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Bill C. NELSON II *v.* STATE of Arkansas

CR 74-26 513 S.W. 2d 496

Opinion delivered September 16, 1974

Sam Sexton, Jr., by: *Jim D. Spears,* for appellant.

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

CARLETON HARRIS, Chief Justice. Bill C. Nelson II was convicted of slaying his wife, Virginia S. Nelson, the jury giving him life imprisonment for first degree murder. From such conviction, appellant brings this appeal. For reversal, six points are asserted, which we proceed to discuss, though not in the order set out by appellant.

It is contended that the court erred in overruling appellant's motion for a directed verdict as to the charge of first degree murder because of insufficiency of the evidence.

We do not agree. The evidence reflected that Nelson was estranged from his wife at the time of the shooting; that on the Thursday before the shooting (which occurred around midnight on Saturday), appellant called Laura Spaulding, a

friend of his wife, and asked if his wife had been seeing her first husband, stating, "if he saw them out together he would blow their heads off"; that on the next day, Nelson went to the apartment of Mrs. Spaulding, his wife being present, and though not getting into the apartment, argued with his wife from the outside, then left, after which Mrs. Nelson called the police. Nelson again returned to the apartment on Saturday afternoon, looking for his wife's ex-husband, went through various rooms, argued with his wife, and Mrs. Spaulding requested him to leave. The witness and Mrs. Nelson left the apartment to meet some friends, and upon returning around midnight, found Nelson crouched beside the fence with a rifle. He ordered them into the house. There, in the presence of seven other persons, appellant raised his gun, cocked it, and shot his wife to death. There was testimony that he remarked, "I came, I did what I intended to do" and left. There was also evidence, which will be more fully discussed in the next paragraph, to the effect that Nelson had taken out an insurance policy on his wife, to which she objected, about two weeks before the shooting. Of course, the evidence was sufficient to sustain the conviction, even without the testimony relating to insurance.

W. H. Weldon, manager of an insurance company, who was Nelson's last employer, testified that appellant had written a policy of life insurance on his wife in the amount of $10,000. Weldon said this was a "joint policy", both Nelson and his wife being the other's beneficiary. The witness said that a sales promotion campaign was in progress, with extra rewards to be given to salesmen who were successful during the campaign. Guy Morrow, a brother-in-law of Mrs. Nelson, testified that he was at the Nelson home when the insurance policy was discussed and that Mrs. Nelson did not seem pleased. He said that he overheard Nelson say "that if she didn't sign the policy, he was going to be very irritated and there would possibly be some family problems." Subsequently, he testified that Nelson "kind of laughed and said, 'Well, I just may kill her and collect the money myself.' "

Counsel for appellant argues that this testimony was not relevant in any way "other than upon some wild theory as to possible motive for murder." Counsel contends that the State's attorney did not offer this evidence in good faith, knowing that the policy was sold during a sales campaign

and that all the company salesmen were being encouraged to take out these policies. We do not agree with this statement. While it appears from the record that jealousy was the primary motive for the shooting, the fact remains that there can be more than one motive and the prosecuting attorney was justified in offering this evidence to the jury. After all, it is the function of that body to determine what facts are significant or not significant, and whether the fact under discussion had any bearing on the killing.

Appellant argues that the court erred in permitting jurors to ask questions of the witnesses. This happened about a half dozen times, and the judge was very careful to tell each witness not to answer until he had held the question to be proper. A detailed discussion of this point is unnecessary since in the case of *Ratton* v. *Busby,* 230 Ark. 667, 26 S.W. 2d 889, we held to the contrary, citing 58 Am. Jur. Witnesses, § 558 with approval to the effect that it is not error for a trial judge to give the jury permission to interrogate a witness without any special request from them so long as the questions asked are germane to the issue. In the case before us, as previously stated, the court was quite careful in determining that only proper questions were propounded and we see no abuse of discretion.

It is asserted that the court erred in permitting the prosecuting attorney to ask leading questions on re-direct examination. Six questions are listed, all of which, with the possible exception of one, we would not class as leading questions, but even if some of the questions could be considered in that category, we certainly can find no prejudice.

It is argued that on four occasions, the trial court erred in limiting defense counsel's cross-examination. Though we permit a full cross-examination of witnesses upon subjects mentioned in the examination in chief, we have held numerous times that the scope and extent of such examination are largely discretionary with the trial court. See *Bartley and Jones* v. *State,* 210 Ark. 1061, and cases cited therein. The first instance mentioned by appellant refers to several questions asked the witness relative to the expression on appellant's face when he shot his wife. The witness had already answered several times that she did not observe Nelson's face when he fired the shot and the court was merely

curtailing repetition. This was not an abuse of discretion. See *Vaughn* v. *State,* 252 Ark. 260, 478 S.W. 2d 759. While examining this witness, counsel also asked, "Mrs. Spaulding, is the reason you couldn't see his face, as you sit in the witness chair and you think about it, you know that at the time the shot was fired Bill Nelson had no awareness that the shot was being fired?" The court did not permit the question, stating to counsel that he was "testifying". As we said in *Woodruff Electric Coop.* v. *Daniel,* 251 Ark. 468, 472 S.W. 2d 919, "Even though the cross-examiner has the right to ask leading questions, this does not accord him the right to in effect testify by making statements."

The second instance mentioned by appellant refers to the cross-examination of Ronnie Bogard, a young man of teen-age, who was present in the room when the shot was fired. On the original cross-examination, Bogard was asked if there were changes in the way Nelson appeared insofar "as the look that he had." Bogard answered that he had the same look until just before he fired the shot when "he kind of got a mean look on his face, and then did it." The next question on cross-examination was, "Did he have a wild look in his eye?" Counsel never during the balance of the cross-examination referred to the statement by Bogard relative to the "mean look". The apparent purpose of the cross-examination of Bogard was to support the contention of insanity, and an extensive examination was conducted of the witness for that purpose.

The last question asked on cross-examination was, "Ronnie, can you describe for the jury what Bill Nelson looked like at the time of this shooting?", to which the witness replied, "I'd say about two seconds before and right after he had did it, he looked like he went into some kind of a trance, like his mind went blank or something." Counsel then stated, "No further questions." On re-direct, when asked to describe the physical features of Nelson, Bogard again mentioned that appellant looked "mean". On re-cross, several questions were asked about the expressions "mean", "trance", and "blank". The court finally halted this examination, and we certainly find no abuse of discretion. In the first place, it appears that the subject was fully covered and the witness's answers were only a reiteration of earlier testimony. In the next place, the "mean" expression was used by the witness in

his original cross-examination and no further questions asked. Likewise, the "trance" expression was used by the witness in the original cross-examination and no further questions asked. As pointed out in 98 C.J.S. Witnesses, § 429, p. 237:

> "As a general rule, recross-examination is not allowable as a matter of right; the question of permitting recross-examination, and the scope and extent thereof, are in the sound discretion of the trial court, whose action will not be disturbed unless an abuse of discretion is shown."

The next instance mentioned by appellant as to curtailment of cross-examination relates to a question asked as follows:

> "Q. Mr. Carruth, did he, Mr. Cowan, advise you that it appeared to him that Mr. Nelson did not know that the shot was fired at the time it was fired, and that he was shocked after discovering that Mrs. Nelson had been shot?"

The court sustained an objection, holding that the evidence was hearsay. Counsel for appellant agrees that such testimony was hearsay but contends that it was admissible as part of the *res gestae*. Cowan was one of the people present when the shooting occurred and Carruth was the first police officer to arrive. This officer questioned the various witnesses to the shooting and this was the basis of the question asked him by counsel. We agree with the State that Cowan's statement was not a part of the *res gestae*. For one thing, though it is indefinite as to when Carruth arrived and the statement was made, it is certain, as pointed out by the State, that if such a remark were made, it was not earlier than five to ten minutes after the shooting occurred and probably much later. In *Liberty Cash Growers, Inc.* v. *Clements,* 193 Ark. 808, 102 S.W. 2d 836, we held that remarks made by a truck driver in an action to recover damages for negligence were not a part of the *res gestae* when the remarks were made five minutes after the accident, this court stating that the remarks constituted what the witness said about the act, rather than the act speaking for itself. The statement by Cowan was simply a response to

questions from the officer and constituted only a narrative of a past occurrence. Cowan had testified during cross-examination that he had "okayed" a written statement by his wife which included a comment that Nelson had looked shocked that he had shot Mrs. Nelson. Cowan, when asked if he was agreeing that Nelson looked shocked replied, "No, not really. I just don't really know what he looked like." However, the questioning of Carruth was not for the purpose of testing Cowan's credibility, and, in fact, the court mentioned that if counsel subsequently ascertained that Cowan had made statements to Carruth different from his (Cowan's) testimony, Carruth could be placed back on the stand by appellant for the purpose of showing that fact. At any rate, we hold that this statement was not a part of the *res gestae,* and was therefore inadmissible as hearsay evidence.

The last contention of improper limitation on cross-examination refers to a question asked Officer Harvey of the Fort Smith Police Department as to whether it was "a matter of common knowledge in the police department that Bill Nelson was undergoing psychiatric care." Nelson was a former police officer, and of course the other officers were acquainted with him. Harvey answered that he had "heard statements to that effect", but had no personal knowledge of that fact. He was then asked:

> "Q. Let me ask you this. Did anybody ever say to the Chief or Assistant Chief, 'look, here's a man who's under psychiatric care. Is this what we really need on the Police Department?' "

An answer to this question would have been inadmissible for more than one reason, and certainly was not proper recross-examination since it did not relate to anything asked on redirect examination.[1]

Finally, it is asserted that the court erred in refusing to permit medical librarians to read from medical records which had been offered into evidence by appellant. These records

[1]Harvey had originally testified that he had overheard an argument between Mr. and Mrs. Nelson at their former apartment. On re-direct examination, two questions were asked, first, the date that Harvey visited the apartment, and second, if this occurred before Nelson "went into the hospital." Appellant contends that the reference to "hospital" permitted the question herein under discussion.

were offered as a matter of furthering the defense of insanity and appellant desired that the hospital employees read *inter alia* the dates of several brain concussions suffered by appellant, medication prescribed, final diagnosis, and summary of the hospitalizations. The records were properly offered under the provisions of Ark. Stat. Ann. § 28-928—929 (Repl. 1962), but this fact in itself does not necessarily mean that all the contents of such records were relevant or competent. In *Royal Service* v. *Whitehead Construction Co.,* 254 Ark. 234, 492 S.W. 2d 423, we stated that though certain business records may be admissible in evidence under the provisions of the statute just mentioned, said statute does not make such evidence either material or relevant. Appellant achieved his purpose in offering these records, for the matters heretofore mentioned, with the permission of the court, were not only fully discussed by Mr. and Mrs. Nelson, parents of appellant, but by both the psychiatrist who testified for the defense, and the psychiatrist who testified for the State. The several concussions and circumstances surrounding were related to the jury in detail, and we cannot say that the mere reading of such records by non-experts would have added anything of value to the evidence. Even if the ruling of the court had been erroneous, no possible prejudice could have resulted.

A reading of the record clearly reflects that the trial court carefully tried this case, rendered the rulings complained of only after studied thought, and conducted the proceedings with thorough competence and impartiality.

Affirmed.

George Buddy WILLIAMS *v.* STATE of Arkansas

CR 74-58 513 S.W. 2d 793

Opinion delivered September 16, 1974

[Rehearing denied October 14, 1974.]

Booth & Wade, for appellant.

Jim Guy Tucker, Atty. Gen., by: *O. H. Hargraves,* Dep. At-

ty. Gen., for appellee.

FRANK HOLT, Justice. A jury convicted appellant of the crime of maiming (Ark. Stat. Ann. § 41-2502 [Repl. 1964]) and imposed a sentence of seven years in the Department of Correction. We first consider appellant's contention for reversal that the court erroneously permitted two officers to testify about certain statements made to them by the appellant preceding the alleged offense. We find no merit in this contention.

Each of these officers testified that the appellant came by the jail where they were working and in a conversation voluntarily stated to them that he was "mad" and intended to "hurt" the prosecuting witness that night. Appellant asserts that this evidence was inadmissible since it contravenes *Miranda* v. *Arizona,* 384 U.S. 436 (1966). Clearly that case only requires that a person "taken into custody or otherwise deprived of his freedom of action in any significant way" be advised of his constitutional rights "when questioning" is "initiated by law enforcement officers." We have said that *Miranda* is not to be so interpreted that a defendant cannot "voluntarily open his mouth." *Hammond and Evans* v. *State,* 244 Ark. 1113, 428 S.W. 2d 639 (1968). It is uncontradicted, in the case at bar, that the appellant volunteered to the officer-witnesses his immediate plan to commit an assault upon the prosecuting witness. It follows *Miranda* is not applicable.

Neither can we agree with the appellant that his oral statements to these officers are within the scope of our recently enacted discovery statute. Ark. Stat. Ann. § 43-2011.2 (Supp. 1973). This statute reads in pertinent part:

> Upon motion of a defendant the court may order the prosecuting attorney to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant, or copies thereof, within the possession, custody or control of the state, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney. . .

Therefore, the trial court correctly ruled the discovery statute is inapplicable in the case at bar.

Neither can we agree with appellant's contention that

the trial court abused its discretion in refusing to grant appellant's motion for a continuance when it was learned on the day of the trial that the state would introduce evidence through these two officer-witnesses that the appellant had told them he intended to harm the prosecuting witness. It appears that the prosecuting attorney promptly advised the appellant's counsel as quickly as he learned that appellant's inculpatory statements were made to these two officers. Suffice it to say that appellant was furnished, as requested, the names, addresses and occupations of the two witnesses in advance of the trial. Appellant had adequate opportunity to interrogate these witnesses with reference to any knowledge they had relating to the alleged offense. It is well settled that the granting of a continuance is within the sound discretion of the trial court. *Thacker* v. *State,* 253 Ark. 864, 489 S.W. 2d 500 (1973); and *Perez* v. *State,* 236 Ark. 921, 370 S.W. 2d 613 (1963). In the case at bar, the appellant has not demonstrated that the trial court abused its discretion.

The appellant also contends that the court abused its discretion in admitting a broken wine bottle into evidence because it was not adequately linked to the alleged crime. We do not agree. One day following the commission of the alleged offense, a broken wine bottle was removed from the scene of the crime. The victim testified that he and the appellant lived at the same residence and that appellant came into his room and cut him with a broken wine bottle. Their landlady testified that she saw the appellant holding a bottle of wine before the offense was committed and immediately afterwards she saw a broken bottle in the room. The broken bottle was relevant to the theory of the state's case and tended to prove the matter in issue in support of the victim's credibility. *Williams* v. *State,* 250 Ark. 859, 467 S.W. 2d 740 (1971); *Gross* v. *State,* 246 Ark. 909, 440 S.W. 2d 543 (1969); and 22A C.J.S. Criminal Law § 601.

Appellant also contends that the court erred in permitting the victim to testify because he was incompetent. We need not consider this contention inasmuch as there was no objection which is required by § 43-2725.1 and it is raised for the first time on appeal. *Ford* v. *State,* 253 Ark. 5, 484 S.W. 2d 90 (1972). Furthermore, the trial court conducted a hearing in chambers and found the witness to be competent inasmuch as he testified that he understood the nature and obligation of

an oath and he would be subject to punishment for false swearing. This comports with the proper standard. *Keith* v. *State,* 218 Ark. 174, 235 S.W. 2d 539 (1951); and *Allen* v. *State,* 253 Ark. 732, 488 S.W. 2d 712 (1973). Also trial courts are given broad discretionary powers in determining the competency of a witness and we do not find error unless there is demonstrated a clear abuse of that discretion. *Allen* v. *State, supra;* and *Ray* v. *State,* 251 Ark. 508, 473 S.W. 2d 161 (1971). In the case at bar, we certainly cannot say the court abused its discretion.

It is next contended that the trial court erred in permitting prejudicial cross-examination of the appellant. The appellant was asked on cross-examination if he had committed certain other criminal acts. We have consistently approved the format of this type of questioning on cross-examination, when asked in good faith, to test the credibility of the witness, the state being bound by the answer. *Butler* v. *State,* 255 Ark. 1028, 504 S.W. 2d 747 (1974). In the case at bar we find no prejudicial cross-examination is demonstrated by any questions propounded.

Finally, it is asserted by the appellant that the evidence is insufficient to support the verdict. In determining the sufficiency of the evidence upon appellate review, it is only necessary to ascertain that evidence which is most favorable to the appellee and if any substantial evidence exists then we affirm. *Murphy* v. *State,* 248 Ark. 794, 454 S.W. 2d 302 (1970). The state adduced evidence that the appellant made statements that he was going to harm the prosecuting witness a short time before he did so. Appellant was observed holding a wine bottle and drinking from it at the scene of the crime a short time before it occurred. Appellant was angry and broke into the prosecuting witness' room. The prosecuting witness testified that the appellant cut him several places about his body with a broken bottle resulting in the loss of an eye. Immediately following the crime the prosecuting witness was found bleeding profusely from his wounds and blood, broken glass and a broken bottle were observed at the scene. Certainly this evidence is amply sufficient without detailing further evidence to sustain the jury's verdict.

Affirmed.

Lois ROGERS *v.* STATE of Arkansas

CR 73-141 513 S.W. 2d 908

Opinion delivered September 16, 1974
[Rehearing denied October 21, 1974.]

Kenneth C. Coffelt, for appellant.

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

FRANK HOLT, Justice. Appellant was convicted by a jury of possessing stolen property and his punishment was assessed at five years imprisonment in the Department of Correction. We affirmed. *Rogers* v. *State,* 250 Ark. 572, 466 S.W. 2d 252 (1971). Pending his appeal, appellant was released to serve a federal prison sentence. Upon being paroled he was returned to the proper state authorities, pursuant to a detainer, to serve the previously imposed state sentence. At that time eleven of the twelve trial jurors asked the court by written petition to suspend the three year old judgment. These jurors personally appeared before the court in support of their petition. During this hearing, one of the jurors testified that she had consistently voted for the minimum sentence of one year. However, in the belief that a majority vote of the jurors controlled, she agreed to the five year verdict. The trial court refused to suspend the sentence. Thereupon the appellant filed a motion to vacate the judg-

ment and set aside the jury verdict on the basis of this juror's testimony. On appeal from a denial of that motion, appellant asserts that the jury verdict was invalid and a nullity because the juror's testimony is uncontradicted that she agreed to the verdict in the belief that "she thought the majority ruled." Consequently, appellant argues the verdict was not unanimous. We cannot agree.

Ark. Stat. Ann. § 43-2204 (Repl. 1964) reads:

> A juror cannot be examined to establish a ground for a new trial; except it be to establish, as a ground for a new trial, that the verdict was made by lot.

A verdict by lot is defined as involving an element of chance. *Blaylack* v. *State,* 236 Ark. 924, 370 S.W. 2d 615 (1963); *Speer* v. *State,* 130 Ark. 457, 198 S.W. 113 (1917). See also *Strahan* v. *Webb,* 231 Ark. 426, 330 S.W. 2d 291 (1959); *Patton* v. *State,* 189 Ark. 133, 70 S.W. 2d 1034 (1934); *Arnold* v. *State,* 150 Ark. 27, 233 S.W. 818 (1921); and *Fain* v. *Goodwin,* 35 Ark. 109, (1879). In the case at bar, we cannot construe the juror's testimony as tending to establish that the jury verdict resulted from any element of chance. To hold otherwise would subvert the public policy upon which the statute is based; i.e., shielding the stability and sanctity of a jury verdict. If a juror is permitted to impeach a verdict, as in the case at bar, the juror would be permitted to nullify the solemn action under oath of that juror as well as the other fellow jurors.

Furthermore, it does not appear that the appellant availed himself of the right to poll the jury upon rendition of its verdict to ascertain if the verdict was that of each juror as provided by § 43-2160. The statute provides that the verdict cannot be received if a juror says it is not his veridct. Neither do we deem it of any significance that the juror's testimony was elicited by the state upon cross-examination. The answer was not responsive to the question. Even so, the statute plainly safeguards a jury verdict from impeachment by the testimony in the case at bar.

Affirmed.

James Rupert BYLER *v.* STATE of Arkansas

CR 74-68 513 S.W. 2d 801

Opinion delivered September 23, 1974

Robert A. Newcomb, for Dept. of Correction, for appellant.

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

GEORGE ROSE SMITH, Justice. This is a Rule 1 petition by which the appellant Byler seeks to withdraw his plea of guilty to a charge of second-degree murder, on the grounds that he did not validly waive the assistance of counsel and did not intelligently and voluntarily enter the plea of guilty. The Honorable John L. Anderson, circuit judge, accepted the plea after a brief hearing on April 4, 1973. The Honorable Elmo Taylor, circuit judge, denied Byler's Rule 1 petition after a more extensive hearing on February 2, 1974. This appeal is from the latter order.

We defer for the moment a statement of the facts now before us, because this case can best be understood in the light of fairly recent developments in this area of the criminal law.

A convenient starting point is Rule 11 of the Federal Rules of Criminal Procedure, governing federal district courts. That Rule, as revised in 1966, reads:

> A defendant may plead not guilty, guilty or, with the consent of the court, *nolo contendere.* The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea. If a defendant refuses to plead or if the court refuses to accept a plea of guilty or if a defendant corporation fails to appear, the court shall enter a plea of not guilty. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea. [Federal Rules of Criminal Procedure, Rule 11.]

In *McCarthy* v. *United States,* 394 U.S. 459 (1969), the district court failed to observe the Rule's directive that the judge personally inquire whether the defendant understands the nature of the charge against him and is aware of the consequences of his plea. The Supreme Court held that the omis-

sion entitled the defendant to an opportunity to plead anew. A month later the court refused to make the *McCarthy* rule retroactive. *Halliday* v. *United States,* 394 U.S. 831 (1969).

Another month later, in *Boykin* v. *Alabama,* 395 U.S. 238 (1969), two dissenting judges asserted that the *Boykin* majority had in effect made Federal Rule 11 binding upon the States as a matter of constitutional law. Although we do not construe the *Boykin* majority opinion to be that far-reaching, the court unquestionably held that State trial judges must determine whether pleas of guilty are intelligently and voluntarily made and, further, that such a determination cannot be presumed from a silent record.

The clearest and most detailed discussion of recommended procedures is to be found in the American Bar Association's "Standards Relating to Pleas of Guilty" (1968). In quoting those sections of the Standards that are especially applicable to the case at bar we are not to be understood as making them inflexibly binding, to the letter, upon the trial courts of this State, either retrospectively or prospectively. The draftsmen of the Standards say themselves: "The responsibility of the judge varies, depending upon such circumstances as the complexity and comprehensibility of the indictment and the defendant's intelligence, education, age, and experience." Commentary, Section 1.4(a). Nevertheless, we must observe that compliance with the Standards will go far toward achieving the twofold purpose of (1) assuring justice both to the accused and to the public and (2) minimizing the dreary necessity of having to reconsider in postconviction proceedings points that should have been set at rest when the plea of guilty was accepted.

We quote those parts of Section 1 of the Standards that are particularly pertinent to this case:

> 1.4 Defendant to be advised by court.
>
> The court should not accept a plea of guilty or nolo contendere from a defendant without first addressing the defendant personally and
>
> (a) determining that he understands the nature of the charge;
>
> (b) informing him that by his plea of guilty or nolo contendere he waives his right to trial by jury; and

(c) informing him:

(i) of the maximum possible sentence on the charge, including that possible from consecutive sentences;

(ii) of the mandatory minimum sentence, if any, on the charge; and

(iii) when the offense charged is one for which a different or additional punishment is authorized by reason of the fact that the defendant has previously been convicted of an offense, that this fact may be established after his plea in the present action if he has been previously convicted, thereby subjecting him to such different or additional punishment.

1.5 Determining voluntariness of plea.

The court should not accept a plea of guilty or nolo contendere without first determining that the plea is voluntary. By inquiry of the prosecuting attorney and defense counsel, the court should determine whether the tendered plea is the result of prior plea discussions and a plea agreement, and, if it is, what agreement has been reached. If the prosecuting attorney has agreed to seek charge or sentence concessions which must be approved by the court, the court must advise the defendant personally that the recommendations of the prosecuting attorney are not binding on the court. The court should then address the defendant personally and determine whether any other promises or any force or threats were used to obtain the plea.

1.6 Determing accuracy of plea.

Notwithstanding the acceptance of a plea of guilty, the court should not enter a judgment upon such plea without making such inquiry as may satisfy it that there is a factual basis for the plea.

1.7 Record of proceedings.

A verbatim record of the proceedings at which the defendant enters a plea of guilty or nolo contendere should be made and preserved. The record should include (i) the court's advice to the defendant (as required in section 1.4), (ii) the inquiry into the voluntariness of the plea (as required in section 1.5), and (iii) the inquiry

into the accuracy of the plea (as required in section 1.6).

We turn now to the facts in the case at hand. Byler, a middle-aged man, had only a first-grade education. He cannot read or write. Jimmy Zomant, the victim of the asserted homicide, died of a gunshot wound on March 31, 1973. On April 2 Byler was charged by information with second-degree murder. On April 4 Byler appeared before the court without counsel and pleaded guilty. The hearing, transcribed upon less than three typewritten pages, could hardly have taken more than five minutes. Before pleading guilty Byler was asked nine questions, all of which he answered either "Yes, sir," or "No, sir." There was no testimony.

Seven of the nine questions had to do with the appointment of an attorney for Byler and are not now directly pertinent. By his responses Byler acknowledged that he did not have an attorney, that he understood that the court would appoint one for him, that he did not want an attorney, and that he waived his right to have one.

The other two questions, the first being dual in form, were the only inquiries touching upon whether Byler's plea of guilty was intelligently and voluntarily made. Both questions were put by the prosecuting attorney, not by the court:

> Mr. Raff: Mr. Byler, do you understand the elements of the charge against you? Do you understand what your defenses would be?
>
> Mr. Byler: Yes, sir.
>
> * * * * *
>
> Mr. Raff: You also understand, sir, that you are waiving your constitutional right to a trial by jury to determine the issues that are involved and the charges that have been brought against you? You understand that, too, don't you, sir?
>
> Mr. Byler: Yes, sir.

Byler than pleaded guilty. The court, upon the prosecuting attorney's recommendation, sentenced Byler to imprisonment for ten years. No statement or explanation of the minimum or maximum penalty had been made.

It is apparent that the court's procedure in accepting Byler's plea of guilty did not meet the minimum requirements laid down in *Boykin* v. *Alabama, supra,* much less the more detailed safeguards contemplated by the quoted Standards. The key question is whether the deficiencies were supplied by the record made at the second hearing.

At that hearing Byler, testifying in his own behalf, asserted on direct examination that he could not read or write, that he had been knocked in the head shortly before the earlier hearing and didn't know what he was saying, that he had been arrested for a felony in 1946, that he did not know the lesser included offense(s) in the charge of second-degree murder, that he did not understand the law of self-defense, and that before entering the plea of guilty he had not had an opportunity to discuss the charge with an attorney.

On cross-examination Byler admitted that he was convicted of first-degree murder in 1946. (That conviction was reversed and the cause remanded for a new trial. *Byler* v. *State,* 210 Ark. 790, 197 S.W. 2d 748 [1946]. The present record is silent as to the further proceedings in that case.) Byler acknowledged that he had a lawyer in the earlier case and that he understood, in the cross-examiner's words, "what the elements of murder were, what you were accused of, and what that meant . . .?" Byler's answer: "Yes, sir."

The court then questioned Byler, who supplied a few details about the 1946 trial, such as the surnames of his lawyer and of the prosecuting attorney. The court then asked about the present charge of second-degree murder. Byler was evasive, saying that he had been knocked in the head "at the party when it happened" and that he had been drinking; but the fact remains that the record contains no admission by Byler, other than his plea of guilty, that he actually committed the crime with which he was charged. See section 1.6 of the quoted Standards.

At the close of the hearing Judge Taylor stated his findings that Byler, though illiterate, was not ignorant and was smarter than he pretended to be; that Byler knew what he was doing when he waived his right to an attorney; and that his statement about having been knocked in the head (which

was disputed by the jailor) was untrue. Those findings are amply supported by the proof.

