probate court has jurisdiction.*" (Our emphasis).
>
> In *Hartman* we pointed out that when the new pro-

bate court code was adopted in 1949, the old statute for discovery was re-enacted[1] and the former statute providing for attachment was not re-enacted. The *Hartman* case turned, however, on the conceded fact that Mrs. Hartman had assigned the notes to Mr. Hartman prior to his death. Under this concession the probate court correctly considered the notes as assets of the estate and ordered Mrs. Hartman to surrender the notes to the administrator. Although admitting that the assignment had been made, Mrs. Hartman contended that the assignment itself was void. The probate court did not pass on that issue and it was not before us on appeal. We did point out that the burden was on Mrs. Hartman to establish her alleged invalidity of the assignment and that remedy was still available to her. Another primary difference in *Hartman* and the case at bar is that Mrs. Hartman was not the administratrix of Mr. Hartman's estate.

The case of *Thomas* v. *Thomas,* 150 Ark. 43, 233 S.W. 808, is more in point with the case before us for in that case the widow of the decedent was the administratrix of his estate. In *Thomas* the probate court found that certain property was the individual property of the widow and awarded it to her. The brothers and sisters of Thomas contended on appeal that the probate court had no jurisdiction to determine title to property when the dispute was between the administrator and others, and in that case this court said:

> "It is true that the jurisdiction of the probate court is confined to the administration of the estate of the decedent. The probate court had jurisdiction to appoint appellee as administratrix of the estate of James Thomas, deceased, and to allot her dower in his estate as his widow. According to the evidence adduced by her, she and her husband lived on a farm in Ashley County, Arkansas, and he had accumulated considerable personal property which was kept on the farm. Certain articles of this property however, belonged to her, and the court gave it to her. In order to properly administer the estate of James Thomas, deceased, and to allot dower to his widow, it was

[1]Now Ark. Stat. Ann. § 62-2409 (Repl. 1971).

> necessary for the court to determine what property belonged to the estate, and the question of the title to certain articles arose as a necessary incident to the determination of the main matter before the court. In such case the probate court can determine the question of title to the property, for this is necessary in properly administering the estate and allotting the property to those entitled to it as distributees under the statute. *King* v. *Stevens,* 146 Ark. 443."

In the more recent case of *Carlson* v. *Carlson,* 224 Ark. 284, 273 S.W. 2d 542, Roy E. Carlson, Jr. was appointed administrator of his father's estate and he listed a truck as an asset in his inventory filed. The decedent's widow petitioned the probate court for the exclusion of the truck from the court's order of sale, asserting that her husband had given the truck to her. After hearing testimony on the matter, the probate court found in Mrs. Carlson's favor. On appeal to this court the only point raised was "the court's power to determine that Mrs. Carlson owned the truck." In this connection this court said:

> "As to the contention that the probate court was without authority to vest title to the car in Mrs. Carlson, the answer in so far as this controversy is affected is to be found in *Thomas* v. *Thomas,* 150 Ark. 43, 223 S.W. 808, where Mr. Justice Hart said in a unanimous opinion that the probate court, in the exercise of its jurisdiction to administer the estates of decedents, is authorized to determine what property belongs to the estate. See *Ellsworth, Administrator* v. *Cornes,* 204 Ark. 756, 165 S.W. 2d 57."

In the case of *Hobbs, Admr.* v. *Collins,* 234 Ark. 779, 354 S.W. 2d 551, cited by the appellants in the case at bar, the decedent Mr. Gaylor, had accumulated bank deposits and bonds worth about $40,000. A Mrs. Collins claimed that Gaylor had given her the money and bonds during his lifetime. The administrator of the estate had listed both the money and bonds as assets of the estate and Mrs. Collins filed exceptions to the inventory. The probate court found that Mrs. Collins was entitled to the money in the banks and on appeal to this court the administrator contended that the probate court did not have juris-

diction to determine the ownership of the money. While no objections to the jurisdiction of the probate court were made until the case reached this court on appeal, in our opinion in that case we said:

> "The Probate Court was not without jurisdiction of the subject matter. *Carlson, Administrator* v. *Carlson,* 224 Ark. 284, 273 S.W. 2d 542, *Thomas* v. *Thomas,* 150 Ark. 43, 233 S.W. 808, *King* v. *Stevens,* 146 Ark. 443, 225 S.W. 656, Ark. Stats. § 62-2409. If appellant had not wanted to submit the issue of the ownership of the property to the Probate Court, objection should have been made before a full scale trial was had and then appellant would have been in a position to raise the question on appeal. It appears, however, that the Administrator voluntarily submitted to the jurisdiction of the Probate Court. This can be done. *Park* v. *McClemens,* 231 Ark. 983, 334 S.W. 2d 709."

In *Ellsworth* v. *Cornes,* 204 Ark. 756, 165 S.W. 2d 57, we stated a rule which we still adhere to and by which we measure the jurisdiction and distinguish the case at bar. In *Ellsworth* we said:

> "Throughout its history, this court has held that probate courts are without jurisdiction to hear contests of and determine the title to property between personal representatives of deceased persons and third persons claiming title adversely to the estates of deceased persons. *Moss* v. *Sandefur,* 15 Ark. 381; *Mobley* v. *Andrews,* 55 Ark. 222, 17 S.W. 805; *Shane* v. *Dickson,* 111 Ark. 353, 163 S.W. 1140; *Fowler* v. *Frazier,* 116 Ark. 350, 172 S.W. 875; *Gordon* v. *Clark,* 149 Ark. 173, 232 S.W. 19; *Huff* v. *Hot Springs Savings, T. & G. Co.,* 185 Ark. 20, 45 S.W. 2d 508; *Sides* v. *Janes,* 188 Ark. 386, 66 S.W. 2d 617; *Ellis* v. *Shuffield,* 202 Ark. 723, 153 S.W. 2d 535."

In the case at bar we are unable to accept Mrs. Martensen or Miss Snow and Mrs. Smith as "third persons" claiming title to the funds involved adversely to the estate of Mrs. Box. Mrs. Martensen was the administratrix of the estate with will annexed and it was her duty to marshal all the assets of the estate and distribute them as

directed in the will under proper orders and approval of the probate court. If Mrs. Martensen was claiming title to the savings account as a third party and adversely to the estate, she certainly occupied an inconsistent position of claiming against an estate she was required to administer. For all practical purposes she was already in possession of the savings account and the question was whether it belonged to her or to the estate she was administering. If the probate court had no jurisdiction to determine this question, she would probably have no desire to go elsewhere.

Miss Snow and Mrs. Smith are not third persons claiming title to the funds adversely to the estate. They are beneficiaries under the will and as such beneficiaries, they are claiming the funds, not *against* the estate, but as their lawful share of the estate. If they were third parties claiming the funds adversely to the estate, they, of course, would have ample recourse outside of probate jurisdiction, but such is not the situation in the record before us. Miss Snow and Mrs. Smith would have no recourse against the savings and loan association in this case, because their claim is against the estate and not adversely to it. In any event, a suit by them in chancery or circuit court would place Mrs. Martensen in the conflicting position of defending her personal claim to the property involved as against the estate she is charged with administering, and would place the circuit or chancery court in the position of determining what are, and what are not, assets of the estate actually in the hands, or under complete control, of the personal representative. The fee of a personal representative, as well as the amount of required bond, is based on the value of the assets of the estate being administered and the allowance of such fee and fixing of such bond, fall within the exclusive jurisdiction of the probate court.

We are of the opinion that in the probation of wills or administration of estates the better rule would be that the probate courts do have jurisdiction to determine the ownership of property as between personal representatives claiming adversely to the estate, or adversely to the heirs or beneficiaries of estates claiming as such, and as between personal representatives claiming for the estates

and heirs or beneficiaries claiming adversely to the estates.

The order of the probate court is, therefore, reversed and this cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

HOWARD PORTER *v.* JAMES L. DEETER AND NADEAN DEETER d/b/a DEETER REAL ESTATE

73-213 505 S.W. 2d 18

Opinion delivered February 11, 1964

Robert L. Blount, for appellant.

Boyett & Morgan, P.A., for appellees.

CONLEY BYRD, Justice. This is an appeal by Howard Porter from a summary judgment in the amount of $11,122.00 entered in favor of James L. "Dobie" Deeter and NaDean Deeter d/b/a Deeter Real Estate for a commission allegedly due upon the sale of a bulk oil plant.