The difficulty is that the trial court made no finding whatever upon the second point raised by Byler's Rule 1 petition and argued by his attorney at the hearing; that is, that Byler's plea of guilty was not made intelligently and voluntarily. The omission is readily understandable, for the record falls fatally short of meeting even the minimum showing required by the *Boykin* decision. Byler actually received no information at all at the first hearing. No one explained to him such essential but difficult legal matters as the definition of second-degree murder, the defenses to that charge, or its lesser included offenses. There is nothing even to hint that he was aware of the minimum or maximum penalty for the offense charged. No facts were brought out either with regard to the asserted homicide or with regard to Byler's part in it.

In this court the State argues simply that Byler, even though illiterate, must have known all those things, because he was found guilty of first-degree murder 27 years before the second homicide took place. Upon the meager record before us such a conclusion could be reached only by means of speculation and guesswork. No such finding was made by the trial court, undoubtedly because the State adduced no proof to support such a conclusion. In the light either of the *Boykin* ruling or of the cited Standards we can find no basis for denying the appellant's Rule 1 petition.

The judgment is reversed and the cause remanded with directions that the appellant be permitted to withdraw his guilty plea, with such further proceedings as may be appropriate.

HARRIS, C. J., and BYRD, J., dissent.

Sherrill AVANTS *v.* STATE of Arkansas

CR 74-83 513 S.W. 2d 805

Opinion delivered September 23, 1974

Robert A. Newcomb, for appellant.

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

LYLE BROWN, Justice. This appeal is from a conviction of first degree rape for which a thirty-year sentence was imposed. Only those facts which are pertinent to a discussion of the points for reversal need be related.

Point I. *The refusal to grant appellant's motion to dismiss denied*

him a right to a speedy trial. Appellant was charged on November 11, 1973, and held without bail. Trial was set for February 4, 1974, but was postponed at the request of the State and rescheduled for March 4, 1974. Again the trial was postponed at the request of the State and rescheduled for March 26, 1974. As a result of the recited continuances appellant filed a motion to dismiss for failure of the State to give him a speedy trial. [Appellant does not contend our statute restricting the number of court terms that an accused may be incarcerated before trial was violated. Ark. Stat. Ann. § 43-1708 (Repl. 1964).] The court denied the motion but directed that appellant be released on his own recognizance awaiting a trial date. See *Ray* v. *State,* 254 Ark. 74-B, 491 S.W. 2d 585 (1973).

Appellant makes no showing of prejudice as a result of the continuances. He did not attempt to show that the continuances were granted without good cause. Furthermore, the time spent in jail awaiting trial was credited against his sentence. Lapse of time between the filing of the charge and the trial date is only one factor to be considered in passing on the question of whether the constitutional right to a speedy trial has been violated. An important factor is a showing of prejudice. *Barker* v. *Wingo,* 407 U.S. 514 (1972). The point is without merit.

Point II. *The trial court erred in allowing non-expert witnesses to give opinion testimony as to whether a stain on a jacket was blood and whether an object was a human tooth.* Appellant left his jacket in the car of the prosecuting witness. It was introduced in evidence without objection. When the prosecuting witness identified the jacket she pointed out blood stains thereon. There was no objection to the testimony. Later in the course of the trial, the husband of the prosecuting witness identified the stains as being blood, to which appellant objected. If it was error to permit the husband to identify the stain as blood it was harmless error because the jacket had already been introduced and the prosecuting witness had been permitted to identify the stains as blood. *Eddington* v. *State,* 225 Ark. 929, 286 S.W. 2d 473 (1956).

The prosecuting witness testified that in the course of her resistance she struck appellant in the mouth with a wrench. She examined her car the next morning and found a tooth. Appellant testified he had lost a tooth that night but

insisted that it was knocked out in a scuffle with a male friend. The prosecuting witness was permitted to exhibit the tooth and to testify it was the one she found. Appellant contends the tooth could only be identified as a human tooth by an expert witness. The prosecuting witness testified she knocked out one of appellant's teeth and that appellant complained to her that he lost a tooth in the scuffle. Expert testimony was not necessary to enable the jury, based on their own experiences and the evidence presented, to ascertain whether the tooth came from appellant's mouth. *Bailey* v. *State*, 255 Ark. 34, 498 S.W. 2d 859 (1973).

Point III. *The trial court erred in allowing pictures of the victim's face to be introduced into evidence.* We do not agree. The pictures certainly corroborated the testimony of the prosecuting witness that she resisted appellant's advances and that she was physically subdued into the act of intercourse. We cannot say the court abused its discretion. Since they were otherwise admissible, the fact they might tend to prejudice the jury does not render them inadmissible. *Oliver* v. *State,* 225 Ark. 809, 286 S.W. 2d 17 (1956).

Point IV. *The verdict of the jury is not supported by the evidence.* We have carefully examined the abstracted testimony and find it indeed very substantial.

Affirmed.

David W. SWISHER *v.* STATE of Arkansas

CR 74-64 514 S.W. 2d 218

Opinion delivered September 23, 1974
[Amended on Denial of Rehearing October 28, 1974.]

Harold Hall, Public Defender, by: *John W. Achor,* Chief Dep. Public Defender, for appellant.

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

JOHN A. FOGLEMAN, Justice. Appellant filed a motion for post-conviction relief under Criminal Procedure Rule 1 from his conviction of forgery and uttering on October 9, 1973 in a trial in which he was represented by the public defender. No appeal was taken. The only ground for reversal of the circuit court judgment denying appellant relief is the assertion that the court erred in refusing to admit some paper, which he asserts, without support in the record, would have established that he was not released from the Texas State penitentiary until after the crimes of which he was found guilty had been committed. No explanation is offered for appellant's failure to appeal.

Criminal Procedure Rule 1 was not designed to permit review of mere error in the conduct of a trial and it is not a substitute for a direct appeal. *Clark* v. *State,* 255 Ark. 13, 498 S.W. 2d 657. The rule permits review only to determine whether a sentence is subject to collateral attack for violation of constitutional rquirements or statutory enactments or for other such reasons. *Thacker* v. *Urban,* 246 Ark. 956, 440 S.W. 2d 553. Even if we should hold that the paper (of which no proffer was made[1]) was admissible, either as an official document or a business record (and we do not) this would not afford any basis for relief under our rule governing post-conviction relief. Errors in ruling on competency of evidence are not a basis for collateral attack under Criminal Procedure Rule 1.

The judgment is affirmed.

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[1]It is true that appellant's counsel asked to be permitted to introduce this paper, but no proffer was made for the record, so it is impossible for us to know its content or review the court's ruling, even if it were otherwise admissible. See *Cy Carney Appliance Co.* v. *True,* 226 Ark. 961, 295 S.W. 2d 768, 61 A.L.R. 2d 1264; *Arkansas State Life Ins. Co.* v. *Allen,* 166 Ark. 490, 266 S.W. 449; *T. J. Ellis & Co.* v. *Farrell,* 146 Ark. 274, 225 S.W. 349.

Ruby Helen CHARLESTON *v.* STATE of Arkansas

CR 74-65 514 S.W. 2d 209

Opinion delivered September 23, 1974
[Rehearing denied October 28, 1974.]

Harold Hall, Public Defender, by: *John W. Achor,* Dep. Public Defender, for appellant.

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

J. FRED JONES, Justice. The appellant, Ruby Helen Charleston, was charged on information with voluntary manslaughter in the killing of her paramour, James Singleton, with whom she lived as his wife and by whom she had one child. At a trial before the circuit judge, sitting as a jury, she was convicted of the charge and was sentenced to two years in the penitentiary with one-third of the time to be served before parole. On appeal to this court the appellant contends that the trial court erred in admitting statements made by the appellant into evidence, and also contends that the evidence is insufficient to sustain the conviction. We do not agree with either contention.

The appellant and the decedent lived in Little Rock and in addition to their own child, the appellant had two other children who lived in the home. The appellant was the only witness who testified as to her and James' activities on the night of his death. She gave three contradictory statements to the police officers and also testified at the trial, and the facts upon which all versions agree appear as follows:

On the night of James' death he and the appellant had gone to some place in or near the town of Scott where the appellant drank some beer and danced with one of the male patrons who was a stranger to them. James voiced objections to the appellant as to the manner in which she danced with the other man. The appellant carried James' .22 caliber revolver in her purse and on their return trip to their home in Little Rock, they both were angry and the appellant refused to talk to James. After arriving at their home in Little Rock, they continued to quarrel over the incident at Scott. James accused the appellant of dancing closer to the other man than she did with him and suggested that if she cared so much for the other man that she go to him, and the appellant responded that she might just do that. The appellant said that upon their return home from Scott, she went directly to the bathroom and James followed her. She said James jerked her up off the commode and then shoved her back down on it. Following the bathroom incident the appellant's versions differ as to what took place until she called James' sister by phone and stated that James had shot himself.

When James' sister, father and the officers arrived, James was lying on his back in bed with his trousers on and with a fatal gunshot wound high on his forehead slightly on the left side. The evidence was to the effect that the course of the bullet was straight into the head and that both the appellant and James had metal tracings on their hands consistent with having handled the gun.

The appellant gave one oral and two written statements in her own handwriting to the police officers and she testified at the trial. The trial court held that her statements were voluntarily made and they were accepted in evidence. The appellant first told the officers that James asked her if she believed he loved her more than he did his parents and when she answered in the negative, he inquired if she believed he would shoot himself over her and the children and when she answered in the negative, he shot himself.

The appellant then gave a written statement in which she said that after the incident in the bathroom, James asked for his gun and she gave it to him. She said James then struck her with a belt; that she attempted to take the gun away from him and it discharged.

In the second written statement the appellant said that after the bathroom incident, she "got smart" with James and he got a belt and started beating her. She said he had done that before and she was getting tired of it. She said she got the gun with the intention of making him stop beating her; that he attempted to take the gun from her and it discharged. She said she didn't intend to kill James but that she did it.

The appellant testified that after the bathroom incident, she had gone to the bedroom and had lain down on the bed when James came into the bedroom. She said he *undressed* and went to bed. She said James then told her he loved her more than he did his parents and she told him he was lying. She said she had taken the gun from her purse and placed it under her pillow. She said James then asked her if she believed he would kill himself over her and the children. She said when she answered in the negative, he started begging for the gun. She said she was lying with her back to James and she finally took the gun from under her pillow and threw it over to him. She said she then heard the gun discharge.

> ". . . [T]he gun was under my pillow, and he kept asking me for his gun and I told him I wasn't going to give him anything. And, so, he kept begging and begging, and I had my back to him and I just throwed the gun over to him, and the next thing he asked me, 'You don't believe I really love you and the kids more than I do my father and mother?' and I told him no. And then he said, 'You don't believe I'll kill myself over you and them kids?', and I said no. The next thing I heard the gun go off."

The appellant testified that before undergoing the trace metal test the officers told her that if gunpowder markings were found on her hands, she would be sent to the penitentiary for life.

> "The tall detective, he told me, he said, 'If we find gunpowders on your hand, I'll see you in the penitentiary the rest of your life."

The appellant said that because of this statement by the detective she became "scared" and gave the written statements. After testifying that James committed suicide as above set out, the appellant then testified as follows:

"Q. Now, Ruby, is that the first story you told the detective that was in here?

A. Yes.

Q. What did he say?

A. He said, he told me like this. He said, 'I just can't believe that. If we find gunprints on your hand, that's all there is to it.'

Q. What else did he say, that's all there is to it?

A. He meant that he would see me—he would send me to the penitentiary for the rest of my life.

Q. Why did you give that second statement, Ruby?

A. Because I was scared.

Q. Why did you write it out?

A. I didn't know what else to do.

* * *

Q. Now, even after you gave that statement, you gave another one?

A. Yes.

Q. Why did you do that?

A. Because they keep asking me questions and questions over again, and I was scared, and I just didn't know what else to tell them."

James' father, Alexander Singleton, testified that when he arrived at his son's house, the appellant was hugging James' body and was crying. He said he heard her say, "James I didn't intend to do this." Detective Plummer testified that after the appellant finished writing her second statement, she acted out the occurrence. In this connection he testified as follows:

> "She explained to me at the time, this is after she had written the last statement, that she was on the bed and sitting in the middle of the bed, had this weapon in her left hand, and Mr. Singleton was standing at the foot of the bed, or either with his knees on the bed, and had his hand on the gun trying to take it from her when it went off. She acted this out for me. In other words, exhibited, you know, what had occurred."

In both of the appellant's handwritten statements she stated that no threats or promises had been made to get her to give the statements. While the appellant's statements were certainly conflicting, it is really not seriously contended they were coerced by the officers or not voluntarily made. We agree with the trial court that the statements were admissible in evidence.

In 22A C.J.S. § 732, at page 1049, is found the following statement:

> "The state of mind which renders a statement involuntary is that induced by mistreatment, threats, promises, or physical or mental abuse which deprives an otherwise rational mind of the exercise of its free will and powers of decision and discernment; it is not that mental condition which arises from an inner sense of wrongdoing and fear of its consequences."

The appellant argues that in determining the voluntariness of a confession, the court should look to the whole situation and surroundings of the accused and the appellant cites *Dewein* v. *State,* 114 Ark. 472, 170 S.W. 582, but in that case we also said:

> "In order to render a confession involuntary there must be some threat or inducement held out to overcome his will."

The appellant admitted that the officers explained her constitutional rights to her and she so states in her handwritten statements. She also testified that the officers were real nice to her. The trial judge sitting as a jury could have reasonably concluded that the statement the appellant said the officers

made to her, prior to making the metal tracing test, prompted her to offer some reasonable explanation for gunpowder she had reason to believe might be found upon her hands. Her first written statement was to the effect that she was attempting to take the gun away from James when it discharged and apparently after further questioning, she admitted that she held the gun and that it discharged when James attempted to take it away from her. We are of the opinion that the statements the appellant gave the officers fell far short of being induced by mistreatment, threats, promises, or physical or mental abuse, and that the statements were voluntarily given.

Manslaughter is defined as the unlawful killing of a human being, without malice express or implied, and without deliberation. Ark. Stat. Ann. §§ 41-2207 and 41-2208 (Repl. 1964) define voluntary manslaughter as follows:

> "Manslaughter is the unlawful killing of a human being, without malice express or implied, and without deliberation.
>
> Manslaughter must be voluntary, upon a sudden heat of passion, caused by a provocation, apparently sufficient to make the passion irresistible."

The appellant testified that James undressed and went to bed and then committed suicide after she finally gave him the pistol in compliance with his repeated requests. James had his trousers on when the officers arrived on the scene and we are of the opinion that the evidence was sufficient to support the conviction for voluntary manslaughter in this case.

Affirmed.

Loamma HOLCOMB, By Her Father And Next Friend, Charles HOLCOMB *v.* Patsy GILBRAITH

74-96 513 S.W. 2d 796

Opinion delivered September 23, 1974

Estes, Storey & Estes, for appellant.

Putman, Davis & Bassett, for appellee.

CONLEY EYRD, Justice. Appellant Loamma Holcomb, age 14, was struck by an automobile driven by appellee Patsy Gilbraith while crossing Highway 59. The jury found the issues in favor of appellee and appellant through her father brings this appeal. For reversal appellant contends that the trial court erred in giving AMI 614 (on sudden emergency); in refusing AMI 605 (On duty to anticipate behavior of

children); and in modifying Ark. Stat. Ann. § 75-628(d) (Repl. 1957).

The proof shows that all parties were acquainted with each other and that appellee knew that appellant was in the habit of crossing the highway from her home to go to her grandparents' home on the other side of the highway. All witnesses generally agree that the point where appellant was crossing the highway is blocked from the view of a north bound motorist until the motorist gets within 400 or 500 feet of the place involved.

Appellant testified that before going across the road she had looked both to the south and the north and that she did not see any vehicles. She says that she was just angling across the road.

Appellee testified that she was driving a 1970 Model Ford LTD. The car was in good shape. She had had the front end aligned and the wheels balanced only two days before. Appellee testified that when she first observed appellant, the latter was walking on the right-hand shoulder of the road. When appellee was within 100 feet of appellant, appellant made a sudden turn onto the highway. Appellee then applied her brakes, blew her horn and pulled to the left. She testified that at first she thought she missed appellant, but she then realized that the appellant was hit by the right front fender. Appellee says that when she first saw appellant she took her foot off the accelerator and pulled to the left. On cross-examination appellee described appellant as just walking along the highway with her head down—appellant didn't seem to be very alert.

The skidding distance of appellee's car varied with the witnesses. One witness, who stepped off the distance estimated it to be 150 to 160 feet. Appellant's father placed the skid marks at 230 feet.

POINT 1. We find no merit in appellant's contention that the instruction on sudden emergency should not have been given. There was proof in the record to the effect that appellant while walking along the road suddenly turned into the path of appellee's automobile. See *Johnson* v. *Nelson,* 242 Ark. 10, 411 S.W. 2d 661 (1967).

POINT II. The trial court refused to give appellant's requested instruction No. 1 (AMI 605) which reads as follows:

> "A person who knows, or reasonably should know that a child may be affected by his failure to act, is required to anticipate the ordinary behavior of children and use care commensurate with any danger reasonably to be anticipated under the circumstances. A failure to use this degree of care is negligence."

To sustain the action of the trial court, appellee argues:

> "In determing the standard of care to which a minor is held, this Court has for many years made reference to 'intelligence,' 'understanding,' 'experience,' 'discretion,' 'capability,' and 'capacity' as well as 'age.' See Comment, AMI 304. It is, of course, well known that some young people mature faster than others. Some are more intelligent, quick witted, comprehending and observant, while others tend to remain awkward and inattentive for a longer than usual period. It is consideration of these things that should determine whether or not AMI 605 should be given in case of injury to a minor. . . ."

In discussing whether a child should be held to the standard of care of an adult in negligence cases, the annotator in 77 A.L.R. 2d at page 932 §7 states the matter in this language:

> "Whether the question of a child's contributory negligence is regarded as one of capacity, standard of care or compliance with that standard, the courts are in general agreement that normally, if not always, a question of fact for the jury is presented rather than one of law for the court. . . ."

This Court is in accord with the general view, see *Brotherton* v. *Walden,* 204 Ark. 92, 161 S.W. 2d 391 (1942) and *Garrison* v. *St. Louis, I.M. & S. Ry. Co.,* 92 Ark. 437, 123 S.W. 657 (1909). We need not here decide at what age the issue becomes one of law for we are dealing with a girl between the ages of 14 and 15 who was injured on the day she graduated from junior

high school. It is also true as the appellee argues that some children develop faster than others, but we know of no reason why jurors would be any less capable in determining those facts than a court. It follows that we conclude that the trial court erred in refusing to give AMI 605 as requested by appellant.

POINT III. The statutory duty of a pedestrian crossing at other than crosswalks is set out in Ark. Stat. Ann. §75-628(a) and (d) in this language:

> "(a) Every pedestrian crossing a roadway at any point other than within a marked crosswalk, or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway. . . . (d) Notwithstanding the provisions of this section, every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway and shall give warning by sounding the horn when necessary, and shall exercise proper precaution upon observing any child, or any confused or incapacitated person upon a roadway."

The trial court in instructing the jury as to the above statute removed the words "child, or any confused or incapacitated person" and in its place put "person."

Appellee contends that appellant was not prejudiced by the court's modification but since we are reversing for the court's error in refusing AMI 605 *supra,* we point out that under the circumstances of this case the statutory language should have been used without modification.

Reversed and remanded.

Billy Ray COX *v.* STATE of Arkansas

CR 74-76 513 S.W. 2d 798

Opinion delivered September 23, 1974

James H. Pilkington Jr. and *Albert Graves,* 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 burglary and assessed his punishment as a habitual criminal at 31 1/2 years imprisonment in the Department of Correction pursuant to Ark. Stat. Ann. § 43-2328 (Supp. 1973).

There was no appeal and appellant now seeks postconviction relief. The trial court conducted an evidentiary hearing and denied the petition. Appellant first contends for reversal, through present court appointed counsel, that the court erred in overruling his motion for a continuance. We cannot agree.

On July 17, 1973, the date of the trial, a continuance was sought by oral motion. It was predicated upon the basis that a witness, who was under subpoena, was "supposedly out of state" and her testimony, in effect, would provide an alibi for the appellant. The case was first set for trial in July, 1972, and later reset for October, 1972, at which time it was continued on the defendant's motion because of the absence of a material witness. On January 4, 1973, a hearing was scheduled and appellant did not appear. An alias warrant was issued for him and the hearing was rescheduled for January 15, 1973, and again appellant failed to appear. On April 13, 1973, a Miranda hearing was conducted and at that time appellant was found in contempt of court for "failing to appear twice" upon his admission that "he knew of the settings" at which he did not appear. The case was then set for trial on April 27, 1973. On that date it appears that the asserted material witness was present, pursuant to a subpoena, and was admonished to be available at the forthcoming trial. On trial date, July 17, 1973, she was not present. The witness left no forwarding address and was believed to have left the state. No one appeared to have any knowledge about when she would be available. When appellant's retained counsel stated that the absent witness would provide an alibi, the state responded it was their understanding that this witness, if present, would contradict the appellant's alibi. In overruling appellant's oral motion for a continuance, the trial court observed "[A]ccording to the subpoenaes issued it appears that we've got some eight or nine witnesses involved in this case, all witnesses, who, if we get a continuance for every one of them for being absent one time we are going to be here five years trying to get this case tried."

It is well settled that granting a continuance is within the sound discretion of the trial court and on appeal we do not disturb that decision unless abuse of discretion is shown. *Thacker* v. *State,* 253 Ark. 864, 489 S.W. 2d 500 (1973), *Nash* v. *State,* 248 Ark. 323, 451 S.W. 2d 869 (1970). In *Thacker* we enumerated factors to be considered such as diligence of the movant, probable effect of the testimony, future availability,

and the likelihood of procuring the attendance of the absent witness. Furthermore, we said the failure to file an affidavit pursuant to Ark. Stat. Ann. § 27-1403 (Repl. 1962) stating the affiants belief of the truth as to what the absent witness would testify, its materiality and that the witness is not absent because of any acts on his part "is a significant factor in appellate review of the trial court's denial of such a motion." In the circumstances of the case at bar, we cannot say that the appellant has discharged the burden of proof by demonstrating that the trial court abused its discretionary authority.

Appellant next contends for reversal that he was denied effective assistance of counsel. In support of this contention appellant argues that his retained counsel failed to inform him of his right to appeal, as an indigent, by court appointed counsel and merely advised him that it would cost money to appeal. Appellant testified that he was unaware of his right to appeal as an indigent. It is true, as appellant asserts, that he has an absolute right to appeal. Ark. Stat. Ann. § 43-2701 (Supp. 1973). In fact, the very purpose or genesis of our Rule 1 is in furtherance of that guarantee by permitting postconviction relief where there is demonstrated a denial of any constitutional or statutory right. Appellant's retained trial counsel testified and appellant admitted that the feasibility of an appeal was discussed at trial and it is uncontradicted that the appellant himself made no complaints about any matter occurring during the trial that could be the basis for an appeal. Appellant's trial counsel also testified that appellant stated he didn't know of any appealable grounds. Neither did he indicate indigency. His attorney testified that in his judgment no "appealable matters" existed. Appellant is thirty years of age and has a seventh grade education. He acknowledges that he has been in the penitentiary on four sentences, including the present one, and has experienced the services of four attorneys.

Appellant has the burden of showing that trial counsel by "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." *Sheppard* v. *State,* 255 Ark. 40, 498 S.W. 2d 668 (1973). See also *Davis* v. *State,* 253 Ark. 484, 486 S.W. 2d 904 (1972). Furthermore, there is a presumption that an attorney is competent, and appellant has the burden to show otherwise. *Clark* v. *State,* 255 Ark. 13, 498 S.W. 2d 657 (1973); and *Credit* v. *State,* 247 Ark. 424, 445 S.W. 2d 718 (1969). We have also said that trial tactics and strategy of a defendant's trial counsel involve "elements of discretion and judgment upon which conpetent counsel might disagree especially after the event." *Credit* v. *State, supra.* In the case at bar, the appellant's retained counsel is a veteran practitioner with some thirty years experience. We are firmly of the view that appellant has not demonstrated any prejudicial error with respect to him being denied the right of appeal through effective assistance of counsel.

Appellant next contends for reversal that the trial court failed to advise him of his right to appeal. We need not consider this contention as this allegation was not raised in his Rule 1 petition and cannot be raised for the first time on appeal. *Fleschner* v. *State,* 253 Ark. 58, 484 S.W. 2d 342 (1972); and *Carney* v. *State,* 250 Ark. 205, 464 S.W. 2d 612 (1971).

Appellant asserts that the trial court erred in permitting appellant's trial counsel to stipulate that he had previously been convicted of four felonies which resulted in the enhancement of his sentence. Appellant argues that the stipulation of these previous convictions was prejudicial inasmuch as the trial court did not question the appellant as to whether he consented to it. We are of the view that even though the better practice would be for the trial court to inquire about his consent to the stipulation, we cannot say that the appellant has shown that he did not knowingly approve or acquiesce in the stipulation. As previously indicated, appellant has a seventh grade education, was thirty years of age, and is no stranger to criminal proceedings. It appears from the transcript that these convictions were read into evidence from the local court docket sheets. It was a factual issue for the jury to consider which, as any other fact, the parties could agree upon. Ark. Stat. Ann. § 43-2330.1 (Supp. 1973) provides in pertinent part that "if the defendant admits such previous conviction(s), then the prior conviction(s) shall be considered in fixing the punishment for the current offense. . . . " It appears that the

trial strategy was to minimize the effect of the four previous convictions by acknowledging, which the statute permits, that which was readily capable of proof by the local court records, resulting, therefore, in a lesser sentence.

After reviewing the record, we are of the view that the evidence is sufficient to sustain the trial court's denial of appellant's petition. Appellant has not demonstrated any infringement of his constitutional or statutory rights.

Affirmed.

BROWN, J., not participating.

Carl RAY, Individually, and as Administrator of The Estate of Teri Leann RAY, and Loretta K. RAY *v.* Sherry D. MOCK

74-60 513 S.W. 2d 916

Opinion delivered September 30, 1974

Tackett, Moore, Dowd & Harrelson, for appellants.

McMillan & McMillan, for appellee.

CARLETON HARRIS, Chief Justice. This litigation relates to Ark. Stat. Ann. § 75-913 (Repl. 1957), the guest liability statute. Loretta K. Ray was injured and the two-year-old child of appellants was killed when the car in which they were riding with appellee, Sherry D. Mock, struck a tree and overturned. Carl Ray, Individually and as Administrator of the Estate of his young daughter, together with Mrs. Ray, instituted suit for damages against appellee, but after presentation of the evidence on their behalf to the jury, the trial court directed a verdict in favor of Mrs. Mock. From the judgment so rendered, appellants bring this appeal.

The proof reflects that Mrs. Ray and Mrs. Mock had made arrangements to meet their husbands in Pisgah, Arkansas to attend a musical performance on the night of May 5, 1972. The two ladies went to Pisgah in an automobile being driven by Mrs. Mock. Upon arrival, they were unable to locate their husbands, and apparently there was no musical being presented. After searching for the husbands, they finally saw them parked on the side of the road near Antoine. According to Mrs. Ray, appellee was rather "peeved" at her husband for his failure to be present at the meeting place and did not stop where the husbands were parked, but proceeded on toward Arkadelphia. The witness said that as they came into a curve, she observed that Mrs. Mock was driving "too fast"; that she looked at the speedometer and Mrs. Mock was driving 90 miles per hour; that this speed was attained on a straight stretch just before reaching the curve. Mrs. Mock lost control of the automobile and it crashed into a tree, killing the child. In their brief, appellants emphasize three acts in support of their contention that there was sufficient

evidence of wilful and wanton misconduct on the part of Mrs. Mock to send the case to the jury. It is first pointed out that appellee was peeved at her husband because she had been unable to locate him, and that this anger influenced her in operating the car at a high speed. Second, the testimony on the part of appellants reflects that Mrs. Mock was driving up to 90 miles per hour and had passed a sign indicating a curve and a 45 mile per hour suggested safe speed just prior to the collision. Thirdly, it is observed that Mrs. Ray testified that she told appellee "She couldn't make the curve going that fast, and she could slow down, or she could let me and the baby out."