At the bottom of an itemized list of property dated 9/27/71, is an agreement admittedly signed by Porter which provides:

> "Owner hereby agrees to give Deeter Real Estate (Agent) an Exclusive Listing on the above listed property & equipment for a period of ninety (90) days; also agree to pay Agent five per cent (5%) commission. If sold at a reduced price, commission will be reduced as agreed by Owner and Agent."

The complaint alleged that Porter, on March 1, 1972, closed a sale to Jerry Ethridge that was negotiated during the 90 day listing period, for the sole purpose of avoiding the payment of a real estate commission to appellees. The answer denied that the sale was made during the 90 day period and affirmatively alleged that appellees in obtaining the exclusive listing represented that the contract was for the purpose of preventing other real estate agencies from contacting Porter. The appellees do not contend that they procured the purchaser or that the sale resulted from their efforts.

Through interrogatories it was determined that Porter sold the property described in the listing contract for $222,440.00 to Ethridge and that the transaction was closed on March 1, 1972. Based upon the foregoing information appellees moved for summary judgment contending there was no genuine issue as to any material fact. Porter responded: (1) denying that the property was sold during the 90 day listing period; (2) contending that he was entitled to have a jury pass on the issue of whether the contract was an exclusive listing contract or an exclusive sales contract; and (3) pointing out that appellees had not produced a ready, willing and able buyer during the exclusive listing period. The affidavits attached to the response tend to support Porter's contention that no sale was made during the 90 day period. Thereafter appellees' counsel filed a reply to Porter's response to the motion for summary judgment including therein an excerpt from an alleged deposition taken of Porter. The trial court, based upon the motion for summary judgment, the interrogatories, the affidavits

of Porter and Ethridge and the response to the motion for summary judgment which contained excerpts from the alleged deposition of Howard Porter, awarded appellees a summary judgment in the amount of $11,122.00 —that amount being 5% of the full sale price of $222,-440.00. For the reasons hereinafter stated, we reverse.

1. The rule is that before a movant is entitled to summary judgment, he must show that there are no issues of fact. Ark. Stat. Ann. § 29-211(c)(Supp. 1973). The appellees in contending that the agreement here involved prohibited Porter from selling the property without becoming liable for the broker's commission rely upon such cases as *Halbert* v. *Block-Meeks Realty Co.,* 227 Ark. 246, 297 S.W. 2d 924 (1957); *Blumenthal* v. *Bridges,* 91 Ark. 212, 120 S.W. 974 (1909); and *Hardwick* v. *Marsh,* 96 Ark. 23, 130 S.W. 524 (1910). Since the language in those cases all involved or referred to "exclusive sales" of property as distinguished from the language here which only refers to "exclusive listing" of the property, we do not find them controlling of the issue raised in Porter's answer. The contract here is somewhat ambiguous particularly in view of Porter's affirmative allegation in his answer that it was represented to him as an agreement solely for the purpose of preventing him from doing business with other real estate agents. Consequently, a fact issue remains as to whether Porter reserved a right to sell the property.

2. The record, although certified as the complete record, does not contain the deposition of Howard Porter. The excerpt contained in the reply filed by appellee's counsel to appellant's response to the motion does not show affirmatively that appellees' counsel was competent to testify to the matters therein contained. Thus we need not decide whether the deposition is conclusive of the issue of whether the sale was made during the term of the listing. We note that the affidavits of Porter and Ethridge raise a fact issue—it being their contention that the sale did not take place until after the expiration of the listing.

3. On this motion for summary judgment appellees do not even contend that during the exclusive listing

period they furnished a purchaser ready, willing and able to buy the bulk plant. Having failed to so furnish a purchaser, they are not entitled to recover the full amount of the commission under the terms of the contract here involved even if it should ultimately be determined that Porter breached the contract by selling during the terms of the listing period. *Manzo* v. *Parke,* 220 Ark. 216, 247 S.W. 2d 12 (1952). Appellees' reliance upon *Halbert* v. *Block-Meeks Realty Co., supra,* overlooks the fact that in that case the agreement provided for liquidated damages in the amount of the commission in the event of a sale by the owner.

Reversed and remanded.

LIFE AND CASUALTY INSURANCE COMPANY OF TENNESSEE *v.* ANNA GILKEY

73-202 505 S.W. 2d 200

Opinion delivered February 11, 1974
[Rehearing denied March 11, 1974.]

Wallace M. Moody, for appellant.

Camp & Thornton, P.A., by: *Ronald L. Griggs,* for appellee.

FRANK HOLT, Justice. Appellant issued its policy insuring the deceased, William Gilkey, against loss of life, limb, or sight resulting from violent external and accidental means. His mother, the appellee, was made the beneficiary of the policy. The insured was fatally injured by a tractor he was driving on a public highway when he was thrown or fell from it. He was enroute to his home after using it for farming purposes. The policy provides a $1,000 coverage for accidental death in four instances. The only relevant section, and the one in controversy, provides coverage when death occurs:

> As a result of a collision of or other accident to any automobile, taxicab, bus, truck, wagon or buggy inside of which the insured is riding or driving on a public highway . . . .

Both parties moved for a summary judgment based upon the pleadings, the insurance contract and a stipulation of facts. Both motions were denied and the case then proceeded to trial. Appellant presented no evidence and its motion for a directed verdict, which was overruled, is not an issue on appeal. A jury awarded the policy benefits to the appellee. Appellant first contends for reversal that the trial court erred in denying appellant's motion for summary judgment because there existed no genuine issue as to any material fact and, therefore, appellant was entitled to judgment as a matter of law.

A sufficient answer to this contention is that the denial of a motion for a summary judgment is not reviewable on appeal when, as here, the cause then proceeds to trial on its merits. *Deposit Guaranty* v. *River Valley,* 247 Ark. 226, 444 S.W. 2d 880 (1969), and *Ross* v. *McDaniel,* 252 Ark. 253, 478 S.W. 2d 430 (1972). See also *Widmer* v. *Fort Smith Veh. & Mach. Co.,* 244 Ark. 971, 429 S.W. 2d 63 (1968).

Appellant next contends that the trial court, "upon denial of appellant's motion for summary judgment, erred in failing to determine, and to set out, the facts about which there was no genuine issue or controversy" as required by Ark. Stat. Ann. § 29-211 (d) (Repl. 1962). This statute requires the court to make an order specifying the facts that appear to be without substantial controversy and, upon trial, the specified facts shall be deemed established and the trial conducted accordingly. Appellant relies upon *Young, Adm'r* v. *Dodson,* 239 Ark. 143, 388 S.W. 2d 94 (1965). The case at bar proceeded to trial without any request for such an order or an objection by appellant as to the asserted non-compliance with the procedural requirements of the statute. Although, there was a stipulation of facts, it appears the appellant did not ask that the stipulation be presented to the jury to avoid the necessity of testimony by the appellee upon the agreed facts. In fact, it appears appellant acquiesced in the procedure and thoroughly cross-examined the witnesses. Although formal exception to the action of the court is no longer required, it is necessary to make known to the court the action desired or make objection to the court's action and the grounds therefor. § 27-1762. A matter to which no objection is made during the trial is not reviewable on appeal. *Sherman, Adm'x* v. *Mountaire,* 243 Ark. 301, 419 S.W. 2d 619 (1967). In the circumstances, we do not perceive any prejudicial effect is demonstrated by appellant.

Appellant next asserts that the trial court "erred in failing to give appellant's requested jury instruction No. 3 and due to such failure, the jury was not instructed on the law applicable to the situation before the court." Appellant's proffered instruction reads:

> You are instructed that the word 'automobile' is defined to be taken in its ordinary and popular acceptation, which is a motor driven vehicle having four wheels, a body, sides and top, suitable and intended for the conveyance of persons.

Appellant's instruction was based verbatim on the definition of an automobile in *Neighbors* v. *Life and Casualty Ins. Co. of Tenn.,* 182 Ark. 356, 31 S.W. 2d 418 (1930), where the policy in question provided coverage for in-

juries effected solely by external, violent and accidental means where the same were caused "by the collision of or by any accident to any private horse drawn vehicle or private motor driven automobile in which the insured is riding or driving." There we said:

> . . . . in a contract where the word 'automobile' is used it is to be taken in its ordinary and popular acceptation, which is a motor driven vehicle having four wheels, a body, sides and top, suitable and intended for the conveyance of persons, and does not include such a vehicle as a motorcycle.

We observe that both parties focus their arguments upon the issue as to whether a tractor is an automobile within the meaning of this policy. We realize that insurance contracts must be so interpreted as to resolve all reasonable doubts in favor of the insured. *First Pyramid Life Ins. Co.* v. *Thornton,* 250 Ark. 727, 467 S.W. 2d 381 (1971). However, as *Neighbors, supra,* indicates, we will not allow an unreasonable meaning and in that case we established the acceptable definitional boundaries. Since the trial court judge is under a duty to instruct as to the law applicable in the case, it was error not to give the instruction.