We are of the view that the trial court erred in granting the directed verdict. In *McCall* v. *Liberty,* 248 Ark. 618, 453 S.W. 2d 24, this court, citing an earlier case, *Harkrider* v. *Cox,* 230 Ark. 155, 321 S.W. 2d 226 (1959), said:

> "It is only when fair minded men could not differ as to the conclusions to be drawn from the evidence that a plaintiff is entitled to an instructed verdict."

The essence of an action under the host - guest statute is the requirement that a plaintiff prove wilful and wanton misconduct on the part of the defendant driver, and we have said that to constitute wilful misconduct, there must be a showing of "a conscious failure to perform a manifest duty in reckless disregard of natural or probable consequences to the life or property of another." *McCall* v. *Liberty, supra.*

Here, there was evidence that an upset or angry motorist was driving 90 miles per hour on a road containing curves, with a two-year-old child in the automobile, and we are definitely of the opinion that these circumstances presented a jury question, i.e., we feel that the situation was one wherein fair-minded or reasonable men could differ as to the degree of negligence. Of course, it may well be that appellee can present evidence which will convince the jury that Mrs. Mock's operation of the car was not wilful or wanton as that term has been construed — but again, this is a fact question, and accordingly one for a jury to determine, rather than the trial court.

Appellants also urge the court to adopt what they term the "modern trend of law" by holding that a two-year-old child, since it does not voluntarily accept a ride in an automobile, cannot be classified as a guest. Of course, if this contention be true, a showing of simple negligence on the part of appellee would be sufficient. A discussion of this point is unnecessary since this question was before the court in *Tilghman, Administrator* v. *Rightor,* 211 Ark. 229, 199 S.W. 2d 943, and we held that in defining a guest, the statute, presently Ark. Stat. Ann. § 75-914 (Repl. 1957)[1], makes no exception in favor of a minor, and it thus follows that appellants' contention is without merit.

In accordance with the reasoning set out under the first point, the judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

FOGLEMAN, J., concurs.

JOHN A. FOGLEMAN, Justice, concurring. I concur because of an additional fact not mentioned by the majority. To me, the real evidence of wilfulness and wantonness on the part of appellee was the testimony of Mrs. Ray about her protest just before the disastrous event. This testimony tended to show:

> Mrs. Mock had honored a previous protest about her speed on a curve registered by Mrs. Ray. In a straight stretch approaching the curve where Mrs. Mock lost control of the vehicle, Mrs. Ray, observing that Mrs. Mock was increasing the speed and that the speedometer then registered 90 miles per hour, asked Mrs. Mock to slow down, told her she couldn't make the curve at that speed and requested that Mrs. Mock either slow down or let her and the baby out of the vehicle. Mrs. Ray made the protest 30 seconds before appellee's car entered the curve.

If Mrs. Ray's testimony is to be believed, Mrs. Mock

[1]This statute is identical with § 1303, Pope's Digest of the Statutes of Arkansas, in effect when *Tilghman* was decided.

travelled at least three-quarters of a mile on a straight stretch after the protest was made without responding to it in any way. This to me is evidence of both wilfulness and wantonness, but without it I am at least doubtful that we could say that the circuit judge erred.

Andrew Jackson ROSS *v.* STATE of Arkansas

CR 74-35 514 S.W. 2d 409

Opinion delivered September 30, 1974

[Rehearing denied November 4, 1974.]

Murphy, Carlisle & Taylor, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Alston Jennings, Jr.,* Asst. Atty. Gen., for appellee.

CARLETON HARRIS, Chief Justice. Andrew Jackson Ross, in 1971, the Treasurer of Pope County, Arkansas, was charged with the crime of embezzlement, the Information alleging 86 transactions of embezzlement of public funds in his custody and possession, it being alleged that the embezzlement occurred between January 5, 1971 and December 10, 1971. On trial, the jury found Ross guilty and his punishment was fixed at 21 years imprisonment in the Arkansas Department of Correction. From the judgment so entered, Ross brings this appeal. For reversal, four points are relied upon, which we proceed to discuss.

It is first asserted that a confession given by appellant was not freely and voluntarily made and was therefore inadmissible, this contention being based on the premise that the statement was given in consideration of a promise of leniency. We do not agree. Prior to the introduction of appellant's statement into evidence, a *Denno*[1] hearing was held in chambers on motion of the State, and at such hearing the Sheriff of the County and Robert H. Williams, original counsel[2] employed by Ross, testified, the latter being called by appellant. Williams testified that he had earlier entered into plea bargaining negotiations with the prosecuting attorney and had received assurances that that official would recommend to the court a 15 year sentence, 10 years being suspended, if Ross should plead guilty to the charges. The attorney testified that he gave this information to his client and was advised by the latter that the agreement was acceptable, and what Ross "wanted to do." Williams very clearly stated that the agreement was not contingent in any manner upon Ross agreeing to give a confession and, in fact, the lawyer testified that the agreement on the recommendation of time to be served was made before the prosecuting attorney asked for any statement. These were the only witnesses who testified in chambers and the court held the statement to be voluntarily made, commenting further to the effect that in in-

[1]*Jackson* v. *Denno,* 378 U.S. 368, 84 S. Ct. 1774.

[2]While not entirely clear, the record indicates that Williams was the attorney for the Bank of Russellville, one of the depositories for County funds, and this apparently occasioned his withdrawal.

stances where agreements had been reached between the State and defense, following plea bargaining, and a statement was subsequently given, such statement, under appellant's theory, no matter how voluntary, would be inadmissible if a defendant decided to retract such confession. In the trial itself, Williams reiterated the testimony given in chambers and further testified that the statement was taken in his office. Mr. Williams, a capable and experienced attorney, was present the entire time and thus was in a position to advise his client during the questioning. The attorney also testified that Ross was entirely willing to make a statement. Appellant relies upon *People* v. *Jones* (Ill. App.), 291 N.E. 2d 305, where the court held a confession to be inadmissible, such confession being rendered after an agreement had been reached by the State and defense during plea bargaining. We do not consider the case applicable to the fact situation at hand. In *Jones,* the testimony on the part of the defendant (which was sharply disputed) reflected that the promise of leniency was conditioned upon that defendant testifying on behalf of the State against another defendant; Jones was told that he could get 40 to 50 years if he went to trial. The opinion further reflects that the statement was taken by an Assistant State's Attorney in his office, counsel for defendant not being present. It is at once apparent that there is but little, if any, similarity in that case and the one at hand. In addition to the differences in the circumstances surrounding the statement here in issue, it will also be noted that Ross himself does not contend that the agreement reached between the prosecuting attorney and his counsel had any bearing on his willingness to give the statement. Not a single witness testified to such a fact. In fact, appellant admits in his brief that the confession was not given in consideration of the agreement between the State and defense counsel, appellant stating:

> "The testimony reflects that an agreement had been reached between the appellant's attorney and the Prosecuting Attorney and the statement given by the appellant was purely for whatever extrajudicial purposes the Prosecuting Attorney might have had."

It is true that the attorney said that he would not have permitted the statement to have been made except for the agreement which had already been consummated, but this

would seem to be the obvious view of an experienced attorney, and certainly has nothing to do with the voluntariness of the statement. For that matter, in *Jones,* the court held that the issue of voluntariness was a question for the trial court to determine and stated that a reviewing court will not disturb such a finding unless there is a showing that it is contrary to the manifest weight of the evidence.[3]

Appellant's brief also devotes a paragraph to an assertion that the confession was inadmissible for the reason that Ross, during interrogation, indicated that he wished to answer no more questions. We find no merit in this contention. In the first place, this issue was not raised in the trial court. The record reflects the following colloquy between the court and defense counsel, as follows:

> "THE COURT: Do I understand you to say that there has been a denial of constitutional rights in this case?
>
> MR. MURPHY: No. No. If this is admitted it will be. This is not a voluntary statement.
>
> THE COURT: I see.
>
> MR. MURPHY: Because *it was given under a benefit.*" [Our emphasis].

This objection, which has already been thoroughly discussed, was the only objection made to the admission of the confession. It might be added that Ross never declined to answer questions, and indicated only once that he was tired. Certainly, the finding of the Pope County Circuit Court that the confession was voluntarily made is not against the weight of the evidence.

It is next urged that the appellant lacked the mental capacity to voluntarily waive his constitutional rights, and that this lack of mental capacity was made known to the State at the time the confession was obtained. Let it be said at the outset that no objection along this line was made to the trial court at all. As previously stated, the *only* objection to this confession made to the circuit court was that it was the result

[3]In *Jones,* the trial court held the statement to be involuntary.

of coercion, i.e., made on the basis of the understanding that Ross would receive a lesser sentence. Under our procedure and cases, we do not consider arguments raised for the first time in this court on appeal. See *The Travelers Insurance Company* v. *McCluskey,* 252 Ark. 1045, 483 S.W. 2d 179. This actually could preclude consideration of the point, but inasmuch as this is a case of public interest, it might be said that even considering the point to be properly raised here, same is found to be without merit. Appellant's argument is based on the confession itself and thus is totally dependent upon the statements of Ross. Briefly stated, he related the disorders that he had been told he was suffering from by his doctor. He mentioned shock treatments at sometime in the past, and stated that the doctor, during his most recent confinement, thought he (Ross) was suffering from a brain tumor (but the tests showed normal); the doctor subsequently found a small cancer in his stomach. In subsequent testimony which was offered by the defense in an effort to establish insanity, Dr. Stephen Finch testified that Ross was suffering from chronic brain syndrome, a condition where brain cells die because of lack of blood supply. The doctor said that Ross suffered from a memory loss, more particularly of recent events, and that he would say that appellant's brain had deteriorated because of arteriosclerosis, to the age of an 80-year-old man. There was other medical testimony on both sides, but no testimony by any physician was offered that Ross was mentally incompetent to make the statement. The testimony of appellant's physicians was simply an effort to convince the jury that Ross was not guilty by reason of insanity.

The basis of the allegation that a lack of mental capacity was made known to the State at the time the confession was obtained is predicated simply upon a few statements that appellant made to the prosecuting attorney during interrogation. For one, when asked about the alleged giving of money to his secretary for extra work, Ross replied that he "wouldn't be capable of remembering what happened back then because I underwent shock treatments and it has kinda affected my memory a little bit." For another, appellant stated that his doctor had advised him that he would not be able to be present on the date set for trial and should not even engage in telephone conversations. It is argued that after

these observations by Ross, the prosecuting attorney should have ceased his questioning, but that instead, "Incredibly the inquisition continued for quite some length of time." We cannot agree that the matters mentioned reflect a lack of mental capacity to give the statement. Appellant appeared fully aware of the questions being propounded, and it is interesting to note that when asked if he had converted to his own use about $295,040.61, appellant responded, " '94, I believe." He also explained that at the end of each month, to make his bank statement balance with his books, he "would take from one bank and put in the other." When asked how much he would take from the bank[4], he answered, "Just whatever amount I used that month I would take from the other bank and then before the end of the month — at the end of the month I would put that back." Let it also be remembered that his attorney was present with him for the purpose of seeing that appellant's rights were not violated. The interrogation was conducted in a conversational manner and there was no harassment or intimidation of the witness. We find no merit in appellant's second point.

It is next contended that the introduction of evidence of alleged embezzlement occurring prior to 1971, and for which no criminal charge had been filed, was prejudicial and requires a reversal. Wendell Riddell, an auditor for the Division of Local Affairs Audit, employed by the Audit Division for about 12 years, testified that he recovered 85 checks totaling $41,570.00 for the year 1971 (this was the amount set out in the Information filed against Ross), and he asked appellant if he objected to telling the amount that had been taken. Ross responded that the amount of the shortage would be close to $300,000.00. Subsequently, appellant, according to the auditor, stated that they would have to go back over a period of years to determine the proper amount. The auditor testified that the total shortage amounted to $295,040.61. Counsel for appellant objected to "anything which happened before 1971," such objection being overruled, the court holding it admissible as testimony concerning method of operations. Counsel never did state why he objected to testimony concerning shortages before 1971, except that on one occasion he said that he objected "if this is trying to get anything in in the form of a confession or admission."

[4]The treasurer banked with the Bank of Russellville and the Peoples Bank.

Subsequently, counsel asked that the testimony be stricken, stating, "The Information is for $41,000." We find no merit in the contention. While evidence of other offenses is not admissible where the only purpose is to portray a defendant as a person of bad character, or addicted to crime, such evidence is properly received, *inter alia,* to show mode or method of operations, common scheme or plan, design, habits, practices, etc. See *Baker* v. *State,* 4 Ark. 56; *Cain* v. *State,* 149 Ark. 616, 233 S.W. 779; and *Tolbert* v. *State,* 244 Ark. 1067, 428 S.W. 2d 264. See also 22A CJS Criminal Law § 688 where it stated:

> "Proper evidence which proves or tends to prove a common scheme, plan, design, or system of criminal action will not be excluded because it also shows the commission of another crime by accused. Broadly speaking, evidence of other crimes than that charged is competent and admissible when it tends to establish a common scheme, plan, system, design, or course of conduct."

It might be added that appellant requested no instruction advising the jury that the testimony was admissible only for the purposes herein mentioned.

Finally, it is asserted that the trial court erred in refusing to declare a mistrial when the appellant discovered a member of the jury was a justice of the peace. Formerly, by statute (Ark. Stat. Ann. § 39-230 [Repl. 1962]), a justice of the peace could be peremptorily challenged, but such statute was repealed by Section 30 of Act 568 of 1969. Of course, there was no statutory disqualification even to begin with, and the juror was not challenged on *voir dire;* nor is there any indication that his presence as a member of the jury prejudiced the rights of the appellant. Under these circumstances, there was no abuse of discretion in refusing to declare a mistrial.

Finding no reversible error, the judgment is affirmed.

It is so ordered.

Richard Leon BREWER *v.* STATE of Arkansas

CR 74-60 513 S.W. 2d 914

Opinion delivered September 30, 1974

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

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

GEORGE ROSE SMITH, Justice. The appellant, charged

with second-degree murder in the shooting of his wife, was found guilty by the jury and was sentenced to imprisonment for ten years. For reversal he contends that the trial court should have directed a verdict in his favor and that the court was in error in its rulings upon the admissibility of certain evidence.

With respect to the directed verdict counsel for the appellant mistakenly assume that we may consider only the evidence that had been introduced when the State rested its case in chief. The appellant, however, did not stand upon the motion for a directed verdict which was made at that time. Instead, he introduced proof, including his own testimony, to establish his defense. By that procedure the original motion for a directed verdict was waived; the sufficiency of the evidence must be determined upon the entire record. *Crow* v. *State,* 248 Ark. 1051, 455 S.W. 2d 89 (1970).

There is ample proof to support the verdict. The jury had grounds for disbelieving Brewer's assertion that he accidentally shot his wife while cleaning his pistol. To begin with, there were admittedly two shots, which makes it unlikely that both were accidental, as Brewer testified. The State showed that, depending upon whether the gun was cocked, it took either 8 or 14 pounds of pressure to pull the trigger. The police arrived at the scene almost immediately, but they found no equipment for cleaning a gun. The decedent was shot at close range. Finally, there had been marital difficulties between the couple. Brewer had contracted a venereal disease three different times; in one instance he had infected his wife.

It is argued that the State's proof was incomplete, because Dr. Moser, who performed an autopsy and determined the cause of death, was unable to say that the body which he examined was that of Brewer's wife. Dr. Moser, however, took pictures of the body, the pictures being received in evidence. On cross-examination Brewer identified one of the pictures as that of his wife. Thus any defect in the State's proof was corrected later in the trial.

We cannot sustain the appellant's contention that the State failed to establish a continuous chain of possession with

respect to the cartridges that the police found at the Brewer home, where the homicide occurred. Officer Martin, who first took charge of Brewer's pistol, said that "it had four shells in it, and two had been shot." Brewer's argument assumes that the officer was referring to only four shells; but upon the testimony as a whole the jury could readily have found that the officer was talking about six shells. Indeed, his field notes made at the time refer specifically to six cartridges, and the testimony given by other witnesses in the chain of possession is to the same effect. When the testimony is considered in its entirety no gap in the chain is established.

It is insisted that one of the State's witnesses, Mrs. Garrison, was allowed to testify about the contents of an insurance policy in violation of the best evidence rule. The witness, who was the personnel manager at the plant where Mrs. Brewer had worked for a short time before her death, testified that under the company's insurance plan for its employees Mrs. Brewer had been insured for $4,000, plus double indemnity. It is now argued that the insurance policy should have been produced by the State.

We find no error. The best evidence rule does not apply strictly to collateral matters. *Lin Mfg. Co. of Ark.* v. *Courson,* 246 Ark. 5, 436 S.W. 2d 472 (1969). McCormick's treatise on Evidence, § 234 (2d ed., 1972), points out that some writing plays a part at nearly every turn in human affairs. It becomes impracticable to forbid any reference to a writing without its being produced in court. McCormick goes on to say that although the concept of collateralness defies precise definition, three principal factors should be considered. "These are: the centrality of the writing to the principal issues of the litigation; the complexity of the relevant features of the writing; and the existence of genuine dispute as to the contents of the writing." *Id.*

The appellant's present argument fails on all three points. The group insurance policy had a bearing only upon possible motive, not an essential element in the State's case. The face amount of an insurance policy is not such a complex matter that the writing itself must be examined before the amount can be determined with reasonable certainty. Finally, the record contains no indication that there was any

genuine dispute about the extent of the coverage. The objection was a purely technical one, which the trial court properly overruled.

We have considered the appellant's brief in its entirety and find no prejudicial error.

Affirmed.

THE DOWNTOWNER CORPORATION
v. Gordon SCOTT

74-89 513 S.W. 2d 910

Opinion delivered September 30, 1974

Fred E. Harrison & Thomas E. Downie, for appellant.

Troy Wiley, for appellee.

LYLE BROWN, Justice. Appellant Downtowner Cor-

poration instituted this suit to require Gordon Scott to account for profits from the operation of the Red Apple Inn during a period from June 1, 1972, through November 7, 1972. The critical issue in the case is which party is entitled to the profits made during the stated period.

Downtowner Corporation owned a large land development at Eden Isle, Arkansas, which included Red Apple Inn, a resort hotel, and related recreational enterprises. On March 1, 1972, Downtowner gave Block Investment Company an option to purchase the entire Eden Isle properties. Negotiations toward that end began to go forward and in late May it appeared that the sale was near closing.

Scott, manager of the Red Apple Inn, learned of those negotiations in March 1972. Since Block's interest was mainly in the land development, appellee reached a separate agreement with Block to purchase Red Apple Inn if and when it was acquired from Downtowner. The Scott-Block agreement was expressed in a written offer dated May 4 and accepted by Block on May 8. It was essential to Scott that he have the benefit of the profitable summer months to offset the loss which would expectedly occur in the winter months. The contract contained a provision to that effect. Thereafter, various officers of Downtowner, at different times, became aware of the Scott-Block agreement.

On May 31 Downtowner sent Loel Holder, an employee, to Red Apple Inn to conduct an inventory and accounting of receivables and cash on hand. Afterwards Holder signed a memorandum prepared by Scott's attorney and dated May 31, to which was attached a typed schedule reflecting a summary of the audit and inventory. That document in most part contained language identical to Scott's May 4th contract with Block, including the following:

> Scott to assume all obligations incurred after June 1, 1972, except depreciation and taxes or other assessments and Scott to have the benefit of all income accrued and earned during that portion of time between June 1, 1972, and closing date.

The purpose of Holder's visit, the scope of his authority,

and the effect of the May 31st memorandum are in dispute. Downtowner contends Holder was sent to establish certain values as of May 31 so that at its closing with Block the sale of Red Apple Inn would be retroactive to that date. Downtowner contends Holder was a part-time accountant who had no authority to bind Downtowner to a contract. Scott contends Holder was sent to turn over the operation of the Inn to him, Scott, pursuant to his contract with Block. Scott contends he also had assurance from a Downtowner official, Mr. Perkins, that Downtowner would sell the Inn to Scott if the Block-Downtowner deal was not consumnated.

On July 12 Holder again went to Red Apple Inn and effected a "reconciliation of funds", in essence giving Downtowner credit for funds collected prior to June 1 but earned thereafter, such as advance deposits. The balance owing Downtowner was $13,605.26 and Scott gave Holder a check in that amount.

From June 1 until November 7 Scott operated the Inn independent of any real control by Downtowner, although some objections were voiced to Scott in June by Fred Eydt, Vice President of Operations for Downtowner. During that period Scott retained the income, paid the daily expenses, and placed the receipts in accounts he had set up under his sole control. Downtowner continued to pay taxes, insurance, and mortgage payments totalling over $50,000.

During that summer the sale from Downtowner to Block began to fall apart and in early September negotiations finally were terminated. Scott then submitted Downtowner a written offer which was substantially the same contract Scott had made with Block. Following a refusal of that offer there were further negotiations and Scott and his attorney thought a meeting of the minds had been reached. On November 7 Downtowner officials went to Eden Isle and assumed control of the Inn from Scott and put in a new manager. An inventory was taken at that time to establish cash on hand and accounts receivable which Downtowner retained. Scott retained the profits and all records of his operation from the period June 1 through November 7. In December Downtowner sent Scott a number of bills incurred during his operation and he paid them.

In January 1973 Downtowner brought this action against Scott for an accounting of the profits of his operation. Scott answered and counterclaimed, seeking recovery for certain capital improvements and for receivables collected and retained by Downtowner which had been earned prior to November 7. The chancellor found that a contract existed between the parties either expressly, by ratification, or by estoppel, whereby Scott would operate the Inn, not as an employee or agent of Downtowner, but as an independent operator under which Scott would retain what he made or assume any loss incurred. The petition for accounting was consequently denied. As to Scott's counterclaim, the chancellor found that if Scott was entitled to any recovery thereunder it should be retained by Downtowner as rent.

We cannot agree with the chancellor's conclusions while at the same time conceding that the suit presented a difficult and novel question for which no parallel can be found in any prior decision. We find there was in fact an agreement based on the sincere belief of all parties that a sale to Scott would be consummated and that such sale would be retroactive to June 1. That agreement allowed Scott to get the advantage of the summer business; however, the retention of those profits was conditioned on the closing of a sale to Scott.

In the first place the testimony of Scott warrants such a conclusion. The chancellor propounded this question to Scott: "Were you working on the theory all the time when you were running this business that you were going to buy the business?" Scott answered in the affirmative. At another point in his testimony Scott testified: "I assumed I would end up owning the property involved". Scott also conceded there was no discussion as to who would get the net profits during his period of operation. He said he was standing on the written documents.

In further support of our conclusion we examine the written instruments introduced into evidence. The first one is the offer to purchase executed by Scott and addressed to Block. It provided that in the event the sale was not consummated by June 1, the operation and management would be turned over to Scott on that date and he would retain the profits accruing between June 1 *and closing date*. Then, under

date of May 31 Scott executed a memorandum to Downtowner, to Block, and to the banks which proposed to finance Scott. It was in effect an amendment to the written offer of May 4. It provided, among other things, that the operation and management of the Inn would be transferred to Scott on June 1 and that he would thereafter retain all profits *until closing date*. Again, under date of September 12, 1972, after the proposed sale to Block had collapsed, Scott made a written offer to Downtowner. Therein it was stated that Scott would retain all income accrued and earned from June 1, 1972, *until closing date*. We think it abundantly clear there had to be a closing of the sale to Scott before he was unconditionally entitled to retain the summer profits.

Appellant Scott finds himself in a position which is untenable, namely, that he was entitled to the profits from the operation, come what may, and regardless of whether there was ever a closing of any sale of the property to him. Again, the agreement to buy and sell was not open-ended; it was based on a contingency of a closing.

The principle of estoppel is of no benefit to Scott; that is because we find no estoppel. There can be no estoppel because Scott did not show that he relied on representations, inaction, or silence of Downtowner to his detriment. *Bowlin* v. *Keifer,* 246 Ark. 693, 440 S.W. 2d 232 (1969). As to representations, Scott concedes that the only representations made about the profits were contained in the recited contracts. As to inaction or silence there was no occasion for Downtowner to speak out about the profits until the sale to Scott collapsed. Furthermore, there is no evidence in the record that Scott suffered any detriment.

Nor can we find any evidence that Downtowner committed any act of ratification whereby Scott was vested with the sole right to the profits during his period of operation. It is undisputed that if a closing had been effected then Scott was entitled to the profits; therefore, there was no cause for Downtowner to demand the profits until the sale became an impossibility.

The chancellor laid stress on the memorandum of May 31 from Scott to Downtowner and seems to conclude that

since the instrument was approved for Downtowner by Holder, it constituted a contract between the parties. If it be conceded that the instrument did form a contract between the parties, we simply cannot interpret it to mean that Scott was entitled to the profits of a sale which was never consummated.

The cause is remanded with directions to conduct an accounting of the operation from June 1 to November 7 and to enter judgment accordingly. In that connection it is noted Downtowner appears to concede in its brief that in an accounting Scott should be credited with his salary "and possibly an extra amount should he be able to establish services over and above those he had previously exerted in operation of the Inn as well as credit for expenditures or improvements of a capital nature made in good faith. . . ."

Reversed and remanded.

BYRD, J., dissents.

Helen P. WASHBURN *v.* STUART'S MUFFLER SHOP & Alfred C. HENDERSON

74-81 513 S.W. 2d 913

Opinion delivered September 30, 1974

Dodds, Kidd, Hendricks & Ryan, for appellant.

Whetstone & Whetstone, by: *Bud Whetstone*, for appellees.

JOHN A. FOGLEMAN, Justice. Appellant was injured when struck by a motor vehicle driven by Alfred C. Henderson, the agent, servant or employee of Stuart's Muffler Shop. The incident occurred in the intersection of Broadway and Eighth Street in Little Rock, which is controlled by traffic lights. When struck, appellant was walking in a painted crosswalk provided for pedestrians. Appellant's sole point for reversal is the failure of the circuit judge to include Ark. Stat. Ann. § 75-627 (b) (Repl. 1957) as a part of AMI 601 (Violation of Statute or Ordinance as Evidence of Negligence) as she requested. We find no error and affirm.

The statute which appellant insists should have been included in the instruction is a part of § 76 of Act 300 of 1937 and reads thus:

> (b) whenever any vehicle is stopped at a marked crosswalk or at any unmarked crosswalk at an intersection to permit a pedestrian to cross the roadway, the driver of any other vehicle approaching from the rear shall not overtake and pass such stopped vehicle.

Sec. 76 is a part of Art. X of the Act, which is entitled "Pedestrians' Right & Duties." Sec. 75 is the opening section of that article. It reads:

> Section 75. *Pedestrians Subject to Traffic-Control Signals.* Pedestrians shall be subject to traffic-control signals at intersections as heretofore declared in this act, but at all other places pedestrians shall be accorded the privileges and shall be subject to restrictions stated in this article.

We take § 75 to be the introductory provision of this article and to govern the remaining sections including 76 (b). The latter section could not be applicable because of the traffic control signals at the intersection. Thus, we cannot say that appellant was "accorded the privileges" of § 76 (b) to the extent that Henderson could have eeen held guilty of a violation of the statute simply because he overtook and passed a vehicle stopped at the crosswalk to permit appellant to

cross the roadway. For this reason, there was no error in the trial court's refusal to include § 76 (b) in the instruction. This does not mean that a jury might not have found that appellant's conduct constituted negligence. It simply means that the court properly refused to tell the jury that a driver's overtaking and passing a vehicle stopped to permit appellant to pass was, in and of itself, evidence of negligence.

Since we make this disposition of the case on the merits, we do not consider appellee's argument that the judgment should be affirmed because of appellant's failure to designate sufficient record for review of the point relied upon by her and because of her failure to file a statement of the points to be relied upon, after having filed a less-then-complete record.

The judgment is affirmed.

James L. EDRINGTON *v.* Barbara Edrington FITZGERALD

74-95 514 S.W. 2d 712

Opinion delivered September 30, 1974

Tom Forest Lovett & Griffin Smith, for appellant.

Marvin H. Robertson, for appellee.

J. FRED JONES, Justice. This is an appeal by James L. Edrington from a chancery court decree denying his habeas corpus petition for the custodial possession of two minor children from his former wife and mother of the children, Barbara Edrington Fitzgerald. In 1962 Edrington obtained a divorce from the appellee in Jefferson County Kentucky while he was stationed in that state as a member of the Armed Forces. The custody of the two children, a boy then one year of age and a girl then seven months of age, was awarded to him by consent in the divorce decree.