Reversed and remanded.

W. N. RASMUSSEN ET UX *v.* MIKE REED AND KIRBY REED, D/B/A REED BUTANE & APPLIANCE COMPANY AND JAMES P. DOLLAR, D/B/A DOLLAR SHEET METAL COMPANY

73-214 and 215 505 S.W. 2d 222

Opinion delivered February 11, 1974

Rasmussen and Hogue, by: *Sigun Rasmussen,* for appellants.

Robert D. Ridgeway, for appellees.

FRANK HOLT, Justice. These cases were consolidated at trial and on appeal since the same issues exist in each case.

A contractor, Don Kymes, agreed to build a house for the appellants. Appellees, Reed and Dollar, each contracted with Kymes to supply certain equipment for the

house. The equipment supplied through Kymes by Dollar was valued at $1,360. The appliances furnished through Kymes by Reed were worth $506.30. Appellees, Reed and Dollar, were never paid by Kymes and timely filed their respective materialmen's liens on the Rasmussen property. Several weeks prior to the filing of the liens, Kymes was adjudged bankrupt. Neither Dollar nor Reed joined Kymes as a co-defendant in their complaint or petition to foreclose their respective liens until sixteen months after their liens were filed. Nevertheless, the lower court granted both appellees a lien upon one acre surrounding appellants' dwelling. Appellants contend that since appellees failed to join the contractor, Kymes, as a co-defendant within fifteen months of the filing of their liens, the statutory limit, the tardy joinder constitutes a bar to this action.

Ark. Stat. Ann. § 51-610 (Repl. 1971) requires the contractor to defend an action against the owner to enforce a lien. We have consistently interpreted this statute to require that the contractor is a necessary party to an action to enforce a lien. *People's Building & Loan Assn.* v. *Leslie Lbr. Co.,* 183 Ark. 800, 38 S.W. 2d 759 (1931), *Cruce* v. *Mitchell,* 122 Ark. 141, 182 S.W. 530 (1916), and *Simpson et al* v. *J. W. Black Lbr. Co.,* 114 Ark. 464, 172 S.W. 883 (1914). Appellees vigorously contend that this is a harsh requirement and we should reconsider our long standing rule.

The policy reason for that requirement is set forth in *People's Building & Loan Assn.* v. *Leslie Lbr. Co., supra:*

> This court, therefore, is committed to the doctrine that in suits to foreclose mechanics liens the contractor is a necessary party. He should be made a party because the original contract for the improvements is made between the contractor and the owner. The other contract, that with materialman, is made between the contractor and materialman; the owner is not a party to it, and it is therefore necessary in a suit to foreclose a mechanic's lien against the property of the owner, to make the contractor a party. The

> owner is not primarily liable, and it is necessary to make the contractor a party to prove the debt against him, show that the material went into the construction of the building, before the materialman is entitled to a lien against the owner's property . . . .

The rationale and practicality of the requirement that the contractor be joined as a necessary party are further well stated in *Simpson et al* v. *J. W. Black Lbr. Co., supra:*

> He was a necessary party, both for his own [the contractor] and the owner's protection. The owners had the right to look to him for payment of any judgment that might be recovered against their property for materials furnished, having contracted with him to supply such materials and paid him the contract price for the improvement and can not be compelled to resort to another action against the contractor for the recovery of such sum of money in which the contractor would be at liberty to claim that he did not owe the materialman the amount for which the judgment was rendered and the lien enforced. It is the intention of the law to have the contractor to defend all such actions and be bound by the judgment rendered.

We adhere to our decisions.

Ark. Stat. Ann. § 51-616 (Repl. 1971) places a fifteen month statute of limitations for commencement of a foreclosure action after timely filing a lien. In the instant case, the petitions to foreclose the asserted liens were filed against the owners within the fifteen month period. However, the contractor was not joined as a party until sixteen months after the liens were filed. In each case, the joining of the contractor by leave of the court after the statutory period had expired, constituted a new cause of action which was barred. *Simpson et al* v. *J. W. Black Lbr. Co., supra.*

Appellees argue that the amendment did not come too late because the Federal Bankruptcy Act tolled our statute of limitations. The section of that act relied on by appellees is 11 U.S.C. § 29 (f):

> The operation of any statute of limitations of the United States or of any state, affecting the debts of a bankrupt provable under this title, shall be suspended during the period from the date of the filing of the petition in bankruptcy . . . (3) until thirty days after dismissal of the bankruptcy proceeding. . . .

Appellants stipulated to the existence of a bankruptcy proceeding involving Kymes. The stipulation appears in the *Reed* case and is referred to and incorporated in the *Dollar* case.

> The court: Well, so far as this proceeding is concerned in this claim and other cases involved here, the court is going to rule that if either there is a stipulation or proof that Kymes is in bankruptcy and that bankruptcy court had issued its usual injunction against bringing lawsuits against him.
>
> Mr. Rasmussen: We'll stipulate that provided that there is a date as to discharge from bankruptcy. [That date was provided which was several months before appellees' petitions to foreclose their asserted liens were instituted.]

Appellees rely on that stipulation as being sufficient to invoke the tolling provision of the Bankruptcy Act. However, we note that the "usual injunction" issued by the Bankruptcy Court in the Kyme proceeding temporarily enjoined all creditors in that court proceeding from attempting the collection of their claims and stayed their pending suits. We do not construe the stipulation as being sufficiently comprehensive to include appellees. Unless appellees were listed as creditors in the bankruptcy proceeding, they cannot utilize the tolling provision, 11 U.S.C. §29 (f), *supra*. The stipulation and the record, including the appellees' pleadings, are void of any proof that appellees themselves were listed creditors. The court will not extend a stipulation beyond its terms nor construe a waiver of a right not plainly intended to be relinquished. See *In Re Carroll,* 247 So. 2d 350 (Ala. 1971), and *Griego* v. *Hogan,* 71 N. M. 280, 377 P. 2d 953 (1963). Appellees misplace the burden of proof. They shouldered

the responsibility of demonstrating their status as listed creditors, since the burden falls on the party attempting to toll a statute of limitations. *Taylor* v. *Merchants National Bank, Ex'r.*, 236 Ark. 672, 367 S.W. 2d 747 (1963).

Since the contractor, a necessary party to both actions, was not joined within the statutory period, we must reverse the judgments and dismiss the causes. Therefore, it becomes unnecessary to discuss other contentions asserted by appellants for reversal.

Reversed and dismissed.

THE SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT *v.* GUY HAMILTON JONES, SR.

73-121 499 S.W. 2d 619

October 8, 1973

PER CURIAM

Now on this day, the above styled cause comes on for hearing and is considered by the court on the pleading filed by respondent, Guy Hamilton Jones, Sr., on July 30, 1973, and the Reply filed to such pleading by the Supreme Court Committee on Professional Conduct on September 9, 1973.

Respondent, in his Response, avers that there are unique, extenuating and mitigating facts and circumstances that would bear on whether petitioner's petition should be granted, and that he should be given the opportunity to present evidence to establish such circumstances.

After due consideration of the pleadings filed by both petitioner and respondent, it is the opinion of the court that the request of respondent should be granted, limited, however, as hereinafter set out. Under Paragraph 11, in Sub-sections A, C, and D, respondent mentions matters which relate only to the charges against him, and his conviction in the United States District Court for the District of Arkansas (Eastern District, Western Division), and these allegations, referring only to matters that have already been adjudicated and disposed of, are not considered proper subjects for further testimony. In other words, it is not the intent of this order to permit any evidence relating to the issues there concluded.

Respondent may offer evidence under Sub-sections B, E, F, G, H, I, and J, which might be deemed pertinent to the issue of mitigation.

It is, therefore, the order of this court that respondent, Guy Hamilton Jones, Sr., be permitted to offer evidence on the matters set out under the sub-sections hereto-

fore mentioned, but he is not permitted ot offer any evidence under Sub-sections A, C, and D.

For the purpose of conducting such a hearing, W. D. Murphy, an Attorney of Batesville, is hereby named as Master of this court and said Master is authorized and directed to take testimony offered by respondent, and to take testimony offered in opposition thereto by The Supreme Court Committee on Professional Conduct in an open and public hearing, each side to be represented by counsel who shall have the full right to examine and cross-examine as in any trial in a court of law or equity. Said hearing shall be conducted in a location or locations convenient to the Master, shall be reported by a competent reporter selected by the Master, and shall be concluded not later than sixty days from the entry of this order. At the conclusion of the hearing, said reporter shall transcribe the testimony and a record of same shall be filed with this court by the Master.