Edrington was transferred to the state of Maryland in January, 1967, and since his retirement from the Armed Forces in 1972, he has resided in the state of Indiana. The children have lived with him in Maryland and Indiana except for visitation periods with their mother. The appellee mother married Fitzgerald in 1968 and has lived in the state of Arkansas since her remarriage. None of the parties have resided in Kentucky since 1967. The battle over the custody of the children in this case has been a continuous one extending through the courts of Kentucky, Maryland, Indiana and Arkansas and over a period of twelve years, the entire life of the children. Of course the children are the primary casualties.

The original divorce decree and many of the numerous subsequent court orders are not in the record before us but the history of the litigation is set out in a detailed "Findings of Fact and Conclusions of Law" filed on July 24, 1969, by

the Jefferson Circuit Court in Kentucky denying one of Mrs. Fitzgerald's petitions for change in custody. The pertinent portions of this ten page document are as follows:

> "This action came before the Court following the filing of an amended and supplemental complaint by the defendant seeking change of custody of the two infant children of the parties.
>
> On December 14, 1962, a judgment of divorce was entered incorporating an agreement awarding the plaintiff the custody of the two children, who are now seven and eight years of age respectively, and awarding the defendant the right of reasonable visitation.
>
> Following several abortive efforts by the defendant to secure custody of the children an agreement was entered on June 1, 1965, ordering temporary custody to the defendant from June 1, 1965, to September 1, 1965. On November 5, 1965, another amended and supplemental counterclaim was filed by the defendant praying for the permanent custody of the children. The Court entered its findings of fact and conclusions of law on May 6, 1966, retaining custody with the plaintiff and awarding custody during the summer months to the defendant with support to be paid her at that time at the rate of $120 per month.
>
> Sergeant Edrington, plaintiff in this action, a member of the United States Army Air Force, was transferred to the Andrews Air Force Base in December, 1966, and reported there on January 19, 1967. He has been living there since that time with his present wife whom he married on October 15, 1964, in Florida, and his two children by his first marriage, the subject matter of this action, and her child by a previous marriage and the child born of his present union.
>
> * * *
>
> In the year 1968 the defendant had moved to Maryland and lived within five miles of the residence of the plaintiff. * * * [F]riction arose which resulted in the employ-

ment of attorneys in Maryland by both of them. As a result, the defendant filed in the Maryland Court a petition for modification of visitation rights requesting that she be given Christmas visits. An order was entered on December 23, 1968, by the Prince George Circuit Court granting the plaintiff in this action custody of the minor children during the period of one week prior to the beginning of school in the fall until one week after the ending of school in the summer, granting Mrs. Fitzgerald custody for one week after closing of school in the summer until one week prior to the starting of school in the fall. Other provisions were made in the order, the principal of which was that the mother should have the right of visitation with the children commencing Christmas of 1968 and every even numbered year thereafter from December 26 until the evening prior to the resumption of school and commencing Christmas of 1969 and every odd year thereafter from the first day of the Christmas school vacation until December 26.

* * *

Acting pursuant to this order the defendant took the children to Arkansas. She did not return them on the date specified in the Maryland order. The plaintiff was compelled to go to Arkansas to seek relief there. He received an order of the Arkansas Court following a hearing directing the defendant to turn the children over to him forthwith. This order was dated January 26, 1969. The following day the defendant removed the children to Atlanta, Georgia. She then spent about two weeks with them there and then came to Kentucky to this Court to file her amended and supplemental complaint. The children were finally delivered over to the plaintiff on February 14, 1969. . . .

An order was entered by the Prince George Circuit Court on January 28, 1968, holding Mrs. Fitzgerald in contempt of that Court for failure to comply with the order of December 23, 1968. The order further provided that Mrs. Fitzgerald's rights of custody, visitation privileges, and support payments referred to in said order were held suspended until further orders of that

Court.

* * *

The conduct of the defendant seems to this Court to be one of self-help in taking the law into her own hands. She deliberately disobeyed the orders of the Maryland Court and the Arkansas court. She and her present husband are not persons of limited means nor are they unversed in the field of domestic relations law. They were represented by lawyers in Maryland. They were represented by a lawyer in Louisville. They had counsel in Arkansas. The conduct of the defendant appears to this Court to be not only contemptuous of two other Circuit Courts of this nation but indicative of a campaign of harassment which is made possible by the financial resources of her new husband.

* * *

These children need more than anything a firm fixed base and periods of visitation with their secondary custodian which will not basically disturb their relationships with their primary custodians. The motion for a change in custody is overruled.

* * *

It is believed to be appropriate at this time to comment upon the jurisdiction of this Court and on the Doctrine of Forum Non Conveniens. This Court, of course, has jurisdiction under the continuing jurisdiction rule. See *Batchelor* v. *Fulcher,* 415 S.W. 2d 828 (Ky., 1967). As pointed out in that case, there are three concurrent bases of jurisdiction in cases of child custody. They are: domicile of the child in the state, presence of the child in the state; and personal jurisdiction over the contending parties. In this case the only real contact that this Court has with the parties arises out of the previous proceedings in this Court and neither one of them lives in Kentucky nor do the children.

In the case of *Walden* vs. *Johnson,* 417 S.W. 2d 220 (Ky.,

1967) at Page 223 it was pointed out that the right to control infants should be exercised only when a state has acquired a recognizable parens patriae interest in the child predicated upon bona fide residence or domicile. The domicile of the Edrington children and their residence is in Maryland. The Maryland Court has every advantage over this Court in being able to enlist the help of neighbors, doctors, teachers and other persons who are familiar with the living conditions of the Edrington children in making any further determinations of what is best for them. These observations are made purely for the purpose of obviating future litigation in this Court subject to the condition that the Maryland Court will hold that it does have jurisdiction over the subject matter notwithstanding the presence of the plaintiff on a military base in that state, it being the understanding of this Court that the matter has been raised in the Maryland Court by Mrs. Fitzgerald and will be adjudicated by that Court."

Mrs. Fitzgerald appealed this decision to the Kentucky Court of Appeals[1] and that court in affirming the trial court, among other things, said:

"Appellant's next point questions the propriety of that part of the judgment relating to future jurisdiction of this controversy. While the judgment does not mention this question, it adopts the findings of fact and conclusions of law which suggest that the Maryland courts should logically have jurisdiction. In dealing with this question the chancellor said: 'These observations are made purely for the purpose of obviating future litigation in this Court subject to the condition that the Maryland Court will hold that it does have jurisdiction over the subject matter * * * .' It was unnecessary that the chancellor embody this language in his findings, although it may have been a gratuitious and beneficial 'observation.' Of course, this part of the judgment is not binding on any court of the Commonwealth in the future for the simple reason that we cannot foretell future circumstances and conditions that may determine the question of jurisdiction."

[1]*Edrington* v. *Edrington,* 459 S.W. 2d 141.

It appears that Mrs. Fitzgerald continued to file petitions or motions for change in custody and visitation rights in the Jefferson Circuit Court while she was a resident of Arkansas and Mr. Edrington and the children resided in Indiana. On December 20, 1973, the Kentucky Court entered an order reciting that Edrington and his Indiana counsel had been notified of the hearing by registered letter delivered on December 16. The order recited that Mrs. Fitzgerald resides in Arkansas; that she had driven 600 to 800 miles to Kentucky for the hearing on her motion and if the motion should be granted, she would have to drive to Indiana for the children before returning with them to her home in Arkansas. The court then, by order signed by The Honorable Richard A. Revell, Judge, recited as follows:

> "The respondent, Barbara Fitzgerald (formerly Edrington) may have the two infant children, James L., Jr. and Marcelle, with her for visitation purposes from December 20, 1973, until January 7, 1974, or such time as school reconvenes, if earlier, and for such purposes may take said children with her out of the State of Indiana to her home in Arkansas. The respondent shall be responsible to see that said children are returned to their father, the petitioner, on the day before school begins."

On December 21 Mrs. Fitzgerald filed the Kentucky Court order in the Washington County Indiana Circuit Court and on short notice to James Edrington's Indiana attorney, obtained an order of the Indiana Court giving full faith and credit to the Kentucky Court order and obtained an order from the Indiana Court for the delivery of the possession of the children to her. The order provided in part as follows:

> "That the Sheriff of Washington County forthwith pick up the children, James L. Edrington, Jr. and Marcelle Sabrina Edrington, and deliver them to the possession of Barbara M. Fitzgerald for visitation in accordance with the Judgment of the Jefferson Circuit Court.
>
> This judgment may be executed immediately."

The possession of the children was delivered to Mrs.

Fitzgerald under this order and she returned with them to her home in Arkansas.

Instead of returning the children to Mr. Edrington in Indiana on January 7, as directed and ordered by both the Kentucky and Indiana Courts, Mrs. Fitzgerald on January 7, 1974, again filed a motion in the Jefferson Circuit Court for a change in custody. On January 28, 1974, the Jefferson Circuit Court entered an order which, among other things, extended the visitation period to March 11, 1974, when the motion for change in custody would be heard and ordered Mr. Edrington to reimburse Mrs. Fitzgerald certain expenses in traveling from her home in Arkansas to the Kentucky Court hearing.

On January 17, 1974, in connection with Mrs. Fitzgerald's petition for possession of the children under the Kentucky Court order, the Washington Circuit Court in Indiana made the following "Entry:"

> "It is therefore ORDERED, ADJUDGED AND DECREED as follows:
>
> 1. That the Defendant James Edrington has been in compliance with all prior orders of the Circuit Court of Jefferson County, Kentucky, and the Circuit Court of Prince George's County, Maryland, in bringing the parties' minor children into the State of Indiana.
>
> 2. That the Defendant James Edrington and the parties' minor children are residents and domiciliaries of the State of Indiana.
>
> 3. That the Washington Circuit Court has jurisdiction of the Defendant and the parties' minor children, by virtue of their residence and domicile.
>
> 4. That the Washington Circuit Court does now accept jurisdiction of this cause and all matters pertaining to the present and future custody of the parties' minor children.
>
> 5. That the Plaintiff's, Barbara M. Fitzgerald's, peti-

tion shall be denied.

6. That the order of this Court heretofore entered on the 21st day of December, 1973, granting full faith and credit to the Kentucky judgment is in error and is hereby set aside and declared null and void.

7. That the parties' minor children have not been returned to the Defendant James Edrington, as promised to the Washington Circuit Court by Plaintiff's counsel, and that the children shall now be immediately returned to the Defendant's custody.

8. That the parties' minor children are being illegally detained in the State of Arkansas or the State of Kentucky and that said children shall be immediately returned to the Defendant."

Edrington filed his petition for habeas corpus in the Lonoke County Chancery Court. A hearing was had thereon on February 14, 1974, and on February 21 the chancellor entered a decree denying the petition. Apparently the chancellor felt that the Kentucky rather than the Indiana Court had jurisdiction in this case, and the Kentucky Court order rather than the Indiana Court order was entitled to full faith and credit in this case.

On trial de novo we are of the opinion the chancellor should have granted the petition for habeas corpus. Even if this were truly a conflict of laws case requiring a determination of whether full faith and credit must be given to a foreign court order or decree, we have held contrary to Mrs. Fitzgerald's interest in this case.

In the case of *Keneipp* v. *Phillips,* 210 Ark. 264, 196 S.W. 2d 220, Mrs. Phillips was divorced from her former husband in Indiana in 1944 and the custody of a child was awarded to her. After her marriage to Mr. Phillips she became domiciled in Fayetteville, Arkansas, and in August, 1945, she brought the child to Arkansas where he lived with her and his stepfather. On September 11, 1945, the child's father in Indiana applied to the Indiana Court that had rendered the divorce decree for a modification of the decree for custody of the child

and, on September 26, 1945, an order was entered by the Indiana Court modifying its former decree as to custody and awarding the custody of the child to his aunt, Mrs. O. M. Dennison, as requested by the father. There was no personal service on Mrs. Phillips in Indiana in connection with the modification order. On November 14, 1945, the appellants, father and aunt of the child, filed suit as plaintiffs in the Washington Chancery Court of Arkansas to have the custody of the child awarded to the aunt as was decreed by the Indiana Court. The Washington Chancery Court denied the petition and in affirming the decree on appeal to this court we said:

> "As to the effect to be given the modified decree, *supra,* procured by appellant, husband, while his son and former wife were residents of Fayetteville, Arkansas, the general rule, as well as that declared here by this court, is that it has no extraterritorial effect beyond the boundaries of Indiana where it was rendered, and that when the domicile of a child is changed and it becomes a citizen of another state, as in the present case, such child is no longer subject to the control of the courts of the first state. In the *Tucker* v. *Turner* case, *supra,* this court announced the rule, continuing the quotation from § 417 Ruling Case Law, *supra*: 'Nor is a decree of a court of one state awarding the custody of a child binding upon the courts of another state under the full faith and credit clause of the federal constitution after the child had become domiciled in the latter state. Such a decree as to a child has no extraterritorial effect beyond the boundaries of the state where it is rendered, and the courts of the second state will not remand the child to the jurisdiction of another state, especially where it is against the true interest of the child. The reason for this rule is found in the fact that children are the wards of the court and the right of the state rises superior to that of the parents. Therefore, when a child changes his domicile and becomes a citizen of a second state, he is no longer subject to the control of the courts of the first state.' "

The Kentucky Circuit Court recognized as far back as July, 1969, that all the parties including the children had

become nonresidents of the state and that court's only jurisdiction at that time was based on the original divorce proceeding more than eleven years ago. It is true that the Kentucky trial Court went further than was necessary to the issues before it in reciting the three concurrent bases for jurisdiction in cases of child custody as set out in *Batchelor* v. *Fulcher,* 415 S.W. 2d 828, but that court concluded that the courts in the state of the children's domicile were best suited and equipped to determine their custody on changed conditions, and we reach the same conclusion.

It is conceded by all parties concerned that the bona fide domicile of Mr. Edrington is in Indiana and that of Mrs. Fitzgerald is in Arkansas where they have lived for some time. It is also obvious that Mr. Edrington has the legal custody of the children and they have lived with him in Maryland and Indiana at all times except while visiting Mrs. Fitzgerald in Arkansas under temporary court orders of Maryland and Indiana where Mr. Edrington and the children were domiciled.

The length of this opinion is occasioned by the fact that Mrs. Fitzgerald is domiciled in this state and the custody of the children will be subject to judicial review for some time before they reach their majority. It is thought that perhaps this opinion may be of some value as a guide in avoiding quick orders on short notice and possible future litigation in this case. The decree of the chancellor is reversed and this cause is remanded with directions to grant the petition for habeas corpus, together with the necessary orders for enforcing same.

Reversed and remanded.

BROWN, J., concurs.

WESOC CORPORATION et al *v.*
ARKANSAS STATE HIGHWAY COMMISSION

73-273 514 S.W. 2d 212

Opinion delivered October 7, 1974

John C. Calhoun Jr. and *Owens, McHaney & McHaney,* for appellants.

Thomas B. Keys and *Kenneth R. Brock,* for appellee.

GEORGE ROSE SMITH, Justice. Upon bringing this condemnation suit the highway department deposited $16,500 as estimated just compensation. The defendants' testimony put the figure at about three times that amount. In appealing from a verdict and judgment for $21,500 the defendants argue that the trial court erred in the admission and exclusion of evidence.

The defendant-appellants are the owner, the lessee, and the sublessee of a filling station at the corner of State Line Avenue (a major thoroughfare) and 24th Street in Texarkana. The highway department, in order to widen State Line, is taking a strip about 17 feet wide and about 140 feet long. The strip includes three self-service pumps, a large canopy, signs, wiring, and other fixtures. After the taking, according to the landowners' proof, the usuable area along State Line Avenue will be so narrow that the service station building and its appurtenances will have to be moved farther back from the street.

Evidence of relocation costs is admissible, not as the measure of damages but as an aid to the jury in its determination of before and after values. *Ark. State Highway Commn.* v. *Carpenter,* 237 Ark. 46, 371 S.W. 2d 535 (1963). To establish those costs the landowners relied upon the testimony of Ray Gammill, a Texarkana general contractor who had built more than a hundred service stations in Arkansas during the preceding 24 years. Gammill had been the low bidder for this relocation job. He testified that the costs would be $34,549.

The trial judge, on motion by the condemnor, struck Gammill's estimate of costs, on the dual ground that it included the expense of repainting the building after its removal and that it included a provision for a temporary office during the removal. Upon further redirect examination Gammill explained that repainting was a necessary part of the relocation expense, because the metal building would unavoidably be scarred in the dismantling and re-erection process. Gammill also fixed the temporary office expense at $200.

The court was wrong in refusing to change its ruling upon the motion to strike, in view of Gammill's additional

testimony. If, as Gammill asserted without contradiction, repainting was an essential step in the relocation of the structure, then that flaw in his testimony had been corrected. In such a situation it is proper for the testimony to be offered again. *Jones* v. *Railway,* 53 Ark. 27, 13 S.W. 416, 22 Am. St. Rep. 175 (1890). Upon the other point, the $200 item could easily have been subtracted if the court decided to disallow it. In fact, that is the correct procedure when an expert witness specifies an amount improperly included in his valuation. *Ark. State Highway Commn.* v. *Wallace,* 247 Ark. 157, 444 S.W. 2d 685 (1969). Thus there was no sound basis for the court's refusal to reconsider its initial ruling and admit into evidence the witness's estimate of relocation costs.

The appellants' second point for reversal stems from the trial court's action in striking Gammill's estimate of the reproduction cost of the building, on the ground that the landowners' counsel did not intend to qualify Gammill as a valuation expert. Counsel were right, for the reason stated in Jahr's Law of Eminent Domain, § 157 (1953):

> "After the proof [by a building expert] is presented, it is important to remember that the building expert cannot testify to market value. He knows what it would cost to reproduce the improvement and he should not hesitate to admit his lack of knowledge of what the improvement could be sold for. The real estate witness testifies as to the amount the improvement enhances the market value of the land."

The recommended procedure was followed in the court below. After Gammill's estimate of reproduction costs had been erroneously stricken, counsel recalled an expert real estate witness and, in chambers, made an offer of proof based upon Gammill's estimate. The testimony of both witnesses should have been admitted. In view of our ruling upon this point it seems to be unnecessary for us to consider the alternative argument that the real estate expert should have been allowed to base his testimony upon what he had learned about the original cost of the building.

A new trial being necessary, two other points must be mentioned. The court did not abuse its discretion in refusing

to strike the testimony of the condemnor's witness Shockley. Shockley's estimate of reproduction costs was based upon conversations with local builders—a procedure that was approved in *Ark. State Highway Commn.* v. *Bradford,* 252 Ark. 1037, 482 S.W. 2d 107 (1972). Shockley's vagueness about some particulars doubtless affected the weight of his testimony, but it cannot be said that he had no reasonable basis for his conclusions.

The landowners, in relocating the station, planned to put all the pumps along State Line Avenue rather than putting some of them along 24th Street, a less important thoroughfare. A witness for the highway department was allowed to testify that in the construction of a competing service station at the same intersection pumps had been installed along both streets. This was error, in the absence of a showing of points of similarity in addition to mere proximity. It was, of course, proper for the witness to testify in general terms, as he did, about prevailing practices with regard to the location of such pumps.

Reversed.

ALPHA CONTROLS ENGINEERING, Inc., et al *v.* FLAGMASTER, Inc.

74-103 514 S.W. 2d 223

Opinion delivered October 7, 1974

Pearson & Woodruff, for appellants.

Paul Jameson and *Charles W. Atkinson,* for appellee.

LYLE BROWN, Justice. Our Supreme Court Rule 9 (d) provides, among other things, that the appellants provide an abstract of the record as is necessary to an understanding of all questions presented to us for decision. The Rules of the Supreme Court are to be found in Ark. Stat. Ann., Vol. 3A, 1962 Replacement, beginning at page 102 of the 1973 pocket supplement.

This case is affirmed for failure to comply with the recited portion of Rule 9 (d). The trial court entered a detailed judgment consisting of four pages. The judgment sets out many specific findings of facts and conclusions of law covering the numerous facets of the case. (The case was tried to the court without a jury.) Appellant's abstract of the judgment consists of ten lines which actually is an abstract only of the last paragraph of the court's judgment. An abstract of all the specific findings of the court is necessary to an understanding of the issues to be decided.

We do not consider our action unduly harsh because a majority of the court would have affirmed on the merits had they been reached.

Affirmed.

PEOPLES PROTECTIVE LIFE INSURANCE Company *v.* Virginia SMITH

73-293 514 S.W. 2d 400

Opinion delivered October 7, 1974

[Rehearing denied November 4, 1974.]

Rose, Nash, Williamson, Carroll & Clay, by: *Phillip Carroll,* for appellant.

Matthews, Purtle, Osterloh & Weber, by: *Gail O. Matthews,* for appellee and cross-appellant Virginia Smith; *Wright, Lindsey & Jennings,* by: *James M. Moody,* for cross-appellant Progressive National Life Ins. Co; *Givens & Buzbee,* by: *John R. Buzbee,* for Moore Ford Co.

JOHN A. FOGLEMAN, Justice. Appellee Virginia Smith is the widow of Clarence C. Smith, who died on March 4, 1972 of cancer which had caused him to be totally disabled after June 18, 1970. Smith had been employed by Moore Ford

Company for a number of years. He was covered by a group life and health insurance policy issued by Mid-West National Life Insurance Company, predecessor of Progressive National Life Insurance Company, covering the employees of Moore Ford Company. On January 1, 1971, a new group policy covering these employees was obtained by Moore Ford Company. This policy, providing certain medical benefits and $6,000 life insurance to employees of Moore Ford was issued by appellant, Peoples Protective Life Insurance Company.

This appeal involves the question whether Clarence C. Smith came within the coverage of a group life and health insurance policy issued by Peoples Protective Life Insurance Company to Moore Ford Company. Appellant contends that the judgment against it should be reversed because:

I

There was no coverage for Smith under the Peoples Protective policy.

II

Smith's ineligibility under the group policy was not waived.

Mid-West issued a group health and life insurance policy to Moore and a certificate to Smith, with appellee as beneficiary. When Peoples Protective issued the policy sued on, it also issued a certificate to Smith, with appellee as beneficiary. The Mid-West policy, which lapsed for nonpayment of premiums about 20 days after the Peoples Protective policy was issued, contained a provision by which premiums were waived in case of total disability.

The Peoples Protective policy contained the following pertinent provisions:

DECLARATIONS PAGE 1

2. All Full-Time Employees to be eligible are all active employees less than 65 years of age. Full-Time

employees shall be those who work 30 or more hours a week for the employer.

3. (A) All present Full-Time Employees who have completed 1 month employment on the Effective Date of this Policy shall be eligible immediately; all other Full-Time Employees shall be eligible upon completion of 1 month employment.

PART I ELIGIBILITY

An Eligible Employee shall be an employee of the Employer and of any subsidiary and any affiliate company who qualifies under Statements 2 and 3 of the Declarations Page for whom benefits are indicated in Statement 6 of the Declarations Page.

PART II EFFECTIVE DATE OF INSURANCE

*****

If any Eligible Employee is required to contribute toward the premium for all or a part of his insurance as indicated in Statements 7 and 9 of the Declarations Page, each such employee, as a condition to becoming insured for such contributory insurance, shall make written request to the Employer on a form approved by the Company and shall agree thereon to contribute the amount required for the insurance to which he is or may become entitled. The effective date of such insurance for such an Eligible Employee, subject to the further provisions of the Part, shall be as follows:

1. If such request for insurance is made by the employee on or before the date he becomes eligible, the effective date shall be the date he becomes eligible.

2. If such request for insurance is made by the employee within 31 days after he becomes eligible, the effective date shall be the date of his request or

3. If such request for insurance is made by the employee after the end of 31 day period following the date he is eligible or is made after a previous termination of insurance because of failure to make his contribution when due, the employee shall be required to submit evidence of insurability, including good health, satisfactory to the Company and without expense to it. The effective date of his insurance shall be a date designated by the Company after the Company determines the evidence to be satisfactory.

In any case in which the employee is not actively at work on the date his insurance would otherwise become effective, the effective date of his insurance shall be the date of his return to full-time work.

*****

EMPLOYER NOT COMPANY'S AGENT:

The Employer shall in no event be considered the agent of the Insurance Company for any purpose under this Policy.

*****

AMENDMENT AND CHANGES:

No agent is authorized to alter or amend this policy, or to waive any conditions or restrictions herein, or to extend the time for paying a premium. This policy may be amended at any time by mutual agreement between the Employer and the Company without consent of the employees insured, but without prejudice to any loss incurred prior to the date to which premiums have been paid. No person except the President, Vice President, or Secretary, or Assistant Secretary of the Company has authority on behalf of the Company to modify the policy or to waive any of the Company's rights or requirements.

It was shown that, after Smith became disabled, he went to work again in July, 1970, and worked for some five or six weeks, but that he was not working when the Peoples Protective policy was issued or at any time thereafter. Both policies were contributory. As long as Smith worked, his portion of the premiums due Mid-West (later Progressive) was withheld from his pay. Thereafter, Smith paid the full premium to Moore Ford Company and Moore remitted it to its insurance carrier along with the premiums paid on other employees. His name was never stricken from the records of Moore Ford as an active employee. He was reported to appellant by Moore Ford as if he were a full-time employee. In January 1971, when its policy was issued, the certificate issued to Smith by Peoples Protective recited life insurance benefits of $6,000. Appellant paid a claim submitted by Smith for medical expenses when Smith was treated in a hospital after the issuance of its policy.

United Financial Services was an agent for Mid-West and for Peoples Protective. Hale Allen was President of the agency and Scott Goodman was a stockholder and soliciting agent of United Financial Services. United Financial Services received an "override" on all policies written by it for Mid-West. Goodman was paid commissions by United Financial Services. Hale Allen, president of the agency, testified that it had no authority to extend coverage beyond the terms of the policy. Scott Goodman negotiated both the Mid-West and Peoples Protective policies.[1] According to Smith's daughter, Goodman advised the Smith family that a change in insurance carriers was contemplated by Moore Ford, but that, because of the non-cancellable clause in the Mid-West policy, they should never let his name be dropped from the group, and that they should continue to pay the premiums, regardless of benefits or costs.

Sometime prior to the issuance of the Peoples Protective policy to Moore Ford Company, Progressive National had discontinued the writing of health policies and requested a

[1]Goodman denied that he had anything to do with the change of carriers or even knew of it until after it had been accomplished. In stating the facts, however, we have drawn all possible inferences and resolved all conflicts favorably to the appellee. Goodman admitted having advised the Smith family when he went to the home to fill out a medical claim form at a time not later than the early fall of 1970, that there were conversion privileges under the Mid-West policy.

change in carriers but had been willing to continue the coverage if Moore desired that it do so. Hale Allen, president of United Financial Services, notified Progressive National of the change in carriers. The death benefits under the earlier policy terminated January 20, 1971, but Smith, who was 62 years of age, was not eligible for extended insurance which would have been available to him had he been under 60. Even though several claims had been filed by Smith under this policy, there had been no waiver of premium, to which Smith would have been entitled upon termination of employment by total disability. This company was never notified that Smith's employment was terminated. He had a privilege of conversion of the life insurance coverage under this policy by applying to Progressive National.

Scott Goodman was aware that Smith had terminal cancer and sometime between June and December 31, 1970 had a conversation with the employee of Moore Ford who kept the company records with regard to claims and premiums on the group insurance policies. According to her, Goodman said that he had told the Smith family to continue the coverage and pay the premium directly to Moore Ford.

There was no evidence that Peoples Protective was ever actually notified of Smith's condition, except by the medical claims submitted to it.

I

The basic premise of the circuit court's holding that there was coverage is that Peoples Protective Insurance Company assumed all coverage previously afforded under the Mid-West contract, and that there was no evidence tc the contrary. We respectfully disagree with the learned circuit judge. In the first place, appellee had the burden of proving coverage. *State Farm Fire & Casualty Co.* v. *Rice,* 241 Ark. 201, 406 S.W. 2d 880; *Southern Farm Bureau Casualty Insurance Co.* v. *Reed,* 231 Ark. 759, 332 S.W. 2d 615; *Phoenix Assurance Co., Ltd.* v. *Loetscher,* 215 Ark. 23, 219 S.W. 2d 629; *State Farm Mutual Automobile Insurance Co.* v. *Belshe,* 195 Ark. 460, 112 S.W. 2d 954; *Atlas Life Insurance Co.* v. *Bolling,* 186 Ark. 218, 53 S.W. 2d 1, 46 C.J.S. 399, Insurance, § 1316 (6); 19 Couch

on Insurance 2d 639, § 79:344 (1968). Annot: 68 A.L.R. 2d 8, 145; 68 A.L.R. 2d 150, 204 (1959).