Thereafter, briefs shall be filed in accordance with Rules 7 and 9 of this court, respondent Guy Hamilton Jones, Sr., filing in accordance with Sub-section (a) of Rule 7, petitioner, The Supreme Court Committee on Professional Conduct, filing in accordance with (b), and respondent being permitted to file reply brief in accord with Sub-section (c).

Costs will be adjudged as in chancery court.

It is so ordered.

Justice Byrd would permit a proffer of what respondent wished to show under Sub-sections A, C, and D of Paragraph 11.

HAROLD SHERMAN UPTON *v.* STATE OF ARKANSAS

5820 502 S.W. 2d 454

Supplemental opinion delivered December 24, 1973

[Original opinion delivered July 23, 1973,

Camp & Thornton, P.A., and *James J. Calloway,* for appellant.

Jim Guy Tucker, Atty. Gen., by: *O. H. Hargraves,* Deputy Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. In our substituted opinion on rehearing in this case, delivered on July 23, 1973, we reversed the judgment because the State had been allowed to introduce inadmissible hearsay evidence. In due course our mandate was issued, remanding the case to the circuit court "for further proceedings to be therein had according to law, and not inconsistent with the opinion herein delivered."

Thereafter Upton filed in the trial court a motion to dismiss the information, on the ground that the case had not been remanded for a new trial. The trial court overruled that motion. Upton then filed a petition for habeas corpus in the United States District Court, reasserting the same point. Judge Oren Harris, to whom the petition was presented, suggested that the Attorney General seek

a clarification of our opinion. Such a request for clarification is now before us. The time for a response to the Attorney General's petition has expired without any response having been filed, but we have studied Upton's petition for habeas corpus and the supporting brief that was filed by his counsel in the federal court.

Upton contends that this court did not remand the case for a new trial, because our opinion ended with the word "Reversed" instead of "Reversed and remanded" or some similar phrase. We customarily use the terms interchangeably; so that no significance attaches to either one. We frequently end our opinions with the word "Reversed" even though the opinion itself shows that a new trial is contemplated. Among countless such opinions in our Reports, recent examples include *Courtney* v. *State,* 252 Ark. 620, 480 S.W. 2d 351 (1972); *Morris* v. *State,* 252 Ark. 487, 479 S.W. 2d 860 (1972); *Swanson* v. *State,* 251 Ark. 147, 471 S.W. 2d 147 (1971).

It is argued that our opinion in the case at bar should be construed as directing a dismissal of the information, in the light of § 12 of Act 333 of 1971, which reads:

> A conviction shall be reversed and a new trial ordered where the Supreme Court finds that the conviction is contrary to the Constitution, the laws of Arkansas or for any reason determines that the appellant did not have a fair trial. Where appropriate, the Supreme Court shall reverse the conviction and order the appellant discharged. In all other cases, the conviction must be affirmed, but the sentence of the appellant may be reduced if it is deemed excessive. [Ark. Stat. Ann. § 43-2725.2 (Supp. 1971).]

We do not read the statute as having anything to do with the manner in which this court writes its opinions —a matter not falling within the authority of the legislative branch of the government. *Vaughn* v. *Harp,* 49 Ark. 160, 4 S.W. 751 (1886). But even if we did so interpret the statute, it states plainly that the court, where appropriate, shall order the appellant discharged. We did not enter such an order. To the contrary, our mandate remanded the cause for further proceedings, which completely answers Upton's present contention.

HARRIS, C.J., not participating.

In The Matter of Uniform Docketing Rule

73-240

December 24, 1973

PER CURIAM

Effective January 1, 1974 the following is adopted as Rule 15 of the Uniform Rules of Procedure for Circuit, Chancery and Probate Courts.

RULE 15

At the discretion of the presiding judge the following may be adopted as a uniform docketing rule of the court:

DOCKET NUMBERING

CIVIL DOCKETS

Civil cases shall be assigned docket numbers in the order of filing as follows:

Beginning with the first case filed each year in each court, the last two digits of the current year shall be entered followed by a hyphen and the number assigned to the case beginning with the number "1". Thus, the first case filed in 1974 will be assigned the docket number "74-1" and the first case filed in 1975 will be assigned the docket number "75-1". In those instances where the presiding judge is of the opinion that further identification is desirable the letters "CIV" preceding the docket number for civil cases in Circuit Court, the letter "E" preceding the docket number for cases filed in Chancery Court, and the letter "P" preceding the docket number for cases filed in Probate Court may be used.