The policy clearly defined eligibility for coverage. There is no evidence that Smith ever qualified for coverage under the policy. He could not have qualified for coverage until the date of his return to full-time work—which never came. See *Hargraves* v. *Continental Assurance Co.*, 247 Ark. 965, 448 S.W. 2d 942. We find no substantial evidence that appellant assumed the Mid-West coverage. It is quite clear that Scott Goodman was a soliciting agent only and that neither United Financial Services nor Hale Allen had the authority to issue policies or extend coverage beyond the terms of the policy. The only evidence on the subject is the testimony of Allen, who categorically stated that all policies sold by United Financial Services were subject to approval by the home office, that all premiums were paid directly to the company and that United Financial Services was an agent which could sell policies and collect commissions on the sale. He said that he had not suggested that his agency had the power to waive contractual terms, or to issue insurance on risks otherwise unacceptable to Peoples Protective or to infer that United Financial Services was a general agency empowered to issue policies. This not only fails to constitute evidence of actual authority, it falls far short of showing any basis for a finding of ostensible authority to bind the company. Certainly, it cannot be said that Scott Goodman had any such authority, even if the ambiguous statement attributed to him could be stretched to carry an inference that coverage of Smith was greater than indicated by the terms of the policy.

The only evidence relating to the assumption by Peoples Progressive of Mid-West obligations was given by Hale Allen in response to this question by appellee's attorney:

> Can you tell me whether or not as a matter of practice that when one policy is terminated and another one is taken up that the second company takes up the claims for the first one and continues the coverage?

The response was admitted over appellant's objection, with a statement by the circuit judge that the objection was probably correct. The answer and further testimony on this

score was as follows:

> As a matter of practice, yes, in transfering one group case from one carrier to another you don't expect to have a lapse in coverage.
>
> *By Mr. Matthews* (claimant's attorney):
>
> Q. In other words, if you're going to write insurance for a business or something you've got to continue their coverage, is that not right?
>
> A. Yes sir.

This testimony was not admissible, but it was obviously considered by the circuit judge in reaching his conclusions. Even if admissible it was not substantial evidence of assumption of the risk on Smith. To have been sufficient, the evidence must have shown that the custom was certain, uniform, definite and known. *St. Louis I.M. & S. Ry. Co.* v. *Wirbel,* 108 Ark. 437, 158 S.W. 118. It must have been known to both parties or of such widespread usage that the contract will be presumed to have been made in reference to it. *Ben F. Levis, Inc.* v. *Collins,* 215 Ark. 172, 219 S.W. 2d 762.

Although evidence of custom may be shown to explain an ambiguity in a contract, it cannot be invoked to defeat, contradict, or vary express terms of the contract. *Farmers Cooperative Association* v. *Phillips,* 243 Ark. 809, 422 S.W. 2d 418; *Arkansas Power & Light Co.* v. *Thompson,* 191 Ark. 171, 83 S.W. 2d 838; *Lindsey* v. *Pierce Petroleum Corporation,* 181 Ark. 841, 28 S.W. 2d 56; *Ozark Badger Co.* v. *Roberts,* 171 Ark. 1105, 287 S.W. 401. *Muse* v. *Eastham,* 141 Ark. 295, 217 S.W. 15. It is not admissible to defeat or vary the plain and unambiguous terms of an insurance contract. *Runyan* v. *Runyan,* 101 Ark. 353, 142 S.W. 519.

Appellee bore the burden of proving that Peoples Protective assumed the obligations of Progressive National on the insurance contract issued by Mid-West, and that burden could not be met by incompetent evidence. *Capital Fire Insurance Co.* v. *J. H. Davis & Son,* 93 Ark. 179, 124 S.W. 520. Appellee did not meet her burden of proof.

II

The trial court's finding of waiver and estoppel was bas-

ed upon two statements of a claim for medical benefits filed on two forms furnished by appellant. The first claim submitted in February 1972 was rejected and returned because medical bills necessary to support the claim were not attached. On the first form Smith's disability was described as "Cancer-asso-Sarcoma." In a blank opposite the words "First full day unable to work" the response "March, 1970" was written. Thereafter, the second claim form submitted was received by appellant on March 21, 1972, some 17 days after Smith's death. This claim was paid, but the form did not contain any statement at all about the time Smith was first unable to work. There was no suggestion in either form that Smith did not work many full days after March, 1970, or that he was disabled from that date on. As a matter of fact he was not. The undisputed evidence shows that Smith worked during 1970 in June, perhaps July, and possibly even later. It was entirely possible, so far as appellant knew, that Smith had worked at a time which made him eligible.

Although the circuit court recognized that the doctrine of waiver and estoppel cannot be invoked to extend coverage and thereby bring into existence a contract not made by the parties, it held that the payment of a claim for medical benefits brought the doctrine into play. We agree that coverage in a contract of insurance cannot be extended by waiver or estoppel, but not that the payment of medical expenses changed the situation so as to accomplish this result. This proposition is thoroughly treated in 18 Couch on Insurance, 2d 32, 33, §§ 71:39, 71:40, viz:

*****

> The doctrine of waiver or estoppel cannot be given the effect of enlarging or extending the coverage as defined in the contract, nor can it create a contract of insurance, since a cause of action cannot be based on a waiver.
>
> The doctrine of waiver or estoppel, based upon the conduct or action of the insurer, is not available to bring within the coverage of a policy risks not covered by its terms, or risks expressly excluded therefrom, and the application of the doctrine in this respect is to be distinguished from the waiver of, or estoppel to deny, grounds of forfeiture. That is, conditions going to the coverage or scope of the policy, as distinguished from

> those furnishing a ground for forfeiture, may not be waived by implication from conduct or action, without an express agreement to that effect supported by a new consideration.
>
> *****
>
> A cause of action cannot arise on the theory of estoppel. This follows from the fact that an estoppel is defensive in character. It does not create a cause of action. Its function is to preserve rights and not to bring into being a cause of action.
>
> An insurer may waive a defense by his conduct and become estopped to thereafter assert it, but in any case estoppel operates to preserve rights already acquired and to prevent forfeitures or avoidance of duties, but not to create new rights or new causes of action.
>
> Similarly, it has been said that the doctrine of estoppel is protective only and may be invoked as a shield but not as a weapon of offense. It is not effective to create a cause of action and should not be used for gain or profit.

Smith was excluded from coverage by specific language in the policy. In *Hartford Fire Insurance Co.* v. *Smith*, 200 Ark. 508, 139 S.W. 2d 411, we said:

> ***** The doctrine of waiver and estoppel cannot be asserted to extend coverage under a contract in which it was excluded by specific language. *Miller* v. *Illinois Bankers' Life Ass'n.*, 138 Ark. 442, 212 S.W. 310, 7 A.L.R. 378; *Mutual Ben. Health & Acc. Ass'n.* v. *Moore,* 196 Ark. 667, 119 S.W. 2d 499; *John Hancock Life Insurance Co.* v. *Henson*, [199 Ark. 987], 136 S.W. 2d 684.

A contention similar to those of appellee was considered and rejected in *Bankers National Insurance Co.* v. *Hembey*, 217 Ark. 749, 233 S.W. 2d 637. We said:

> It is true that prior to institution of this suit appellant rejected appellee's claim of disability on the exclusive

ground that hernia was an excepted risk, and this exception clause was not specifically pleaded. If Part A, when considered in connection with Part E, merely dealt with a ground of forfeiture, appellant might be held to have waived such forfeiture under the rule that where an insurer denies liability for a loss on one ground, at the time having knowledge of another ground of forfeiture, it cannot thereafter insist on such other ground if the insured has acted on its asserted position and incurred prejudice or expense by bringing suit, or otherwise. 29 Am. Jur., Insurance § 871. But Part A, as related to Part E, sets forth the scope or coverage of the policy and not merely a condition, the breach of which may be a ground of forfeiture. The rule is that, while a forfeiture of benefits contracted for may be waived, the doctrine of waiver or estoppel cannot be invoked to extend the coverage and thereby bring into existence a contract not not made by the parties. *Miller* v. *Illinois Bankers' Life Ass'n.*, 138 Ark. 442, 212 S.W. 310; *Hartford Fire Ins. Co.* v. *Smith*, 200 Ark. 508, 139 S.W. 2d 411; 45 C.J.S. Insurance, § 674a. Cases pointing out this well recognized distinction are collected in an annotation in 113 A.L.R. 857. We, therefore, conclude that appellee was not entitled to disability benefits under Part E of the policies.

In *Life & Casualty Insurance Company of Tenn.* v. *Nicholson*, 246 Ark. 570, 439 S.W. 2d 648, we said:

It is well settled in this state that the doctrines of waiver and estoppel, based upon the conduct or action of the insurer, cannot be used to extend the coverage of an insurance policy to a risk not covered by its terms or expressly excluded therefrom. *Hartford Fire Insurance Co.* v. *Smith*, 200 Ark. 508, 139 S.W. 2d 411; *Metropolitan Life Insurance Company* v. *Stagg*, 215 Ark. 456, 221 S.W. 2d 29; *Bankers National Insurance Co.* v. *Hemby*, 217 Ark. 749, 233 S.W. 2d 637. This is not a case where forfeiture is attempted by the insurance company but is a question as to the extent of the coverage of the policy. Consequently, there is no support for a finding of waiver.

Later, in *Batesville Insurance & Finance Company* v. *Butler*, 248 Ark. 776, 453 S.W. 2d 709, we made these appropriate

remarks:

> Butler's second point on cross-appeal is that U.S.F. & G. should be estopped from denying the coverage in question because of the representations of its agent, the Batesville Insurance & Finance Co., Inc. In making this argument, Butler has shown us no reason to overrule our many decisions holding that the doctrines of waiver and estoppel, based upon conduct or action of an insurer, cannot be used to extend coverage of an insurance policy to a risk not covered by its terms or expressly excluded therefrom. *Life & Casualty Insurance Co.* v. *Nicholson*, 246 Ark. 570, 439 S.W. 2d 648 (1969). Furthermore, the only authority, apparent or otherwise, shown to have been delegated to the agent was to countersign and issue policies and riders on printed forms when the proper premium was paid. This falls far short of apparent authority to extend the risk contained in a printed policy by an oral representation as suggested by cross-appellant.

In view of these authorities, the evidence pertaining to the payments of a claim cannot constitute substantial evidence of coverage, even if it could be said to have any probative force in that regard.

Since there is no substantial evidence to support the judgment holding Peoples Protective liable to appellee, we must reverse that judgment. That part of the case has been fully developed, so it must be dismissed.

Appellee cross-appealed, however, from that part of the judgment dismissing her complaint against Progressive National and Moore Ford Company. No reason for the dismissals is given in the judgment or the court's memorandum opinion. It appears, however, that the basis for this action may have been the finding that Peoples Protective had assumed the coverage formerly afforded Progressive National. Appellee quite frankly states that her cross-appeal is an alternative to an affirmance and that she has been unable to determine whether it is proper. Appellee has not stated any basis for holding Moore Ford liable to her. The mere allegation in her complaint that Moore Ford's failure to pay

premiums or transfer coverage is hardly sufficient. Nothing in the evidence shows that Moore Ford failed to pay any premiums or that it had any obligation to transfer coverage.

The basis asserted in appellee's complaint for holding Progressive National Insurance Company liable appears to be the provision for waiver of premiums in case of total disability, coupled with a conversion clause in the policy originally issued by Mid-West and with a clause for extended death benefits. The "extended insurance" provisions were not available to Smith, because he did not become totally disabled before he became 60 years of age. Furthermore, no proof of total disability required by these provisions was ever furnished Progressive National. Smith never applied for conversion of the group life insurance under the Mid-West policy as required by the unambiguous terms of the policy.

Appellee, as cross-appellant, had the burden of demonstrating to this court that the trial court committed error in dismissing the complaint as to cross-appellees. *Holt* v. *Holt,* 253 Ark. 456, 486 S.W. 2d 688; *Poindexter* v. *Cole,* 239 Ark. 471, 389 S.W. 2d 869. Every judgment of a court of competent jurisdiction is presumed right unless the party aggrieved affirmatively shows it was erroneous. *Clow* v. *Watson,* 124 Ark. 388, 187 S.W. 175. See also *Embry* v. *Neighbors,* 139 Ark. 313, 213 S.W. 741. Appellee has also failed to meet this burden.

Since we find no basis for liability of either Peoples Protective Insurance Company, Progressive National Insurance Company or Moore Ford Company, and since the case has been fully developed, we must dismiss the action. The judgment is reversed on direct appeal, affirmed on cross-appeal and the cause is dismissed.

JONES and BYRD, JJ., dissent as to the reversal.

HOLT, J., not participating.

EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES *v.* Willie RUMMELL

74-129 514 S.W. 2d 224

Opinion delivered October 7, 1974

Rose, Nash, Williamson, Carroll & Clay, by: *Phillip Carroll,* for appellee.

McMath, Leatherman & Woods, P.A., for appellee.

JOHN A. FOGLEMAN, Justice. Appellant challenges the reasonableness of a $10,000.00 allowance to Willie Rummel for attorney's fees under Ark. Stat. Ann. § 66-3238 (Repl. 1966). No evidence was presented on the matter. The allowance was made by the trial judge after considerable argument of counsel on the subject. No issue is raised as to the propriety of this procedure. But see, *Union Central Life Insurance Co.* v. *Mendenhall,* 183 Ark. 25, 34 S.W. 2d 1078. Cf. *Unionaid Life Insurance Co.* v. *Bank of Dover,* 192 Ark. 123, 90 S.W. 2d 982.

The fee allowance must be reasonable. Ark. Stat. Ann. § 66-3238. *Aetna Life Insurance Co.* v. *Taylor,* 128 Ark. 155, 193 S.W. 540. Trammel, *One State's Experience with the Statutory Remedy for Insurer's Delays - A Problem in Payment,* 10 Ark. L. Rev. 439, 462 (1956). Under the circumstances here, however, the judgment must be affirmed unless appellant demonstrates, or the record shows, that the allowance is excessive. *American Insurance Co. of Newark* v. *Dutton,* 183 Ark. 595, 37 S.W. 2d 875; *Union Life Insurance Co.* v. *Brewer,* 228 Ark. 600, 309 S.W. 2d 740.

The fee is allowed only to reimburse an insurance policyholder or beneficiary for expenses incurred in enforcing the contract and to compensate him in engaging counsel thoroughly competent to protect his interests. *John Hancock Mutual Life Insurance Co.* v. *Magers,* 199 Ark. 104, 132 S.W. 2d 841; *Vaughan* v. *Humphreys,* 153 Ark. 140, 239 S.W. 730, 22 A.L.R. 1201. It is not the property of the attorney, but is indemnity to the litigant. *John Hancock Mutual Life Insurance Co.* v. *Magers,* supra; *Vaughan* v. *Humphreys,* supra. The purpose of the statute is to permit an insured to obtain the services of a competent attorney and the amount of the allowance should be such that well prepared attorneys will not avoid this class of litigation or fail to devote sufficient time for thorough

preparation. *Old Republic Insurance Co.* v. *Alexander,* 245 Ark. 1029, 436 S.W. 2d 829. It is contemplated that the allowance should not be a speculative or contingent fee but that it be such a fee as would be reasonable for a litigant to pay his attorney for prosecuting such a case. *Old Republic Insurance Co.* v. *Alexander,* supra.

In *Old Republic* we enumerated as pertinent factors to be considered in a case such as this the time and amount of work required of the attorney, the ability to meet the issues that arise and the sum recovered or the amount involved in the action. Similar factors to be used as guides to determining reasonableness of a fee are set out in the Code of Professional Responsibility promulgated by the American Bar Association and adopted by this court. See DR 2-106 (B); EC 2-18. They are:

1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly.

2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

3. The fee customarily charged in the locality for similar legal services.

4. The amount involved and the results obtained.

5. The time limitations imposed by the client or by the circumstances.

6. The nature and length of the professional relationship with the client.

7. The experience, reputation, and ability of the lawyer or lawyers performing the services.

8. Whether the fee is fixed or contingent.

Similar treatment of the problem is given by Prof. Ray Trammell in *One State's Experience with the Statutory Remedy for*

Insurers - Delays - A Problem in Payment, 10 Ark. L. Rev. 439 (1956).

There is no fixed formula or policy to be considered in arriving at such fees other than the rule that the appropriately broad discretion of the trial court in such matters must not be abused. *Federal Life Insurance Company* v. *Hase,* 193 Ark. 816, 102 S.W. 2d 841.

Usually we recognize the superior perspective of the trial judge in assessing the applicable factors, because of his intimate acquaintance with the record and the quality of service rendered. *Old Republic Insurance Co.* v. *Alexander,* supra; *Great American Indemnity Co. of New York* v. *State,* 231 Ark. 181, 328 S.W. 2d 504; *North River Insurance Co.* v. *Thompson,* 190 Ark. 843, 81 S.W. 2d 19. We have not hesitated, however, to reduce allowances we deem excessive because we cannot find adequate support for them when the entire record of the case is before us. *Aetna Life Insurance Co.* v. *Spencer,* 182 Ark. 496, 32 S.W. 2d 310; *Maryland Casualty Co.* v. *Maloney,* 119 Ark. 434, 178 S.W. 387, L.R.A. 1916A 519. See also, *Old American Life Insurance Co.* v. *Williams,* 241 Ark. 250, 407 S.W. 2d 110.

In this case, the circuit judge only had the pleadings in the case and the actual trial along with the recognized skill and ackowledged experience of appellee's attorney and that of his adversary as a basis for making this important determination. Without any disparagement of the ability and services of appellee's attorney or discounting the skill of his adversary, we do not think these elements afford adequate basis for the $10,000.00 figure fixed by the circuit judge. We, too, resort to inspection of the record in reviewing trial court actions in this regard. *Metropolitan Casualty Insurance Co.* v. *Chambers,* 136 Ark. 84, 206 S.W. 64.

The complaint consisted of only two pages which stated the case's rather simple issue, which was one of fact. It was whether or not appellee was entitled to benefits of $270.00 a month for total disability under a group policy issued by appellant, after they had been discontinued on the theory that Rummell was no longer permanently and totally disabled within the terms of the policy. The policy provision involved provided that the monthly payments continued after

two years of disability preventing the performance of the duties of the insured's own work, only if the disability prevented him from working in any reasonable occupation for which he was or might become fitted by education, training or experience. Thus, the only issue was whether appellee was prevented from working in any such occupation and it was resolved against appellant by the jury verdict.

Policy terms were stipulated. During the one-day trial the appellee presented the testimony of a rehabilitation counselor for the Department of Social Rehabilitation Services and the depositions of a diagnosing physician, in addition to his own. The only evidence offered by appellant was the expert opinion of an examining physician, given by deposition.

The only instructions given by the court were AMI, Civil, 102, 103 and 202, and one offered by appellee stating the effect of the pertinent policy provision.

Appellee seeks to justify the fee allowed upon the following bases: the fee was contingent in the sense that, had the judgment gone against him, his attorney would not have received any compensation; the amount involved in the litigation was $50,000; the fee allowed was a smaller percentage of the amount involved than in almost all of the numerous cases collected by appellant; considerable time and effort were expended in preparation for trial; and the circuit judge had evaluated the quality of his attorney's skill and experience as rising far above that of the ordinary lawyer.

Appellant correctly contends that the fee should not be contingent, i.e., contingent upon the outcome of the case. *Aetna Life Insurance Company* v. *Taylor*, 128 Ark. 155, 193 S.W. 540. *Mutual Life Insurance Co.* v. *Owen*, 111 Ark. 554, 164 S.W. 720; *Merchants Fire Insurance Co.* v. *McAdams*, 88 Ark. 550, 115 S.W. 175. This basis of support for the allowance thus falls.

It does not follow, however, that the amount involved is not an element to be considered, along with the difficulty of the issues. We can agree that the testimony abstracted and the 9-3 jury verdict are indicative of the exercise of a high degree of skill in factual presentation and persuasiveness on

the part of appellee's counsel. Some difficulty arises in arriving at the amount of recovery in terms of the ultimate impact of the verdict upon future benefits. No one contends that the jury verdict for $1,350.00, the monthly payments then accrued, is the amount to be considered for fee allowance purposes. Unquestionably, this factor encompasses the future benefits which are to be paid as a result of the judgment in this case. *Pacific Mutual Life Insurance Co. of California* v. *Jordan,* 190 Ark. 941, 82 S.W. 2d 250. However, measuring this amount does present problems. We do not feel justified in accepting appellee's estimate of $50,000.00 in benefits, based upon a total of $38,070.00 which would be paid by his 65th birthday on March 17, 1985 (when the impact of Social Security benefits would, under policy provisions and existing law, reduce the payments) and the indeterminate amount of benefits he might draw for the remainder of his life expectancy extending to 1994 under recognized mortality tables for normal adults. This estimate includes the penalty recovered and, at the same time ignores the present value of the future benefits and the testimony of appellant's medical witness that a diabetic, as appellant was, had a life expectancy less than normal. Even following appellee's assumption that his life expectancy is normal and that payments will continue after his 65th birthday at the rate of $100.00 a month, present value would not exceed $31,000.00 on the basis of a 6% interest rate. Not only does this figure fail to fully support appellee's estimates, we cannot say that any of our previous cases treated by the parties afford us a sufficient comparison to be controlling. We find nothing affording any satisfactory means by which the time and effort spent in preparation for trial can be measured with any degree of accuracy. We are unaware of resort to this important factor in the trial judge's award, as his only reference to any guideline was his consideration of the *responsibility* assumed by the attorney in accepting employment and preparation for trial. These factors alone do not, in our opinion, support the amount allowed. Still, we are unable to accept the vague suggestions of appellant as to the appropriate allowance. We certainly do not agree that a fee of $1,500.00 is adequate, even though we have to rely upon the trial judge's knowledge and experience, and our own, to arrive at any amount that will cover all essential factors and insure that thoroughly competent attorneys will neither avoid

such litigation nor fail to appropriately prepare for its trial. We cannot, in all due deference to the trial judge's evaluation and in the light of our own knowledge on the subject, approve a fee allowance in excess of $5,000.00. It is our usual practice to modify the judgment by reducing the amount allowed. *Mutual Life Insurance Co. of N.Y.* v. *Owen,* 111 Ark. 554, 164 S.W. 720. We accordingly modify the judgment by reducing the allowance to that amount and affirm the judgment as thus modified.

HARRIS, C.J., and BYRD and HOLT, JJ., dissent.

CARLETON HARRIS, Chief Justice, dissenting. I disagree with the disposition of this case by the majority. The taking of the depositions (of the two doctors, one for appellant and one for appellee), while allotted only three lines in the majority opinion, required considerable time; what is more important, the *preparation* for taking same, required considerably more time. While appellant seems to have viewed this litigation as more or less routine, I cannot accept that evaluation, and the fact that the jury returned a 9 to 3 verdict, to me, sufficiently belies such an assertion. Actually, this vote is rather convincing evidence that the case was indeed difficult and required skill, experience, and thorough preparation so — while the record does not reflect the actual amount of time expended in preparing for trial, the result is clearly indicative that appellee's attorney was well informed on all facets of the case — knowledge that results only after diligent and careful study. Here is a laborer, with an eighth grade education, unemployed, totally disabled (as found by the jury), who, in the years to come, will not have to again litigate the question of his disability because the efforts of his attorney established his total and permanent disability. It appears to me that in disapproving the allowance to Mr. Rummell for his attorneys' fee, the court is overemphasizing the purported lack of time expended by that attorney (though it does not appear in the record), and minimizing the results achieved.

It is admitted by the majority that none of the cases cited by either party affords a sufficient comparison to be controlling. The majority then states:

> "we find nothing affording any satisfactory means by which the time and effort spent in preparation for trial can be measured with any degree of accuracy."

This simply means to me that the majority is taking an educated guess as to the amount to be awarded appellee for the attorneys' fee. I submit that this is hardly a sufficient basis to overturn the findings of the trial judge, who heard the case tried, heard the amount of fee argued, had every opportunity to observe the skill displayed and was thus in a much better position to determine, from the conduct of the trial, the time that had been spent in prepration.

I recognize that the amount of benefits to be drawn by Mr. Rummell is not definite, i.e., such is dependent on appellee living a sufficient length of time to draw the benefits that have been calculated, and this uncertainty perhaps could justify a reduction in the amount of the fee. However, it does not in my view, justify a 50% reduction and certainly I would not reduce the amount to less than $7,500.00. For the reasons set out herein, I respectfully dissent.

I am authorized to say HOLT, J. joins in this dissent.

CONLEY BYRD, Justice, dissenting. If we suppose that appellee's counsel spent one day in reading to bone up on his medical knowledge before taking the two doctors' depositions and that he took a half a day in taking each of the depositions, I don't see how he could have had more than four complete days of work in the handling of this one day trial. Furthermore, if we assume that approximately 45% of the fees which he collects, go to overhead, and that after vacations and holidays, counsel only works 154 days in a year, we are still figuring a reasonable compensation to counsel at a rate in excess of $100,000 per year. It looks to me that a gross income of $750.00 per day on this type of litigation should be adequate compensation. On the basis of what the record shows, I don't see how we can make an allowance in excess of $3,000 and that is rather liberal.

For the reasons stated I respectfully dissent.

ARKANSAS STATE HIGHWAY COMMISSION
v. Gerald COOK et al

74-43 514 S.W. 2d 215

Opinion delivered October 7, 1974

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

Brown, Compton & Prewett, by: *Robert C. Compton,* for

appellees.

FRANK HOLT, Justice. Appellant instituted this eminent domain action for the acquisition of some of appellees' lands which were needed for the relocation of an existing highway fronting upon appellees' homesite. The appellee, Gerald Cook, and his expert value witness estimated appellees' damages at $10,000 and $7,000 respectively. Appellant's witness estimated damages at $1,500. The jury awarded $8,-750 as just compensation. For reversal appellant contends that the "before" valuation of the landowner and his value witness, as revealed on cross-examination, is devoid of a fair and reasonable basis. Therefore, there is no substantial evidence to support the verdict.

In determining whether a verdict is supported by substantial evidence we review the testimony in that light which is most favorable to the appellee and indulge all reasonable inferences favoring the support of the judgment. *Ark. Hwy. Comm'n* v. *Duff*, 246 Ark. 922, 440 S.W. 2d 563 (1969). Appellee lived in the area all of his life and acquired the property in question approximately nine months before appellant began acquisition proceedings. He purchased the twenty acres involved as a homesite as well as pasture land for his cattle. The appellant, in relocating the highway from the front of appellees' property, acquired a strip of land containing 2.17 acres which bisected the twenty acre tract. This resulted in leaving appellees' home, his barn and other improvements on approximately four acres that existed between the old road and the new highway. This left approximately thirteen acres, his pasture land, completely separated from his barn and other facilities.

The appellee landowner testified that he had purchased the twenty acre tract for $10,000 and estimated the fair market value at the time of the taking nine months later at $25,000. On cross-examination he justified this before taking value on the basis that he had spent $6,000 improving the home before moving into it, had built a pond and had "cleaned up" some of the property. The relocation of the road had cut through and destroyed his pond. He lost the use of his barn for the thirteen acre residual tract except by transpor-

ting hay across the new highway or driving the cattle across it to the barn. According to him he would have to be "hauling all the time." "I wouldn't have time for nothing else." It was necessary to lease other lands to pasture his cattle. He testified the price of property "goes up each year around here" and he considered himself "lucky" to have purchased the twenty acre tract for $10,000.

Appellant in its original brief asserts that this testimony does not constitute a fair and reasonable basis for the landowner's before value estimate. Appellant agrees that a landowner is a competent witness to testify as to the value of his land simply because he owns it. *Ark. State Hwy. Comm'n* v. *Jones,* 256 Ark. 40, 505 S.W. 2d 210 (1974). However the landowner must relate a satisfactory explanation on cross-examination to justify his value estimate. *Ark. Hwy. Comm'n* v. *Duff, supra.* In the case at bar the thrust of appellant's argument relates primarily to the recent purchase of the property and the asserted inflated value placed upon it by appellee at the time of appellant's acquisition. The difference between the recent purchase price of the property and the before value placed upon it by the landowner is only one item to be considered. The most critical thing that can be said about this disparity is it would tend to weaken the landowner's opinion which is a credibility factor for the jury to determine. We said in *Ark. State Hwy. Comm'n* v. *Russell,* 240 Ark. 21, 398 S.W. 2d 201 (1966), the cross-examination must elicit evidence that demonstrates a witness "had no reasonable basis whatever for his opinion evidence." Certainly it was not demonstrated in the case at bar there was no fair and reasonable basis whatever to support the landowner's opinion.

Appellant also contends that the opinion of the expert value witness was not predicated upon a fair and reasonable basis with respect to the "before" value. He attributed $8,500 as the value to the improvements and $13,000 for the land. The court, on appellant's motion, disallowed his estimate of improvements as he was not sufficiently familiar with its recent condition. It appears that this witness was a lifelong resident of the county and had been engaged for 46 years in the abstract business. At the same time he had kept himself informed about land transactions in the area and had "traded" land around this particular area including pasture land,

homesites, etc. He said the land in question was approximately two miles or three minutes from the city limits of the county seat and that "land is very hard to find around Hampton." On cross-examination he placed a value of $650 an acre on the land. Suffice it to say that this witness testified with respect to similar sales that a two acre homesite within one-half mile of appellees' land sold for about $600 an acre and five acres in the vicinity of appellees' property sold for $1,000 an acre. It appears that there were no improvements upon these two tracts of land. The similarity in size is only one factor in considering comparable sales. We are unwilling to say that appellent's cross-examination of this witness destroyed his opinion evidence of any fair and reasonable basis. Therefore, the court properly refused to strike his testimony.

Appellant next asserts that the court erred in refusing to remove from the jury's consideration the price paid for land by a condemnor (the county) in the vicinity. It is true that in *Youts* v. *Public Service Company of Ark.*, 179 Ark. 695, 17 S. W. 2d 886 (1929), we held it was impermissible on direct examination to elicit evidence as to what a condemnor paid for other lands in the area in order to establish the true market value of lands being acquired. However, in *Ark. State Highway Comm'n* v. *Kennedy*, 234 Ark. 89, 350 S.W. 2d 526 (1961), we held that, although what a condemnor paid for property in the area is not a fair criterion of the true market value, the rule is not a prohibition against that type of knowledge the witness may possess. There we held that such value evidence elicited on cross-examination was not reversible error inasmuch as the court gave an admonitory instruction to disregard it. In *Ark. Power & Light* v. *Harper*, 249 Ark. 606, 460 S.W. 2d 75 (1970), testimony was elicited from a witness on cross-examination concerning a purchase made in the area by a condemnor. There we held the court was correct in refusing to strike the testimony inasmuch as "[O]ne is not permitted to speculate by participating in the development of evidence and then demanding that it be stricken when it proves unfavorable." We further observed that "perhaps appellant [condemnor] would have been entitled to a similar [admonitory] instruction had it so requested." There it was not demonstrated whether the purchase by the condemnor in the area was by a condemnation proceeding or

negotiation. Neither is it demonstrated in the case at bar. Additionally, here the value witness admittedly testified that in forming his opinion he did not take into consideration the purchase by the county of the two acre tract for $1,500 per acre. On further cross-examination he testified that a three acre tract in the vicinity of the county purchase sold for $1,-650 per acre or in excess of the county purchase per acre.

In *Russell, supra,* we held it was not prejudicial error where the condemnor elicited on cross-examination that the witness had taken into consideration an inadmissible offer in forming his opinion. There we said that during cross-examination one "is not entitled to embark upon a fishing expedition with immunity from any unfavorable information he may elicit. He acts at his peril in putting a question that may evoke an answer damaging to his own case." In approving this right of a witness on cross-examination to say he had considered an offer of sale in forming his opinion, we overruled to that extent *Ark. Highway Comm'n* v. *Wilmans,* 236 Ark. 945, 370 S.W. 2d 802 (1963).

In the case at bar, as indicated, and in *Harper, supra,* the inadmissible testimony was elicited on cross-examination and the manner of acquisition by the public agency was not shown. Additional factors exist here. The witness admittedly did not consider the county purchase in forming his opinion. The witness further testified on cross-examination that a sale in the vicinity of the county purchase exceeded in purchase price per acre that paid by the county. Finally the court fully instructed the jury as to the meaning of the term "fair market value" as being a negotiated transaction between a willing seller and a willing buyer with neither being forced to sell or buy. In these circumstances we cannot say with confidence that the failure to admonish the jury as requested by appellant was prejudicial. At most the asserted error was harmless.

Affirmed.

Charles HOOPER and Robert WESTLIN
v. STATE of Arkansas

CR 74-47 514 S.W. 2d 394

Opinion delivered October 14, 1974

John O. Maberry, for appellants.

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

CARLETON HARRIS, Chief Justice. Charles Hooper and Robert Westlin were charged by Information in the Madison County Circuit Court with wilfully and feloniously having in their possession 19 plastic containers of marijuana with the intent to deliver.[1] On trial, appellants were found guilty and their punishment fixed at 10 years imprisonment and a fine of $5,000 each. From the judgment so entered, appellants bring this appeal. For reversal, seven points are relied upon which we proceed to discuss.

It is first asserted that the court erred in compelling appellants to go to trial without a transcript of a certain *habeas corpus* proceeding. On October 4, 1973, the Madison County Circuit Court conducted a hearing on a petition by appellant for a writ of *habeas corpus*, appellants alleging that they were being held illegally. Following the hearing, the petition was denied and the case set for trial. Thereafter, a motion was filed seeking a transcript of the testimony taken at the hearing, particularly that of the sheriff and a member

[1]The amount alleged to have been involved was approximately one-half pound.

of the state police. No facts are set out in the motion in support of the request, but in their argument in this court, appellants state that relative to the testimony regarding the search and seizure of the marijuana, "appellants believe" that that testimony "may be in conflict with testimony introduced at the trial." No mention is made of any conflicting evidence and it would appear that appellants just hoped there would be a conflict. The allegations were, of course, insufficient to justify the court in granting the motion, and no prejudice has been shown to have resulted from the court's action. One of the motions filed also contained a request for a continuance based on the refusal to furnish the transcript, which was denied, but this is not argued in the brief before this court. At any rate, the granting of a continuance is within the sound discretion of the trial court. *Jackson* v. *State*, 245 Ark. 331, 432 S.W. 2d 896. No abuse of that discretion is here shown.

It is next asserted that the court erred in compelling the appellants to be tried by a jury at the request of the prosecuting attorney, appellants having waived their right to a trial by jury. Ark. Stat. Ann. § 43-2108 (Repl. 1964) clearly provides that a defendant may waive trial by jury, except where the sentence of death may be imposed, "provided the prosecuting attorney gives his assent to such waiver." Here, the prosecuting attorney did not give his assent. The contention is thus without merit.

It is contended that the court erred in admitting into evidence the marijuana obtained from appellants' vehicle by an illegal search and seizure. The evidence reflects that Sheriff Ralph Baker of Madison County received information from an informer that appellants would have an amount of marijuana in their black 1964 Ford, which would be in a large black plastic bag, in small packages, and would be located under the driver's seat. This information, acquired from, according to the sheriff, a reliable informant, was received around 8:00 P.M., and apparently the sheriff started out immediately searching for the automobile. This is evidenced by the fact that State Trooper Windell Byrd, who was not on duty at the time, was called by the sheriff and told that he (sheriff) had information that some marijuana was going to be moved shortly on that particular night; according

to Byrd, "He said that he'd like for me to help and I needed to come pretty fast." The trooper stated that he did not have time to put on his uniform and he accordingly answered the call in "civilian" clothes. The transcript does not reveal exactly when appellants' car was first observed, but it is clearly indicated that this occurred not too long after the search began. After catching sight of the automobile in question, the officers got behind the car, pulled up close to appellants and tried to stop them; when this happened, according to the sheriff, "They took off." The officers, traveling in an unmarked car, but equipped with a portable blue light, gave chase, according to the testimony, for about 40 minutes, traveling at speeds of better than 60 miles per hour even on a dirt road. The fugitive car stopped at the Westlin home and the occupants jumped out and started toward the house. The sheriff "hollered" at them and they stopped. The officer officer testified that the driver's side door was completely open and he walked directly to the car, reached under the front seat and pulled out the black bag, the bag being partly exposed. The sheriff said that this bag was located in exactly the place mentioned by the informant, and upon opening same, it was found to contain 18 plastic bags of marijuana. This, says appellants, was an illegal search and seizure. We do not agree. The time element is of prime importance. It is evident from reading the record that the information given the sheriff occurred a short time before appellants were located; of course, the information included the fact that the illegal contraband would be in this automobile, which, of course, could be moved at any time. The circumstances clearly reveal that there was no time to obtain a search warrant; even the accompanying trooper did not have time to change into his uniform. To locate a judge, or magistrate, after office hours is not always easy to accomplish. And, it definitely appears from the record that had such an effort been made, the car would have been gone from the vicinity. As far as the actual act of taking the marijuana from the automobile, the car door was wide open and the black bag partly visible; the wild chase of the automobile certainly was sufficient to justify the sheriff and trooper in believing that the car contained the marijuana about which the informant had spoken. The circumstances bear some similarity to those in *Cox* v. *State*[2], 254

[2]Certiorari denied by United States Supreme Court. See 414 U.S. 923.

Ark. 1, 491 S.W. 2d 802, where a deputy sheriff received information by telephone that Cox and others had gone into a store, returned to their automobile with a shopping bag and driven off, after which articles of merchandise in the store were discovered missing. The car was described to the deputy sheriff who relayed the information to State Trooper Hale. This officer observed a car answering the description, stopped same, saw sacks on the front floorboard partly open with articles of merchandise and we held that Hale was justified, from the information that he had received, in stopping the automobile, and upon observing the merchandise on the floorboard, in ordering the car driven back to town. We commented:

> "To first have obtained a warrant would mean, of course, that the occupants of the car could have driven on, with full opportunity to dispose of the merchandise in the vehicle. In other words, there was complete justification for an intrusion (considering the detention of the car as an intrusion). These were exigent circumstances requiring instantaneous action to preserve the existence of the evidence sought to be seized."

In *Cox*, there is a comprehensive discussion of pertinent federal cases, including *Coolidge* v. *New Hampshire*, 403 U.S. 443, *Chambers* v. *Maroney*, 399 U.S. 42, and *Carroll* v. *United States*, 267 U.S. 132, and we quoted from *Carroll* as follows:

> "The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law."

Certainly, under the circumstances herein, the officers had reasonable cause to believe that the contents of the automobile offended the law, and we hold that the warrantless search was proper and legal.

It is next asserted that the court erred in permitting a bag of marijuana, which had been taken from Westlin during a search at the jail, to be admitted into evidence. We do not

agree and no further authority is needed to establish that the contention is without merit than the recent case of *United States* v. *Robinson*, 414 U.S. 218, wherein Robinson was arrested for a traffic offense, and a search resulted in the seizure of heroin capsules which were admitted into evidence at the trial, such capsules being found in a crumpled cigarette package in the defendant's coat pocket. The district court was reversed by the United States Court of Appeals for the District of Columbia, that court holding that the search was violative of the Fourth Amendment. The United States Supreme Court, however, reversed the Court of Appeals, disagreeing with that tribunal in several respects, but the remarks of the court most pertinent to the issue now before us were as follows:

> "A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment."

We have already said that the intrusion wherein the black bag was discovered in the car was lawful, and that being true, the search of Westlin at the jail was entirely reasonable.

Appellants contend that they had the constitutional right to be confronted by the "reliable" informer, who had given to the sheriff the information concerning the possession of marijuana by appellants. We do not agree under the circumstances heretofore set out that appellants were entitled to this information. In *Bennett* v. *State*, 252 Ark. 128, 477 S.W. 2d 497, the State presented an undercover investigator as a witness who testified that he went to the defendant's apartment, accompanied by two confidential informers, and that one of the informers told the defendant "We wanted some grass." Thereupon, the defendant handed to the undercover agent a bag of marijuana. This act was denied by the defendant, and the testimony of the undercover agent's com-

panions during the alleged transaction was therefore relevant and material to contradict the State's evidence. We held that the court erred in refusing to compel the prosecution to divulge the identity of these two informers. However, in *West* v. *State*, 255 Ark. 668, 501 S.W. 2d 771, the same contention was held to be without merit. In so holding, this court said:

> "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 informant 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."

In the instant case, there is no evidence that the informant possessed any knowledge which was vital to the preparation of appellants' defense; no such objection, or allegation, was made, and in fact, the possession of the marijuana was admitted. The point is without merit.

It is next asserted that the trial court erred in not granting a motion for a new trial. The motion sets out several different grounds but the one referred to in the present argu-

ment was the sixth ground which alleges that "The verdict is contrary to the law and the weight of the evidence." In support, it is simply stated:

> "The Sheriff's uncorroborated statement that he seized 'about one-half pound of marijuana' is inconclusive, and there is no proof offered by the State that appellants delivered or intended to deliver the marijuana."

It is true that there was no evidence offered by the State that appellants intended to sell or deliver the marijuana and the conviction is based on the statutory presumption. Ark. Stat. Ann. § 82-2617 (d) (Supp. 1973) provides that possession by any person of a quantity of marijuana in excess of one ounce creates a rebuttable presumption that such person possesses same with intent to deliver. The section provides, however, that the presumption may be overcome by submission of evidence sufficient to create a reasonable doubt that the person charged intended to deliver.

Whether there was error in the instruction given by the court with regard to the presumption is not raised by appellant, and is therefore not before us. Actually, the import of appellants' argument is that the act is unconstitutional since it permits the conviction for the offense of intending to deliver the controlled substance without actual evidence that the party possessing same so intended. Both appellants testified that the marijuana was purchased for their own use, i.e., they intended to smoke it themselves, but, of course, the jury was not compelled to believe them. In *Stone* v. *State,* 254 Ark. 1011, the same question was before this court and in a comprehensive opinion we held the provision here in question to be valid and sustained the conviction. That case is a complete answer to the present argument and further discussion is not indicated.

Finally, it is asserted that the verdict of the jury is excessive and indicates passion and prejudice on the part of the jury. We have held that we have no authority to reduce a sentence that is not in excess of statutory limits,[3] and we have

[3]In *Simmons* v. *State*, 227 Ark. 1109, 305 S.W. 2d 119, Simmons was convicted of first degree murder and his punishment fixed at life imprisonment. There, we reduced the sentence to 21 years but the basis of such reduction was that the evidence did not reveal that the killing occurred with premeditation and deliberation, elements essential to a conviction for first degree murder. We accordingly reduced to the maximum for second degree murder.

consistently, in recent years, followed that rule. In *Osborne* v. *State*, 237 Ark. 5, 371 S.W. 2d 518 (1963), we said:

> "Counsel vigorously maintains that the punishment is so severe that it should be reduced by this court. It is true that in a number of the older cases, including one as recent as *Carson* v. *State*, 206 Ark. 80, 173 S.W. 2d 122, we have assumed the power to mitigate the punishment imposed by the trial courts. The right to exercise clemency is, however, vested not in the courts but in the chief executive. Ark. Const., Art. 6, § 18. Our latest cases have uniformly followed the rule, which we think to be sound, that the sentence is to be fixed by the jury rather than by this court. If the testimony supports the conviction for the offense in question and if the sentence is within the limits set by the legislature, we are not at liberty to reduce it even though we may think it to be unduly harsh."

In 1971, the Arkansas General Assembly enacted Act 333 (Ark. Stat. Ann. § 43-2701—2725.2 [Supp. 1973]), Section 12 (§ 2725.2) attempting to vest this court with the authority to reduce sentences that it deemed excessive. In *Abbott* v. *State*, 256 Ark. 558, 508 S.W. 2d 733 (1974), we construed this provision, stating:

> "Although we have previously found it unnecessary to pass directly on the constitutionality of this provision insofar as it might be construed to empower this court to reduce a sentence otherwise proper and within statutory limits in cases arising after passage of the act, it should be clear that legislative action cannot override constitutional provisions. We strongly intimated that this act was ineffective to overrule the holding in *Osborne* v. *State, supra,* in *Hurst* v. *State, supra,* and cited in the case of *People* v. *Odle,* 37 Cal. 2d 52, 230 P. 2d 345 (1951). In that case a similar statute was construed by the California court to do no more than authorize it to reduce the punishment, in lieu of granting a new trial, when the only error found on appellate review related to the punishment imposed and was prejudicial. It specifically held that the statute granted no power to modify a sentence where there was no error in the proceeding. To construe the statute otherwise, said the court, speaking

through Justice Traynor, would give the reviewing court clemency powers similar to those vested in the Governor by the California Constitution. That court clearly recognized that any construction of the statute extending the power of the appellate court any further would raise serious constitutional questions relating to the separation of powers. We think the construction given to the California statute by that state's Supreme Court was correct and that the same construction should be given our statute. When given that construction, it is clearly constitutional. If construed to give this court the power to reduce a sentence in the absence of error pertaining to the sentence, the statute would be unconstitutional for violation of Art. 6, Sec. 18 and Art. 4, Sec. 2 of the Arkansas Constitution, and upon the authority of *Osborne* v. *State*, supra."

Finding no reversible error, the judgment is affirmed.

It is so ordered.

BYRD, J., concurs.

Ira CRAIG and Phil SCHAAF *v.*
STATE of Arkansas

74-123 514 S.W. 2d 383

Opinion delivered October 14, 1974

Brown, Compton & Prewett, for appellants.

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

GEORGE ROSE SMITH, Justice. This appeal involves the forfeiture of a bond in a criminal case. The appellant Schaaf is a professional bondsman. The appellant Craig was formerly in that business. On September 19, 1973, the two men made a $7,369.23 bail bond for John A. Jones, who was charged in the Cleburne Circuit Court with "hot check and false pretense." On November 26 the court entered an order declaring a forfeiture of the bond in its full amount. This appeal is from a later order refusing to set aside the forfeiture. The appellants contend that under the statutes they are entitled to complete exoneration as a matter of right.

The facts are simple and not in dispute. Jones was arrested in Hempstead County and was taken to Columbia County, where he had written a bad check. There were additional charges pending against Jones in other counties. The appellants made a number of bail bonds for Jones, including the one now in issue and a $10,000 bond in connection with charges in Van Buren County. Van Buren and Cleburne counties are both in the 14th Judicial District.

Jones had been directed to appear in the Cleburne Circuit Court on October 8, 1973, but he left the state to avoid that appearance. The court entered an order finding that

Jones had failed to appear and directing the two bondsmen to appear on November 26 and show cause why the bond should not be forfeited.

The bondsmen at once printed and circulated fliers seeking Jones's apprehension. As a result of that action Jones was picked up at Winfield, Iowa. The two bondsmen drove to Winfield, paid a $500 reward, and returned Jones to Arkansas, where he was first placed in the Van Buren county jail on November 13 and then transferred to the Cleburne county jail.

Acting upon advice of counsel, the bondsmen did not appear in court on November 26, to show cause why the bond should not be forfeited. On that date the court entered an order declaring a forfeiture of the bond. A hearing upon the bondsmen's motion to set aside the forfeiture was had on December 27. As a result of that hearing the court set aside the forfeiture of the $10,000 bond in the Van Buren County case, where restitution had been made, but refused to set aside the Cleburne County forfeiture.

The appellants, in insisting upon a right to complete exoneration, rely upon Ark. Stat. Ann. § 43-716 (Repl. 1964). We think, however, that three sections of the statutes, all being parts of the Criminal Code of 1868, must be considered. Those sections are:

> Section 43-716. At any time before the forfeiture of their bond, the bail may surrender the defendant, or the defendant may surrender himself, to the jailer of the county in which the offense was committed; but the surrender must be accompanied by a certified copy of the bail-bond to be delivered to the jailer, who must detain the defendant in custody thereon as upon a commitment, and give a written acknowledgment of the surrender; and the bail shall thereupon be exonerated.

> Section 43-723. If the defendant fail to appear for trial or judgment, or at any other time when his presence in court may be lawfully required, or to surrender himself in execution of the judgment, the court may direct the

fact to be entered on the minutes, and thereupon the bail-bond, or the money deposited in lieu of bail, is forfeited.

Section 43-729. If, before judgment is entered against the bail, the defendant is surrendered or arrested, the court may, at its discretion, remit the whole or part of the sum specified in the bail-bond.

Section 43-716, relied upon by the appellants, is not applicable to the facts of this case. That section simply enables the bondsman to avoid liability by surrendering the defendant before there has been any failure on his part to appear in court. That was the situation in all four of the cases cited by counsel for the appellants: *Ex parte Graham,* 150 Ark. 236, 234 S.W. 176 (1921); *Hester* v. *State,* 145 Ark. 347, 224 S.W. 618 (1920); *Carter* v. *State,* 43 Ark. 132 (1884); *Sternberg* v. *State,* 42 Ark. 127 (1883). In *Sternberg,* for example, the bondsman had the sheriff re-arrest the defendant in January, 1882. After that the sheriff either released the defendant or allowed him to escape. At a subsequent forfeiture proceeding in June the trial court held the surety liable, on the ground that he had not taken a written acknowledgment from the sheriff. We reversed that holding, finding compliance with the statute.

In the case at bar the other two quoted sections are controlling. Under section 43-723, when Jones failed to appear on October 8 and the court entered that fact upon its record, the bond was, in the language of the statute, thereupon forfeited. The show-cause order did not abrogate the statutory forfeiture. It merely afforded the bondsmen an opportunity to be heard with respect to a total or partial remission of the forfeiture, under section 43-729.

At that hearing the trial judge expressed his disapproval of professional bonds and indicated that it was not customary in his district for such bonds to be accepted. The law, however, favors the bondsman. As we said in *Central Casualty Co.* v. *State,* 233 Ark. 602, 346 S.W. 2d 193 (1961): "It is well settled that the giving of bail bonds is to be encouraged, not only because the accused is ordinarily entitled to his freedom

before trial but also because the state is relieved of the expense of maintaining the prisoner until the case can be heard. . . . 'The purpose of requiring bail bonds is not to enrich the treasury, but to secure the administration of justice.' " In that case the accused had been only a few hours late in arriving for his trial, a blizzard having delayed his airplane flight. We reduced the forfeiture from $7,500 to $750, stressing the defendant's almost total freedom from fault.

The case at bar presents a more serious issue than that raised in the case just cited. Here the bondsmen permitted their principal to leave the state to avoid trial and failed to appear at the November 26 hearing upon the show-cause order. Even so, the bondsmen were successful in finding the defendant and returning him to custody. The record does not indicate what additional costs and expenses were incurred by the county. We have concluded that a forfeiture of $2,500 is sufficient to secure the administration of justice in this case.

The order of forfeiture is reduced to $2,500 and, as so modified, is affirmed.

FOGLEMAN, J., dissents in part.

JOHN A. FOGLEMAN, Justice, concurring in part, dissenting in part. I am unable to find any abuse of the circuit judge's discretion when he rendered judgment for the full amount of the bond in Cleburne County, particularly in view of the fact that appellants were relieved of any obligation on a $10,000 bond for the appearance of Jones in Van Buren County. Under the very wording of the statutes, it is necessary for us to do this in order to modify the trial court's judgment as the majority has done and what is more, the majority has no basis whatever for arbitrarily fixing the recovery from the sureties at $2,500, sua sponte.

I respectfully dissent from that part of the opinion and judgment, but otherwise concur.

ARKANSAS STATE HIGHWAY COMM'N
v. Ed HUBACH et al

74-111 514 S.W. 2d 386

Opinion delivered October 14, 1974

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

Lightle, Tedder, Hannah & Beebe, for appellees.

LYLE BROWN, Justice. In this eminent domain proceeding the Highway Department took 5.75 acres of improved property, leaving 0.81 of an acre of minimal market value. For reversal appellant contends the trial court erred in refusing to let appellant introduce two transactions involving the lands taken.

The First Sale. Four years and four months prior to the taking appellee and a partner acquired the subject property for a sum considerably less than the damages sought. Appellee objected to any evidence concerning, or reference to, that sale on the ground that it was too remote in time. The court sustained the motion. We think the court fell into error. First, it must be remembered we are dealing with the sale of the subject property to condemnee. The court's ruling precluded any cross-examination of appellee with respect to the sale, which cross-examination should be allowed for the purpose of testing his credibility. On cross-examination of appellee, appellant asked the court for permission to inquire as to the purchase price of the land. The request was denied. Second, we do not think it was proper to hold as a matter of law that the sale was too remote in time. If the appellant could lay the proper foundation it should be permitted to introduce the sale. It is not uncommon for an expert witness to use a purported comparable sale when the witness makes proper adjustments for the passage of time and any fluctuation in values which has occurred since the sale. The general rule is well stated in Nichols on Eminent Domain (3rd Ed. 1974) § 12.311 [1]:

> When a parcel of land is taken by eminent domain, the price which the owner paid for it when he acquired it is one of the most important pieces of evidence in determining its present value. However, this assumes that the sale was recent, was a voluntary transaction between parties each of whom was capable and desirous of protecting his own interests, and that no change in conditions or marked fluctuation in values has occurred since the sale. A price paid under such conditions is a circumstance which a prospective purchaser would seriously consider in determining what he himself should pay for the property. As evidence before a jury, it consumes little time in introduction and raises few collateral issues, so that every argument is in favor of its admissibility.

We adhere to the recited rule but we think the trial judge should not have ruled out, as a matter of law, the sale to the condemnee until and unless it is shown that it is far removed from the date of condemnation and that changes in con-

ditions are such as to make the transaction substantially useless in determining present day value.

The Second Sale. In 1970, two years prior to the taking, appellee landowner purchased the one-half interest of his partner. Upon objection being made by the landowner, the court ruled that reference could not be made to the sale. The ruling was based on the fact that the landowner propounded interrogatories to appellant prior to trial; that in those questions appellant was asked to list the comparable sales on which it expected to rely; and that appellant did not list the 1970 transaction between the partners. Again, the effect of the ruling was to deprive appellant of the opportunity to cross-examine the landowner regarding the transaction. However, in the event of another trial the appellant, upon laying the proper foundation, may introduce the sale. That is because appellee will have had ample notice that appellant proposes to introduce evidence thereon; consequently no prejudice could result from the failure to list the sale in the interrogatories.

Reversed and remanded.

Gordon Eutah McCARLEY *v.* STATE of Arkansas

CR 74-80 514 S.W. 2d 391

Opinion delivered October 14, 1974

Tackett, Moore, Dowd & Harrelson, for appellant.

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

JOHN A. FOGLEMAN, Justice. Appellant Eutah McCarley asserts a single point for the reversal of his conviction of second degree murder by jury verdict fixing his punishment at 21 years imprisonment. He contends that the circuit judge erred in overruling his objections to evidence of specific wrongful acts allegedly done by appellant prior to the incident for which he was tried.

McCarley was charged with first degree murder in the killing of one Lonnie Richardson on October 17, 1973 at or near McCarley's old homeplace near Grannis. At the time, McCarley was moving back into the house there after an absence of some two or three years.

Appellant took the witness stand and on cross-examination the prosecuting attorney asked him if he had a fight with a fellow workman named W. D. Smith, if he had a pretty violent fight in a uranium mine in New Mexico, if he had engaged in bootlegging whiskey in Oklahoma, if he had not operated a still in Oklahoma, if he did not bring whiskey with him to Arkansas on the day of the shooting, and if he had an altercation in which he used a knife and his adversary used a tire tool. All of these questions were answered by McCarley in the negative except that, in response to the question about W. D. Smith, he said that he had to defend his rights with Smith.