CRIMINAL DOCKETS

The procedure to be used for criminal cases shall be the same as that for civil cases except that the docket number shall be preceded by the letters "CR"; thus the

first criminal case filed in the year 1974 will be designated as "CR-74-1" and the first criminal case filed in the year 1975 will be designated as "CR-75-1".

COURTS OF LIMITED JURISDICTION

All County, Juvenile, Municipal, City, Police, Justice of the Peace Courts and Courts of Common Pleas shall follow the docketing procedure set forth above for Circuit, Chancery and Probate Courts.

PER CURIAM

In compliance with the motion adopted by the Arkansas Judicial Council on October 12, 1973, whereby said Council approved the Code of Judicial Conduct [with the second alternate Canon 5C (2)] adopted by the House of Delegates of the American Bar Association on August 16, 1972, this Court declares that such Code constitutes proper standards for the Judiciary of this State. The reports of compensation required by Canon 6 of the Code should be filed annually during the month of June, for the preceding calendar year, with the Clerk of the Arkansas Supreme Court, Justice Building, Little Rock Arkansas, 72201.

BYRD, J., dissents.

CONLEY BYRD, Justice, dissenting. I dissent to the action of this court in adopting the Judicial Code as a standard of conduct for judges and in fixing a time and place for the filing of the financial reports required by the Judicial Code. Such action on the part of this court is not authorized by the Constitution—in fact as I read the Constitution such action is prohibited. Article 4, of the Constitution of Arkansas provides:

> "§ 1. DEPARTMENTS OF GOVERNMENT.—The powers of the government of the State of Arkansas shall be divided into three distinct departments, each of them to be confided to a separate body of magistracy, to wit: Those which are legislative to one, those which are executive to another, and those which are judicial to another.
>
> "§ 2. SEPARATION OF DEPARTMENTS.—No person, or collection of persons, being one of these departments, shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted."

The only other provisions of our Constitution giving any jurisdiction and power to the Supreme Court are Article 7, § 4 and amendment 28. Article 7, § 4 provides:

> "JURISDICTION AND POWERS OF SUPREME COURT.—The Supreme Court, except in cases otherwise provided by this Constitution, shall have appellate jurisdiction only, which shall be coextensive with the State, under such restrictions as may from time to time be prescribed by law. It shall have a general superintending control over all inferior courts of law and equity; and, in aid of its appellate and supervisory jurisdiction, it shall have power to issue writs of error and supersedeas, certiorari, habeas corpus, prohibition, mandamus and quo warranto, and, other remedial writs, and to hear and determine the same. Its judges shall be conservators of the peace throughout the State, and shall severally have power to issue any of the aforesaid writs."

Amendment 28 provides:

> "The Supreme Court shall make rules regulating the practice of law and the professional conduct of attorneys at law."

In *Parker* v. *Laws,* 249 Ark. 632, 460 S.W. 2d 337 (1970), I pointed out in my concurrence that this court has no authority under Article 7, § 4 to discipline judges —the discipline of judges is reserved to the General Assembly under the provisions on impeachment. Amendment 28 applies by its own provisions only to "the practice of law and the professional conduct of attorneys at law". By the decisions of this court it does not permit the investigation of the conduct of a trial judge.

While I agree that the "Judicial Code" is worthy of adoption by this state as a standard of conduct for judges, it appears to me that we are violating Article 4, § 2 and usurping a power reserved to the legislative body by promulgating a rule that would lead the public to believe that judges are obligated by rule of this court to comply therewith.

Even if the per curiam adopting the "Judicial Code" be considered only as a guide to judicial conduct and not as a rule of judicial conduct, still we are giving the

appearance of legislating and with some logic can be accused of legislating contrary to the Constitution. If this country is to remain a "nation of laws" then those in authority (especially those with whom "the buck stops") must not only comply with a constitutional mandate but also with the spirit thereof.

For the reasons stated, I respectfully disagree with the foregoing per curiam adopting the "Judicial Code."