Appellant contends that this interrogation was prohibited by Ark. Stat. Ann. § 28-707 (Repl. 1962). A short answer to this argument is that this statute has no application and does not limit cross-examination of a witness in this respect. *Carter* v. *State*, 255 Ark. 225, 500 S.W. 2d 368. This line of questioning going to the credibility of the witness was permissible. *Inklebarger* v. *State*, 252 Ark. 953, 481 S.W. 2d 750; *Bowlin* v. *State*, 175 Ark. 1047, 1 S.W. 2d 546; *McAlister* v. *State*, 99 Ark. 604, 139 S.W. 684. Furthermore, in view of appellant's answers, he is in no position to claim that he was prejudiced by the questions, particularly since the jury was admonished that the questions affected credibility only. *Wallin* v. *State*, 210 Ark. 616, 197 S.W. 2d 26; *Dailey* v. *State*, 250 Ark. 965, 468 S.W. 2d 238; *Garrison* v. *State*, 148 Ark. 370, 230 S.W. 4; *Barton* v. *State*, 175 Ark. 120, 298 S.W. 867; *Bowlin* v. *State*, supra.

The state's attorney, however, was not satisfied with appellant's answers and, on rebuttal, called Harold Higgins and Nell Dean McCarley, appellant's former wife from whom he had been separated and divorced but who was living with him at the time of the alleged crime. Higgins testified, over appellant's objection, that he had, within recent months, bought whiskey from McCarley. Mrs. McCarley testified, also over appellant's objection, that appellant had been engaged in selling whiskey and had been in a rather violent altercation in which a rifle was involved while they were living in the west. This was clearly error. It did constitute an effort to impeach McCarley in violation of Ark. Stat. Ann. § 28-707. The questions asked were collateral to the issue and the state had no right to contradict appellant by evidence of any prior bad acts, as distinguished from evidence of a former conviction. *McAlister* v. *State,* supra. This prohibition applies with at least as great impact when the defendant is the witness as when any other witness is involved. *Randall* v. *State,* 239 Ark. 312, 389 S.W. 2d 229. The trial court's limitation of consideration of this rebuttal evidence to the credibility of the witness could not cure the error, because its admission was contrary to the statute. See *Ederington* v. *State,* 244 Ark. 1096, 428 S.W. 2d 271.

The Attorney General, however, very appropriately foregoes any argument that there was no error in the admission of this testimony. The state's argument is that the error was not prejudicial. That argument is supported by such decisions as *Ware* v. *State,* 91 Ark. 555, 121 S.W. 927. It presents the real issue on appeal. In *Ware,* we said that the erroneous introduction of testimony is not prejudicial if it does not deprive the defendant of a fair and impartial trial under all the evidence in the case, i.e., where the uncontroverted testimony shows that the defendant is guilty of the degree of crime of which he is convicted, error in the introduction of incompetent testimony is not prejudicial because, regardless of the light in which it is viewed, the jury could not have rendered a verdict of acquittal. We recognized, however, that if the facts are disputed or the proof controverted, that view of the testimony most favorable to the defendant should be taken and, if, in such view, the incompetent testimony would have a tendency to disparage the controverting evidence on the part of the defendant, its admission

would be prejudicial. When we applied the rule in *Ware,* we found the error to have been prejudicial.

The rule recited in *Ware* has been applied without question when the verdict of the jury finding a defendant guilty of a degree of crime clearly demonstrates that the inadmissible testimony could not have been considered in arriving at the verdict. *Coulter* v. *State,* 100 Ark. 561, 140 S.W. 719. But we cannot say that this is so in the present case. Of course, we presume error to be prejudicial in the absence of an affirmative showing to the contrary unless it manifestly is not. *Graves* v. *State,* 256 Ark. 117, 505 S.W. 2d 748 (1974). The question of prejudice here is not without difficulty. It turns upon the question whether appellant's credibility is so essential to his defense that any testimony tending to make him appear less credible is disparaging to the theory of his defense and the evidence tending to support it. If so, the error is prejudicial. *Carlley* v. *State,* 191 Ark. 363, 86 S.W. 2d 36. We must look then to the theory of his defense and its evidentiary support to answer the question.

Appellant was charged with first degree murder and it is sufficient for the purposes of this appeal to say that the evidence would have sustained a finding of guilt of that degree of homicide. The defense was self-defense. The state argues very persuasively that the jury returned the only verdict it could have returned under the undisputed evidence, even when it is viewed in the light most favorable to McCarley. The state asserts that the theory of self-defense was merely colorable, because appellant never saw a gun he said he thought the deceased was reaching for during the encounter and because any defense of his own person was abandoned when, after having fired at and shot the deceased, appellant struck him twice with the butt of a rifle and twice again fired at deceased from behind a tree at the scene.

This case is not sufficiently similar to *Taylor* v. *State,* 72 Ark. 613, 82 S.W. 495 relied upon by the state, to be controlled by it because the undisputed evidence showed that the deceased unlike the heavily armed victim in this case, was unarmed and actually ran from Taylor and his two brothers crying for help and begging them not to shoot him anymore, and that the brothers continued to shoot him until he had fallen and even thereafter. Clearly there was no basis for a finding of self-defense there.

Still McCarley could not avail himself of the defense he asserted if he provoked or brought on, either by acts or demonstrations, the alleged attack by Richardson, if he approached Richardson in anticipation that Richardson would attack him, with the intention of killing Richardson, if McCarley voluntarily entered into a duel or contest with Richardson, or if he had not done everything in his power to avoid the danger and avert the necessity of the killing. *Burton* v. *State*, 254 Ark. 673, 495 S.W. 2d 841; *Clingham* v. *State*, 207 Ark. 686, 182 S.W. 472; *Valentine* v. *State*, 108 Ark. 594, 159 S.W. 26; *Sharp* v. *State*, 175 Ark. 1083, 3 S.W. 2d 23; *Yancey* v. *State*, 120 Ark. 350, 179 S.W. 352. Without reviewing it, the testimony was such, even accepting McCarley's version, that the jury verdict is readily understandable. Still, we cannot say with absolute assurance, when all inferences are drawn in favor of appellant and the situation viewed as it appeared to McCarley, acting as a reasonable person, his plea of self-defense was totally foreclosed as a matter of law. Richardson, according to McCarley, was reputed to be a bully and always went armed. There was evidence tending to corroborate this view. Richardson was sitting in the road in his vehicle, armed with a .308 rifle and a .22 calibre pistol, watching McCarley move into the old home. Richardson had ignored McCarley's signal inviting him to come down to the house. When McCarley first approached Richardson, Richardson was raging and cursing and a hot argument ensued. McCarley thought Richardson reached for a weapon before McCarley fired his .22 rifle, shooting Richardson. Unquestionably, Richardson had fired the rifle at McCarley before Richardson succumbed to McCarley's fatal shot.

The plea of self-defense raised the issue of manslaughter, because if one acts too hastily and without due care in assaulting another, even though he believes he is about to be assaulted by the other, he is not justified in taking human life and is guilty of manslaughter. *Peters* v. *State*, 245 Ark. 9, 430 S.W. 2d 856; *Ellis* v. *State*, 234 Ark. 1072, 356 S.W. 2d 426. The jury was instructed on the crime of manslaughter and a verdict on that degree was possible under the evidence.

Furthermore, we cannot ignore the fact that the jury meted out the maximum punishment for second degree murder. Long ago, we recognized that error in the admission of contradicting evidence was prejudicial, even though the competent evidence clearly showed guilt, when the matter

contradicted could properly be considered by the jury in mitigation of punishment if it gave credit to the defendant's statement. *Stone* v. *State*, 56 Ark. 345, 19 S.W. 968. We certainly are not prepared to say that the jury would not have assessed a lesser punishment, even on a verdict of second degree murder, had it not been for the shadow cast on appellant's credibility by the improper admission of the impeaching evidence. We also find some significance in the jury recommendation that McCarley be required to serve the full sentence imposed. When a greater sentence is imposed than might have otherwise been assessed, had incompetent testimony not been admitted, we have held that its admission was prejudicial. *Williams* v. *State*, 183 Ark. 870, 39 S.W. 2d 295.

When all factors are considered, we cannot say that the error was not prejudicial, so the judgment is reversed and the cause remanded for a new trial.

Bobbie BOWERS *v.* Richard W. BOWERS, Gary C. BOWERS

74-110 514 S.W. 2d 387

Opinion delivered October 14, 1974
[Rehearing denied November 18, 1974.]

Camp, Thornton & Griggs, for appellant.

McKay, Chandler & Choate, P.A., and *Woodward & Kinard,* Ltd., for appellees.

CONLEY BYRD, Justice. The issues here involved arise out of a divorce action between appellant Bobbie Bowers and appellee Richard W. Bowers. Appellee Gary C. Bowers, the son of Richard Bowers, was brought into the action by appellant to set aside an alleged gift to him of the machine shop business known as Bowers Debarking Tools, Inc. The trial court denied a divorce to both appellant and appellee Richard Bowers and dismissed the third party complaint against Gary Bowers for want of equity. In addition the trial court awarded appellant support money in the amount of $300 per month and a total attorney's fee of $1,000. Appellant has appealed and for reversal makes the contentions hereinafter discussed.

The record shows that both Bobbie Bowers and Richard Bowers had previously been married. Bobbie's first husband Kelly Lewis was superintendent of the Magnolia Water works. He died with a heart attack in 1964. Richard Bowers' former wife was killed in a car-train collision in 1964. Mr. Bowers, the driver of the car, also received some injuries. Mrs. Bowers has only one child, Michael Lewis and Mr. Bowers had only one child, appellee Gary C. Bowers.

When Mr. and Mrs. Bowers married in 1966, they moved into the rented house in Waldo where Mr. Bowers had lived since 1954. Mr. Bowers had operated a machine and welding shop in a garage on the back of the rented property. After the marriage Mr. Bowers continued to operate the

machine and welding shop. After the marriage Mrs. Bowers assisted in the operation of the business by doing some painting, running some errands and answering the phone. According to the income tax returns the annual income of the machine shop did not exceed $5,031.56 until 1971, when it climbed to $18,035.00. The record shows that Gary Bowers joined the business in April or May of 1972, and that the business was incorporated on August 4, 1972. On that date all of the shares of stock in Bowers Debarking Tools, Inc., were assigned to Gary.

The record shows that Gary grew up in his father's machine shop. When he was inducted into the navy, he was promoted to 3rd class machinist, because of certain aptitude tests. Gary graduated from Baylor University Law School in 1963 and was admitted to the practice of law in the State of Texas. Following the death of his mother, Gary returned to Waldo and helped his father in the machine shop until 1965, when his father recuperated to the point that he could run the shop by himself. Gary had a private law office in Houston, Texas, until he closed it down to return to Waldo in 1972.

POINTS I and II. Under these points appellant contends that she was entitled to a directed verdict of divorce and a divorce on her counterclaim. The thrust of appellant's argument is that since appellee Richard Bowers testified that appellant was a homosexual and did not corroborate the charge she is entitled to a divorce under the doctrine set forth in *Relaford* v. *Relaford,* 235 Ark. 325, 359 S.W. 2d 801 (1962). The doctrine set forth in the *Relaford* case is as follows:

> "It has been repeatedly held by us that the husband's making of an unfounded charge of lascivious conduct against an innocent wife is in itself evidence of and constitutes cruel and inhuman treatment within the meaning of the statute, entitling the wife to divorce, except where the charge is made, not maliciously but in good faith, upon reasonable grounds for believing it, even though held untrue. (citing cases) Also, we have held that accusations in pleading of spouse as to improper conduct of the other spouse, where not supported by such evidence as to imply good faith, constitutes cruel and inhuman treatment where false and malicious. * * *"

Thus before appellant can rely upon the *Relaford* case it must appear that Richard Bowers was not in good faith when he testified.

The proof shows that a year or two before the separation in February 1973, a school teacher, some 26 or 27 years of age, who lived in Junction City, Arkansas, but was teaching school at Waldo, started spending all of her spare time with appellant. Richard Bowers testified that the teacher was over there after school, at night and stayed there at night when he went out of town. Marie Harris testified that the teacher came to appellant's house every day as soon as school was out and stayed until bed time. On nights when Mr. Bowers was out of town the teacher would spend the night. Before the temporary hearing the teacher parked her car at appellant's house when she came. After the temporary hearing the teacher continued to visit appellant but parked her automobile at the home of a relative.

During the presentation of his side of the evidence appellee Richard Bowers at one place testified he left when he found out two nights before his separation that appellant was a sex deviate. At one other place he used the term "homosexual". After appellant had testified there was no problem in the marriage relating to sexual matters, Richard Bowers, in rebuttal, testified that on the two nights before their separation, appellant wanted him to participate in some oral sex acts. He also explained that his impression of a "homosexual" is the participation in an unnatural sex act. He further stated that he didn't know whether there was anything wrong or unnatural with the relationship between the teacher and appellant.

Appellant quotes the dictionary definition of a "homosexual" and contends that since Mr. Bowers did not corroborate the charges he made, she is entitlted to a divorce. Underlying this contention is appellant's supposition that the proof relative to the teacher was only for the purpose of corroborating Mr. Bowers' sexual charges. We do not necessarily agree on either contention. The proof as to the teacher also tended to substantiate Mr. Bowers' assertions of appellant's indifferent attitude toward him. His only real assertion in the matter is that the woman was there "too often". Furthermore, we do not go so far under the theory set forth in *Relaford* v. *Relaford, supra,* as to hold that a spouse is entitled to a

divorce whenever such charges are not corroborated. On the record here we cannot say that Mr. Bowers' testimony relative to the unnatural sex acts was not in good faith.

Appellant also contends that she was entitled to a divorce because Mr. Bowers abandoned her without cause; caused certain utilities to be cut off; and refused money for support, etc. These were fact issues before the chancellor and we have been shown no evidence whereby the chancellor abused his discretion in refusing to grant appellant a divorce. Furthermore, appellant's testimony leaves some doubt as to whether she desires a divorce.

POINT III. Appellant contends that the trial court should have set aside the transfer of the machine shop business to Gary Bowers. We find no merit in the many contentions made. In the first place the record shows that Mr. Bowers had been operating this business in the same place since 1954. Thus, the contention that the business was accumulated through their joint efforts is not supported by the record. In the next place the business was transferred to a corporation and the corporation is not a party to this proceeding. Furthermore, in the absence of a showing of any interest in the business other than inchoate dower rights, appellant is not entitled to a property division until such time as a divorce is granted.

POINT IV. The trial court awarded a fee of $300 to appellant's counsel at the temporary hearing and an additional $700 in the final decree. Appellant now contends that she was entitled to a $5,000 fee and that the fee should be assessed against both Richard Bowers and his son Gary Bowers. The matter of allowance of attorney's fees in divorce cases is a matter over which the trial court has considerable discretion and on the record before us we cannot say that the chancellor abused his discretion in awarding only $1,000 for the services of her attorney in the trial court. Furthermore, Gary Bowers, the son, would not be personally responsible for the fees to be allowed in the divorce case.

Affirmed with an additional attorney's fee of $1,000 being awarded to appellant as against Richard Bowers for the services of her attorney on appeal.

HARRIS, C.J., concurs.

Debra Ann FORTMAN et al *v.*
TEXARKANA SCHOOL DISTRICT NO. 7

74-71 514 S.W. 2d 720

Opinion delivered October 21, 1974

James E. Davis, for appellants.

Ned A. Stewart Jr., for appellee.

GEORGE ROSE SMITH, Justice. This is an action by the appellants, two tenth-grade high school girls (suing by their next friends), for a writ of mandamus to compel the appellee school district to re-admit them to the Texarkana, Arkansas, high school. The circuit court, in sustaining the district's motion for summary judgment, held that the board of directors of the district had the authority to permanently expel the two girls. Whether that ruling was legally correct is the only issue argued by the appellants.

The material facts are not in dispute. On the evening of

March 21, 1973, some sort of verbal controversy took place at a dance attended by high school students. As an aftermath to that altercation the two appellants on the following day, during school hours, attacked a third girl, Kathy Walker, on the school grounds. The attack was deliberately planned in advance. The Walker girl was kicked, beaten, and stabbed twice in the head with a six-inch pair of scissors. Her injuries were serious but not fatal. The principal of the high school promptly suspended the appellants for the remainder of the school term.

The principal then recommended to the directors that the two assailants be expelled. After a public hearing, about which no constitutional question is raised, the board voted unanimously for permanent expulsion. At the hearing the district's attorney advised the board that it would have the authority to reinstate the two girls later on if it saw fit to do so. The circuit court, in denying the requested writ of mandamus, noted that after their expulsion the girls had pleaded *nolo contendere* to charges of assault with intent to kill and had each received a five-year suspended sentence.

Counsel for the appellants, in insisting that school directors cannot expel a student, argues that the board's only authority in the matter must be derived from Ark. Stat. Ann. § 80-1516 (Repl. 1960), which was part of the comprehensive 1931 school law:

> The directors of any school district may suspend any person from school for immorality, refractory conduct, insubordination, infectious disease, habitual uncleanliness or other conduct that would tend to impair the discipline of the school, or harm the other pupils, but such suspension shall not extend beyond the current term. The board of directors may authorize the teacher to suspend any pupils, subject to appeal to the board.

We are unwilling to construe the board's authority so narrowly. In the first place, the power of expulsion was legislatively recognized in Section 13 of Act 63 of 1969 (Ark. Stat. Ann. § 80-1656 [Supp. 1973]):

> Nothing in this Act shall be construed to limit a local school district's power to adopt reasonable rules, regulations, and policies, not inconsistent with the purposes of this Act, to insure continued orderly operation of schools, including adult education and area vocational-technical high schools, and such powers are deemed to include the right of expulsion for student participation in any activity which tends, in the opinion of the Board, to disrupt, obstruct or interfere with orderly education processes.

It is true that Act 63 was adopted by the legislature to implement Constitutional Amendment 53, which specifically confirmed the power of the General Assembly and of school districts to expend public funds for the education of persons over twenty-one or under six years of age. Nevertheless, we find it difficult to believe that the lawmakers meant to recognize the school board's authority to expel a student after his twenty-first birthday but to deny that power immediately before that anniversary. We can discern no reasonable basis for such a distinction.

In the second place, the directors have implied powers as well as express ones. "But school directors are authorized, not only to exercise the powers that are expressly granted by statute, but also such powers as may be fairly implied therefrom and from the duties which are expressly imposed upon them. Such powers will be implied when the exercise thereof is clearly necessary to enable them to carry out and perform the duties legally imposed upon them." *A. H. Andrews Co.* v. *Delight Spec. Sch. Dist.*, 95 Ark. 26, 128 S.W. 361 (1910). Our school laws unquestionably impose upon school boards the duty of providing orderly educational institutions. Scant imagination is required to think of innumerable situations in which the power of expulsion might be the school board's only effective means of protecting the student body from the disruptive, violent, or criminal actions of an incorrigibly intractable pupil.

The controlling principles are well stated by Professor Bolmeier in "The School in the Legal Structure," § 16.17 (2d ed., 1973):

The legal principle is also firmly established that school authorities may *expel* or *suspend* from school any pupil who disobeys a reasonable rule or regulation. School officials are clothed with considerable discretionary authority in determining whether or not a rule has been violated, and, in the event they conclude that a violation has occurred, they also have discretionary authority in determining the nature of the penalty to be imposed — providing it is not arbitrary or unreasonable. When, however, parents challenge the action of school boards as being beyond the bounds of reasonableness, litigation may develop.

There are a number of cases concerning pupil suspension and expulsion. The terms "suspension" and "expulsion" are sometimes used interchangeably. There is, however, considerable difference in the legal meaning of the two terms. "Suspension" is generally an act of a professional member of the school staff, whereas "expulsion" is a prerogative of the school board. Suspension is usually for a short period of time, or until the pupil conforms to the rule or regulation involved, whereas expulsion is usually permanent or substantially so.

The courts look somewhat askance at acts of suspension, and particularly at expulsion, as methods for forcing pupils' conformance to rules and regulations. Some incorrigible pupils violate school regulations for the very purpose of being removed from the school environment. It should be realized that when a pupil is denied school attendance he is deprived of education designed for his betterment. Of course when a pupil's misconduct or disobedience is of such a grave nature that his presence is disrupting to the school and detrimental to the morale of the student body, suspension, or even expulsion, is likely to be judicially condoned.

The courts have been reluctant to interfere with the authority of local school boards to handle local problems. Our position was well stated in *Safferstone* v. *Tucker,* 235 Ark. 70, 357 S.W. 2d 3 (1962): "In this State a broad discretion is

vested in the board of directors of each school district in the matter of directing the operation of the schools and a chancery court has no power to interfere with such boards in the exercise of that discretion unless there is a clear abuse of it and the burden is upon those charging such an abuse to prove it by clear and convincing evidence." We cannot say that an abuse of discretion has been shown by the undisputed facts in the case at bar.

Affirmed.

William H. HOWELL *v.* STATE of Arkansas

CR 73-123 514 S.W. 2d 723

Opinion delivered October 21, 1974

Tackett, Moore, Dowd & Harrelson, for petitioner.

Jim Guy Tucker, Atty. Gen., by: *O. H. Hargraves,* Dep. Atty. Gen., for respondent.

GEORGE ROSE SMITH, Justice. This is a petition by William H. Howell for a writ of certiorari to review the order of the Miller Chancery Court finding Howell guilty of criminal contempt of court and sentencing him to serve ten days in jail. We stayed the enforcement of the order pending our review of the proceedings — a review that has been delayed by the court reporter's inability to transcribe the testimony promptly. The petitioner contends that the trial court erred in finding him guilty of an offense not specified in the order requiring him to show cause why he should not be punished for contempt of court. We find the petitioner's contention to be sustained by the record.

On December 3, 1971, the trial judge, sitting as a chancellor on exchange, granted a divorce to the petitioner's wife and awarded her the custody of the couple's two-year-old daughter, Susan, with certain visitation rights in the father. Various post-decretal hearings appear to have been held. The present controversy arises from such a hearing held on July 31, 1973, at which the court approved a proposed trip that the petitioner Howell desired to take with his daughter.

No testimony was taken at that hearing. Opposing counsel had jointly conferred with their clients and had agreed upon detailed plans for the trip. It was expected that Mr. Howell and Susan would be gone for about twelve days, stopping at specified places in Oklahoma, at Fayetteville, Arkansas, and at Marshall, Missouri. It was contemplated that Howell's mother, who lived in Oklahoma, would travel with her son and granddaughter for about seven days, including a four-day stop at Fayetteville. Howell's older brother (a doctor) was also to join the group.

The trip was completed as planned, except that Howell's mother was unable to be absent from her job and consequently did not accompany the others, as expected. Upon Howell's return to Texarkana his former wife filed a motion that he be cited for contempt, on the ground that he had failed to make certain telephone calls that he had agreed to make and that Howell's mother had not been present for at least two days during the trip. In response to that motion the trial judge issued an order directing Howell to appear and show cause why he should not be held in contempt "for his failure to

comply with the plan for visitation approved by the Court on the 31st of July, 1973."

At the hearing upon the contempt charge Howell explained that his mother had been unable to leave her job. Needless to say, that was not Howell's fault. He also testified, without contradiction, that at the joint conference with the lawyers, before the trip, he had explained that his mother had a new job and might not be able to make the trip. That possibility, however, was not explained by anyone to the court when the plans were approved.

At the close of the hearing the trial judge found Howell guilty of contempt, upon the sole ground that he had not told the court on July 31 that his mother might not be able to leave her job. The judge pointed out that Howell is an attorney and had a duty to be open with the court and not permit his own lawyer to mislead the court.

We cannot sustain the conviction for criminal contempt. Such a charge must be established by proof beyond a reasonable doubt. *Blackard* v. *State*, 217 Ark. 661, 232 S.W. 2d 977 (1950). The accused is entitled to be informed with reasonable certainty of the facts constituting the offense, so that he can present his defense. *Taliaferro* v. *Taliaferro*, 252 Ark. 1078, 483 S.W. 2d 189 (1972).

Here there was no notice, either in the motion for citation or in the show-cause order, that Howell was being charged with a failure to inform the court of his mother's possible inability to leave her work. Had that charge been made, Howell might have engaged additional counsel to act for him, so that his own attorney would be free to testify in his behalf, perhaps taking the blame himself. We cannot say that Howell was not prejudiced by being found guilty of a criminal charge of which he had no notice and therefore no fair opportunity to prepare his defense.

The writ of certiorari to review the trial court's order is granted, and the order is set aside.

Peggy Ann JENKINS *v.* Leslie Leverne JENKINS

74-105 514 S.W. 2d 701

Opinion delivered October 21, 1974

Monroe L. Bethea, for appellant.

No brief for appellee.

JOHN A. FOGLEMAN, Justice. On this appeal, appellants seeks to sustain service of process on the appellee-defendant (under the "longarm" provisions of the Uniform Interstate and International Procedure Act [Ark. Stat. Ann. § 27-2501 — 2507 (Supp. 1973)]) in her divorce action. The chancery court denied appellant a divorce, holding that, even though appellee had actually received the notice given, service on him had not been completed. We agree.

Service was attempted by the issuance by the clerk of a writ labelled "summons" but in the form of a warning order. By affidavit filed in the case the clerk deposed that she had served this process, to which a copy of the complaint was attached, on appellee by certified mail and had received a return receipt therefor. This receipt was attached to the affidavit. It showed that a letter from the clerk for delivery to the addressee only had been directed to Leslie Leverne Jenkins, c/o Clyde Jenkins, Route 1, Louisville, Illinois. The receipt was signed "Leslie Jenkins."

Appellant places her sole reliance upon § 27-2502 B and 27-2502 C 1(a) which reads:

B. Personal jurisdiction based upon enduring relationship. A court may exercise personal jurisdiction over a person domiciled in, organized under the laws of, or maintaining his or its principal place of business in, this State as to any cause of action.

C. Personal jurisdiction based upon conduct.
1. A court may exercise personal jurisdiction over a person, who acts directly or by an agent, as to a (cause of action) (claim for relief) arising from the person's
(a) transacting any business in this state;

We readily reject the idea that appellee, either by marriage to appellant or by living with her in Arkansas, was in any sense of the word transacting any *business* in the state on which personal jurisdiction over appellee could have been exercised by the chancery court. Furthermore, the provisions of §27-2502 B are not applicable, because there is no showing whatever that appellee is, or for that matter ever was, domiciled in the State of Arkansas.

The order of the chancery court is affirmed.

David GARRISON *v.* STATE of Arkansas

CR 74-101 515 S.W. 2d 222

Opinion delivered October 21, 1974
[Rehearing denied December 2, 1974.]

Adams & Covington, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Gary Isbell,* Asst. Atty.

Gen., for appellee.

CONLEY BYRD, Justice. Appellant David Garrison's sole contention for reversal of his two year conviction and sentence for possession of a controlled substance (LSD) is that the trial court should have excluded under the Fourth Amendment, as an illegal search, any evidence of the drugs that he voluntarily delivered to a confidential informant and an undercover narcotics agent. We find no merit in the contention. See *Lewis* v. *United States*, 385 U.S. 206, 87 S. Ct. 424, 17 L. Ed. 312 (1966).

Affirmed.

Jimmy SMITH, Administrator of The Estate of James Albert SMITH, d/b/a CRESCENT LIQUOR STORE, and ALCOHOLIC BEVERAGE CONTROL BOARD *v.* RIDGEVIEW BAPTIST CHURCH, Inc.

74-120 514 S.W. 2d 717

Opinion delivered October 21, 1974

Murphy, Carlisle & Taylor, for appellants.

Bob I. Mayes and *Truman H. Smith,* for appellee.

FRANK HOLT, Justice. The appellant Alcoholic Beverage Control Board granted appellant Smith's petition to transfer a retail liquor license to within 200 yards of appellee church. The trial court reversed the Board's action pursuant to Ark. Stat. Ann. § 48-310 (Repl. 1964) which, in pertinent part, reads:

> No new permit shall be issued for the location of a business within two hundred (200) yards of any church ****.

Appellants assert for reversal that this statute § 48-310 (§ 2 of Act 352 of 1939) was illegally enacted by the legislature. Therefore, the appellant Board's "Regulation #124" (as authorized by Ark. Stat. Ann. § 48-203 [c] [Repl. 1964]), which requires the retail outlet to be only in excess of 100 yards (and not 200 yards) from church property, is controlling as to the required distance. Appellants rely upon *Matthews* v. *Bailey, Governor,* 198 Ark. 830, 131 S.W. 2d 425 (1939), to the effect that Act 352 is invalid. The appellee, however, argues that *Matthews* is not the latest expression on the validity of the Acts enacted in 1939 and that decision is no longer authoritative or binding. We agree with the appellants that § 48-310 is invalid.

On January 4, 1939, the governor appointed the Honorable Paul Gutensohn to fill a vacancy in the Arkansas State Senate. This procedure, however, was in direct conflict with a mandate by the electorate as reflected by Amendment 29, § 1, Ark. Const. (1874). Two months previous to the appointment this constitutional Amendment was enacted and in pertinent part reads: "Vacancies in the office of **** the

general assembly **** shall [not] be filled by the governor." Subsequent to this obviously invalid appointment, the senate enacted Act 352 of 1939 (§ 48-310) by a vote of 18 to 11. It is stipulated that Gutensohn's vote was one of the 18. Therefore, without his vote the Act would not have received the necessary majority vote of the senate as is required by Art. 5, § 2, Ark. Const. (1874). Now, after approximately 36 years, the validity of this particular Act is squarely presented for the first time by this appeal. *Bell* v. *Adams*, 243 Ark. 895, 422 S.W. 2d 691 (1968). However, we are not without precedent as to the validity of a legislative act voted upon by Gutensohn during the 1939 session. In *Matthews, supra,* the issue was whether the emergency clause of Act 4 of 1939 was validly adopted. Gutensohn's vote constituted the required majority. We held that he was neither a *de jure* nor *de facto* senator. We said:

> It will be conceded that the governor has not the power to appoint members of the Legislature, and has never had. As an express condemnation of the policy of appointing, Amendment No. 29 to the Constitution was adopted November 8, 1938, and became effective thirty days thereafter.

In determining Gutensohn was not a *de facto* official, we further said:

> We find no case of our own holding that legislation enacted by the vote of a stranger to the Senate or the House is sacrosanct.
>
> There are no instances where it has been said that designation by appointment contrary to the Constitution shall have the force of election, or that the admitted right of the Senate and the House to judge of the qualifications, returns and election of members goes to the extent of nullifying the Consitution. Those elected to the General Assembly take an oath to support the Constitution, and there is no presumption that senators and representatives do not intend to adhere to the basic law, and they do attempt to obey it.
>
> *****

> The general rule is that when an official, person or body, has apparent authority to public office, and apparently exercises such authority, and the person so appointed enters on such office, and performs its duties, he will be an officer *de facto*, notwithstanding there was want of power to appoint in the body or person who professed to do so, or although the power was exercised in an irregular manner.

Then we emphatically said:

> In the instant case there was no *apparent* authority to appoint Gutensohn; and, although the latter served energetically and with a high degree of intelligence, the service was not that of of a senator; nor could he have been a *de facto* officer in view of the want of apparent authority by the appointive agency.

In *Trussell* v. *Fish*, 202 Ark. 956, 154 S.W. 2d 587 (1941), the county assessor appointed an ineligible deputy. We held that since the assessor had the appointive authority, although exercised improperly or ineffectively, the appointee deputy was a *de facto* official, citing *Matthews, supra*, but distinguishing it on the basis that the appointing officer there had neither actual nor apparent authority.

Appellee vigorously asserts that Matthews was overruled either specifically or by implication in *Pope* v. *Pope*, 213 Ark. 321, 210 S.W. 2d 319 (1948). (See also *Howell* v. *Howell; Stevens* v. *Stevens*, 213 Ark. 298, 208 S.W. 2d 22 [1948] which followed the reasoning in *Matthews* with reference to *de jure* and *de facto* officials.) In *Pope* the issue was the validity of Act 42 of 1947 where the legislature created a division of chancery court and at the same time appointed a chancellor to serve in this division.

The court held in *Pope* and *Howell-Stevens* that the naming of a chancellor was unconstitutional and beyond the legislature's power. However in *Pope*, contrary to *Howell-Stevens*, we held the chancellor named by the legislature to a *de jure* position constituted a *de facto* official and, therefore, the chancellor's acts as a judge were lawful.

We cannot agree with appellee that *Matthews*, when applied to the case at bar where the pertinent facts are vir-

tually identical, is not binding and controlling. In *Matthews* we said it is an invalid appointment and contrary to our constitution. In doing so we declined to give a *de facto* status to this appointment because there was not even "apparent authority" for the governor to make the appointment. In fact, the appointment was specifically prohibited by a very recent amendment.

It is stipulated, as was said in *Matthews*, that although the senate is the "sole judge" of the qualifications and election of its members, Ark. Const., Art 5, § 1, there was no finding by the senate that Gutensohn was a member of that body. Neither was he compensated as other members. Only by a special act of the legislature was payment provided. Furthermore, we have construed Amendment 29 as being an "express condemnation" by the people as to the practice of the governor to appoint members to the general assembly. *Matthews*. We are unwilling to recede from our decision in *Matthews* and specifically hold that it has not been overruled, either specifically or by implication, since the issue there, as here, concerned the validity of the appointment by the governor to the legislature. We unequivocally held the appointment was without *apparent authority* and contrary to the constitution. Therefore, the appointee's vote was that of a "stranger" and without a *de facto* basis. It is well established that the legislature is deemed cognizant of our decisions respecting statutory interpretation whenever it enacts legislation. The legislature, during the intervening 36 years since our decision in 1939, has met biennially and sometimes in extraordinary sessions. Apparently it has not considered it necessary to correct the obviously invalid 1939 enactment. To the contrary, the appellant Board has continued to exercise its legislative authority in formulating regulations such as the pertinent one in the case at bar. Regulaion 124 as authorized by § 48-203 (c).

It follows that it becomes unnecessary to discuss appellant's other contention that the trial court had no jurisdiction in that appellee did not comply with the terms of the Administrative Procedure Act.

Reversed and remanded.

HARRIS, C.J., dissents.

Harold Eugene ROGERS *v.* STATE of Arkansas

CR 74-59 515 S.W. 2d 79

Opinion delivered October 21, 1974
[Rehearing denied November 18, 1974.]

George Howard Jr., *Sharon Bernard Miller* and *Nathaniel R. Jones*, *James I. Meyerson*, *George E. Hairston* (NAACP), New York City, with assistance from *Mrs. Pat Tobin*, law intern, NAACP, Cornell University, for appellant.

Jim Guy Tucker, Atty. Gen., by: *O. H. Hargraves,* Dep. At-

ty. Gen., for appellee.

FRANK HOLT, Justice. A jury convicted appellant of first degree rape (Ark. Stat. Ann. § 41-3401 [Supp. 1973]) and assessed his punishment at life imprisonment in the State Department of Correction. For reversal of that judgment appellant first contends that the trial court erred in not allowing sufficient voir dire examination by his defense counsel to permit an intelligent exercise of his right to make an informed decision whether to challenge the veniremen peremptorily or for cause.

The purpose of voir dire examination is to provide the litigants sufficient information about the proposed juror to intelligently exercise their challenges peremptorily or for cause. *Griffin* v. *State*, 239 Ark. 431, 389 S.W. 2d 900 (1965). The due process clause of the federal Fourteenth Amendment requires that counsel be permitted to interrogate the prospective jurors about racial bias. *Ham* v. *South Carolina*, 409 U.S. 524, (1973). In *Cochran* v. *State*, 256 Ark. 99, 505 S.W. 2d 520 (1974), two defendants were convicted of assaulting a white officer during an assemblage or riot. The court generally inquired of the jurors as a group whether the difference in race would tend to influence their verdict. Their silent response was accepted by the court as indicating the racial difference would not influence their verdict. The defense counsel was not permitted to inquire into possible racial prejudice. There we held the trial court abused its discretion by unduly restricting the voir dire.

In the case at bar the appellant is a black man and the rape victim is a white woman. In two instances appellant asserts specifically that his voir dire was unduly restricted. The first example relates to the examination of prospective juror Siebenmorgan. The appellant's defense counsel, without objection or interruption by the court, was permitted to propound questions bearing directly on the issues of his mental attitude toward any racial bias. Siebenmorgan responded that he did not "have any racial prejudice;" he would not "believe a white police officer any more than [he] would believe a black man"; he would not "believe a white woman any more than [he] would believe a black man;" he did not "think there's any difference between black people and white people;" his children attended "public schools"

which are "integrated;" he is a Catholic and there are "black members" in his church; he had never had an unfortunate experience with a black man and neither had his family; and he had never had any problem with "interracial social gatherings." Then the question was propounded "would you have any problem with your daughter dating a black man?" The court then remarked that he did not think this type of questioning "has anything to do with this law suit." However, he then permitted the question to be answered. The juror responded that it would present a problem. However, the prospective juror then assured defendant's counsel that the problem "would have no bearing on this case." When the counsel persisted in this type of questioning, the court stated "[N]ow, I think we've gone into that far enough. You've asked him enough. As I explained at barside here, I think I've allowed counsel great latitude ****."

The other example asserted as being too restrictive of voir dire examination relates to prospective juror Bartley. Appellant's counsel was permitted to question him with reference to racial prejudice. In answer to these questions this prospective juror stated that he didn't "have any racial prejudice;" there is no "difference between a black and white person" except "color;" he did not believe black people are "lazier" or "less intelligent" than white people; he did believe black people were "better athletes" than white people. Thereupon the trial court interrupted and said it was not necessary to answer that question since it was not proper voir dire.

As previously indicated, appellant contends that his counsel should have had the right to further pursue the interrogation of these witnesses in order to make an informed decision as to whether to challenge these jurors peremptorily or for cause. In other words, his counsel was not permitted to show "subtle prejudices" or "subjective racism" which these two jurors might have. It is well established that the trial court is accorded a wide discretion in determining the extent or scope of the interrogation of prospective jurors. *Lauderdale* v. *State*, 233 Ark. 96, 343 S.W. 2d 422 (1961). There the defendant was being tried for dynamiting a building during a racial school crisis. After extensive questioning of the jurors by defense counsel as to their racial views, the trial court refused to permit the question "are you a segregationist or an

integrationist" to be propounded to the jurors. There we said that such a question "would have no bearing on his fairness as a juror to sit in the trial of a case being tried for dynamiting a building" and "would ——— inject an issue not pertinent to testing the capacity and competency of the jurors and would have tended to create a bias or prejudice that would also have embarrassed the veniremen."

In the case at bar, the transcript reveals that the voir dire consisted of approximately 473 pages and the court permitted most of this to be conducted by the defense counsel. In our view the trial court accorded the defense counsel great latitude in questioning the prospective jurors in a searching inquiry as to the existence of any subtle or subjective bias that would prevent a juror from rendering a fair and impartial verdict. The appellant has not demonstrated that he was denied any fundamental fairness in interrogating the jurors in order to make an informed decision whether to challenge the veniremen peremptorily or for cause. The trial court did not abuse its discretion.

Appellant also asserts that it was error since the trial court failed to interrogate the prospective jurors about their racial attitudes, citing *Ham* v. *South Carolina, supra.* We do not consider this case applicable in the case at bar inasmuch as the statutory framework in that state provides for the voir dire examination of potential jurors be conducted by the court after accepting questions from the attorneys. That does not exist in our state. *Griffin* v. *State, supra.* Furthermore, the appellant has not demonstrated that the trial court was ever asked to conduct the voir dire examination. Therefore, the issue is raised for the first time on appeal and cannot be considered. Appellant's defense counsel, as previously indicated, was permitted to question extensively the prospective jurors with reference to any possible racial bias.

Appellant next asserts that the "trial court erred in denying defense counsel's motion for a mistrial based on the state's exercise of its peremptory challenges to systematically exclude black persons from the jury in violation of the appellant's Fourteenth Amendment rights." Six of the seven prospective jurors which were peremptory challenged by the state were black. This resulted in an all white jury. In *Swain* v. *State of Alabama,* 380 U.S. 202 (1965), a black man was con-

victed of raping a white woman and sentenced to death. All six prospective black jurors were struck by the prosecutor by peremptory challenges. In affirming the conviction the court held that this procedure did not constitute a violation of the Fourteenth Amendment, " . . . we cannot hold the striking of negroes in a particular case is a denial of equal protection of the laws. In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause." " . . . . [We] cannot hold that the Constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case." In *Jackson* v. *States,* 245 Ark. 331, 432 S.W. 2d 876 (1968), we followed *Swain* and stated the rule to be "[T]he mere fact that the state peremptorily challenged all the Negroes on the petit jury does not constitute a showing that any of appellant's constitutional rights were violated."

It appears that the prosecutor categorically denied that he was using his peremptory challenges merely to exclude blacks. The voir dire examination of the prospective black jurors peremptorily challenged by the state revealed that all of them except one were acquainted with either the appellant or members of his family. It appears that the other juror was reluctant to serve. The record reflects that blacks have consistently served as trial jurors. In *Swain, supra,* Justice White, writing for the majority, said:

> Although historically the incidence of the prosecutor's challenges has differed from that of the accused, the view in this country has been that the system should guarantee 'not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.' *Hates* v. *Missouri,* 120 U.S. 68 (1887).

See also *Green* v. *States,* 222 Ark. 222, 258 S.W. 2d 56 (1953). In the case at bar we hold appellant has not demonstrated any systematic misuse by the state of its right to exercise its peremptory challenges.

Two prospective black jurors arrived late for the empanelment and they were not included in the drawing for the initial 24 jurors. Upon arrival their names were included "in the box." However, the initial empanelment was not redrawn

as requested by appellant. Furthermore, appellant complains that two black jurors did not report for jury duty because they were out of town or could not be contacted. There is no evidence whatsoever that the tardiness of the two jurors or the absence of others was due to any act on the part of any official of the state. Such a factual situation does not constitute a systematic exclusion from the jury. *Apodaca* v. *Oregon,* 406 U.S. 404 (1972).

Appellant next argues that there was an unwarranted reprimand to his defense counsel at a crucial point in the trial and that the court failed to maintain an impartial hearing, generally, throughout the proceedings. The following occurred on cross-examination of the prosecutrix:

> Q. You remember who pulled it out? [tampax]
>
> A. I pulled it out. I told him I was on my period, and I pulled it out. I didn't want him to push it up any farther inside me.
>
> Q. When did he do his talking about Kansas City?
>
> A. After he got through. After he reached his climax he set up and made me sit in his lap naked.
>
> Q. How long did this take from the time that he put it in until—
>
> A. Just a very short time.
>
> Q. What were you doing?
>
> A. I wasn't doing anything, I was just laying there.
>
> Q. Where were your hands?
>
> A. I don't know.
>
> Q. Scratching?
>
> A. No, I don't know.
>
> Q. Biting?

A. No.

Q. Kicking?

A. No.

Q. Kissing?

A. No.

Q. Petting?

A. No.

Q. Did you scream out?

A. No.

Q. Why did you not cry?

A. I'm just not that way. When I'm scared I just don't say anything.

Q. Are you scared now?

A. Yes.

Q. Is it hard for you to cry now?

A. No.

Q. While you were sitting in his lap where were your hands?

A. Around his neck.

MRS. MILLER: Your Honor, maybe the prosecutrix would like a few minutes.

THE COURT: I beg your pardon?

MRS. MILLER: Maybe the prosecutrix would like a few minutes to get herself together.

THE COURT: Well, you got her this way. Why don't you go ahead.

Mr. Myerson: Your Honor, the defense would like to point out that we're not intentionally attempting to get her this way, and we would like for her to have an opportunity to get herself together.

THE COURT: I didn't know she appeared to be so distraught. Do you wish to recess?

A. No.

THE COURT: I beg your pardon?

The prosecutrix then said "I can finish." Thereupon the appellant's counsel moved for a mistrial on the basis of the court's remark before the jury that the "defense counsel having got this witness that way" is "highly prejudicial" which could not be removed from the juror's minds by a cautionary instruction. The court denied the motion. Appellant argues that the court's remark ridiculed the defense counsel and demonstrated a biased attitude which tended to adversely affect the appellant's rights before the jury. Prejudicial error is not committed by the court's remark unless it constitutes an "unmerited rebuke" giving the jury the impression that defense counsel is being ridiculed. *Davis* v. *State,* 242 Ark. 43, 411 S.W. 2d 531 (1967); *McAlister* v. *State,* 206 Ark. 998, 178 S.W. 2d 67 (1944); *Jones* v. *State,* 166 Ark. 290, 265 S.W. 974 (1924). However, prejudice is not shown where the record reveals that the trial judge was merely irritated at defense counsel's trial tactics. *Walker* v. *Bishop,* 408 F. 2d 1378 (8th Cir. 1969). Although the better practice, as we have often said, is to talk to counsel out of the jury's hearing, we do not construe this remark as ridiculing the appellant's counsel. The court merely was stating the obvious. By terse questioning on cross-examination, the defense counsel was properly attempting to weaken the prosecutrix's testimony as a witness. The court's remark certainly did not relate to the merits of the case. At most, it could only be construed as a mere irritation which "does not constitute reversible error whether the court's irritation was justified or not." *Walker* v. *Bishop, supra.*

Further, where evidence of the defendant's guilt is convincing, we have affirmed convictions in spite of the fact that remarks made by the trial court were said to be improper. *Bates* v. *State,* 210 Ark. 1014, 198 S.W. 2d 850 (1947); *Tuttle* v. *State,* 83 Ark. 379, 104 S.W. 135 (1907); and 62 ALR 2d 206. In *Tuttle* the court stated to appellant's counsel "[T]hat is not the rule of evidence, and not the law, and never was the law, and you know it. *** This is not a backwoods justice-of-the peace court, and I will not take up the time of the court with such questions." In the case at bar the evidence, which we later discuss, is amply sufficient to convince us that the verdict is responsive to the evidence and not to any extraneous matter such as the asserted prejudicial remark by the trial court. Moreover the court instructed the jury pertinent to this issue:

> I have not intended by anything I have said or done, or by any questions that I may have asked, to intimate or suggest what you should find to be the facts, or that I believe or disbelieve any witness who testified. If anything I have done or said has seemed to so indicate, you will disregard it.

Appellant contends that the trial court continually showed bias, making it impossible to conduct a fair and impartial trial. The record shows otherwise. A large part of the record contains the voir dire proceedings where the prospective jurors were questioned at length as to racial attitudes. The trial court permitted sufficient inquiry of the jurors to insure that appellant obtained a fair and impartial jury. The appellant complains only of two exceptions which we have previously discussed. The court cut bail in half and was willing to talk to counsel about reducing it further. In chambers the court remarked:

> This is the first time in my nineteen years as a judge that this [racism] — such a thing has been raised. I regret that it has been raised. We all try to get along together and live together, and help one another. But the most important thing in the world, in this courtroom, is to have the proper atmosphere in which to ascertain the truth, whatever the truth may be, and that's what I, as presiding judge, want.

Appellant's argument as to the bias of the trial court relates primarily to proceedings not in the jury's presence. Suffice it to say that we are of the view the trial was conducted in a fair and impartial manner.

Appellant next asserts for reversal that the trial court erred in admitting into evidence the testimony of Sonja Suter. We do not agree. Since the prosecutrix was unable to identify appellant, Mrs. Suter's testimony was permitted. In *Tarkington* v. *State,* 250 Ark. 972, 469 S.W. 2d 93 (1971), we held:

> If the crime charged has been committed by a novel means or in a particular manner, and the identity of its perpetrator is in issue and not otherwise conclusively established, evidence of a defendant's commission of a similar offense by that means or in such manner is admissible as tending to show identity of the perpetrator when the similarity of the means or manner employed logically operates to set the offenses apart from other crimes of the same general variety and tends to suggest that the perpetrator of one was the perpetrator of the other.

See also *King* v. *State,* 253 Ark. 614, 487 S.W. 2d 596 (1972); and *Montgomery* v. *State,* 251 Ark. 645, 473 S.W. 2d 885 (1971). In the case at bar, Mrs. Suter testified she was raped the night after the prosecuting witness was attacked. The circumstances of the alleged assaults are similar. Both victims were returning to their cars at nighttime from a grocery store when a black man, at gunpoint, abducted, blindfolded, and forced each of them to put their heads down as he drove their car to a garage where he raped them. Each was driven back to the grocery store parking lot and released. Appellant contends he did not offer an alibi or refute the charge, and another witness placed him at the scene of the crime. Therefore, appellant says his identity was not in issue, and Mrs. Suter's testimony was inadmissible. The prosecuting witness, however, could not identify her assailant. The other witness, who observed him at the scene, merely testified that he saw appellant with a white girl. Appellant's identity was not "conclusively established" as the person who raped the prosecutrix. Mrs. Suter did not identify appellant as the person who raped her the following night under similar cir-

cumstances. Therefore, we hold her testimony was relevant upon the issue of identity.

Appellant next contends that the evidence is insufficient to support the verdict of the jury. We first observe it is well established that on appeal we review the evidence and all reasonable inferences deducible therefrom most favorable to the appellee and affirm if there is any substantial evidence to support the jury's finding and verdict. *Stanley* v. *State,* 248 Ark. 787, 454 S.W. 2d 72 (1970). At approximately 9 p.m., the prosecutrix went to a grocery store to cash a check. When she returned to her car a black male accosted her with a gun, placed a cap over her face and forced her to ride on the passenger side with her head down. He then drove her car to a garage where he pushed her inside and onto a couch where she was told to undress. After undressing himself, he proceeded to fondle various parts of her body. She was required to remove a tampax and then he proceeded to have sexual intercourse with her without her consent. She did not struggle because she was fearful he would kill her. Afterwards her assailant drove her in her car back to the grocery store parking lot where she was released. She could not identify him although she got a glimpse of the surroundings at the garage and a momentary view of the interior of the garage. There was medical proof of recent intercourse. Since the prosecutrix could not identify the appellant as her assailant, Mrs. Suter was permitted to testify based upon the issue of identity. She identified the appellant as being the one who raped her the following night under similar circumstances. Both victims were able to identify the garage as being the place where the assaults were made upon them. There the tampax was found that the prosecutrix was forced to remove and a part of a thermometer case which had fallen out of Mrs. Suter's purse was also recovered. We hold the evidence was amply substantial to support the jury's finding that the prosecutrix was sexually assaulted in violation of Ark. Stat. Ann. § 41-3401 (Supp. 1973).

Appellant next asserts that a "sentence of life imprisonment without an opportunity for parole, imposed upon a first-offender minor, whose offense resulted in no physical harm to the victim, is so excessive and disproportionate to the illegal act as to constitute cruel and unusual punishment." We cannot agree. Appellant, 17 years old at the time of trial,

was sentenced to life imprisonment for first degree rape pursuant to Ark. Stat. Ann. § 41-3403 (Supp. 1973). However, a life sentence does not absolutely preclude the opportunity for parole. Ark. Stat. Ann. § 43-2807 (b) (Supp. 1973) provides for parole eligibility upon commutation to a term of years by executive clemency. Thereupon, the individual is "eligible for release on parole after serving one-third (1/3) of the time to which the life sentence was commuted, with credit for good time allowances." Until recently the penalty for rape was death or life imprisonment. However, by Act 362 of 1967 (41-3403, *supra*) the legislature provided that "[A]ny male, upon conviction of first degree rape, shall be subject to death or thirty (30) years to life imprisonment in the state penitentiary." Therefore, the legislature permitted the jury the latitude of fixing a lesser sentence than formerly. Appellant presents the argument that the punishment of life imprisonment fixed by the jury is too harsh and cruel because the prosecutrix suffered no serious or permanent physical harm. Appellant recognizes that no one can deny that rape is one of the most morally reprehensible criminal offenses and, historically, the act has been the subject of the most severe penalties and public condemnation. In the case at bar, as previously indicated, the prosecutrix was abducted at gunpoint, subjected to indignities and raped. The jury is in the better position to evaluate the physical abuse as well as any mental anguish experienced by the prosecutrix as a result of her ordeal. Appellant acknowledges that recently in *McDonald* v. *State*, 253 Ark. 812, 491 S.W. 2d 36 (1973), we reaffirmed the generally prevailing view that if a sentence is within the limits established by the legislature, it is valid even though it is insisted that the punishment is unconstitutionally excessive. There we said "[I]nasmuch as the determination of the limits of punishment lies peculiarly within the legislative province, we have no basis for disturbing the verdict." To the same effect is *Osborne* v. *State*, 237 Ark. 5, 371 S.W. 2d 518 (1963); *Randle* v. *State*, 245 Ark. 653, 434 S.W. 2d 294 (1968); and *Patterson* v. *State*, 253 Ark. 393, 486 S.W. 2d 19 (1972).

In the case at bar, the testimony, as previously discussed, is amply substantial to support the jury verdict. The punishment assessed was within the limits prescribed by law and less than the maximum. It was for the jury to exercise the right and authority vested in it by our legislature and constitution. Therefore, we hold that the penalty imposed by the

jury is not cruel and unusual punishment. As previously indicated a life sentence is not without any opportunity for parole eligibility since executive clemency is available by a commutation of sentence.

Affirmed.

BYRD, J., dissents.

CONLEY BYRD, Justice, dissenting. I would reverse and remand this case for a new trial because of the trial court's remarks to appellant's counsel during the cross-examination of the prosecutrix. It must be remembered that the burden was upon the State to prove to the jury beyond a reasonable doubt that appellant had intercourse with the prosecutrix "by forcible compulsion."

Mac Chambers, a witness called by the State, testified that he lived near the garage where the alleged rape took place and that on the night of October 31, the defendant asked the witness to take him to Piggley Wiggley. When the witness got outside the defendant got in a car with a white girl and the witness followed the defendant to Piggley Wiggley. Upon arriving at the Piggley Wiggley, the defendant sat in the car and talked to the girl awhile before he got into the witness' car. The next night at about the same time the appellant and a white girl walked upon the porch where the witness lived. This time at the request of appellant, witness followed appellant to Kroger. Witness described the girl on the second night as smiling when he saw her. Stated that the girl was not scared. Witness also testified that there were a number of stop signs between his house and the Piggley Wiggley and that appellant stopped at each stop sign.

On direct the prosecutrix had testified that upon arriving at a garage the appellant tied her hands behind her back with a rope and pulled my blouse, that I was wearing, over my face. On cross-examination the prosecutrix stated appellant started to take off my blouse at first, but I just took it off myself. Thereafter, the cross-examination continued as set out in the majority opinion and culminated with the prosecutrix testifying that she was sitting on the appellant's lap while nude and with her arms around his neck. At that

time the following occurred:

> "Mrs. Miller: 'Your Honor, maybe the prosecutrix would like a few minutes.'
>
> The Court: 'I beg your pardon?'
>
> Mrs. Miller: 'Maybe the prosecutrix would like a few minutes to get herself together.'
>
> The Court: 'Well, you got her this way. Why don't you go ahead.' "

These remarks on the part of the trial court, although not necessarily intended, could be construed as showing some irritation in counsel's manner of interrogation and that it went beyond the bounds of propriety. In dealing with a remark of a trial court to counsel in *McAlister* v. *State*, 206 Ark. 998, 178 S.W. 2d 67 (1944), we stated the general principle as follows:

> "'No principle is better settled than that a judge presiding at a trial should manifest the most impartial fairness in the conduct of the case. Because of his great influence with the jury, he should refrain from impatient remarks or unnecessary comments which may tend to result prejudicially to a litigant or which might tend to influence the minds of the jury. By his words or conduct he may, on the one hand, support the character and weight of the testimony or may destroy it in the estimation of the jury. Because of his personal and official influence, uncalled for or impatient remarks, although not so intended by him, may give one of the parties an unfair advantage over the other.' 'We are not unaware that many things occur during the trial of a case to fray and irritate the nerves of the presiding judge, and that he is not immune to the natural frailties of humanity, but because of his position he must exercise the greater forbearance and patience.'"

We constantly hold that there is a presumption that every error is prejudicial, unless it is demonstrated otherwise. See *Arkansas Highway Comm.* v. *Jensen*, 253 Ark. 795, 489 S.W.

2d 5 (1973), where we stated:

> ". . . The presumption is that error is prejudicial unless it is shown otherwise or manifestly is not..."

The majority's bald assertion that they "do not construe this remark as ridiculing appellant's counsel" does not show that the court's demonstrated irritation had no effect in discrediting the testimony elicited on cross-examination. As pointed out in *McAlister* v. *State, supra,* a trial judge because of his great influence with the jury: "By his words or conduct he may, on the one hand, support the character and weight of the testimony or may destroy it in the estimation of the jury." Here I cannot say that the record manifestly shows that the trial court's expressed irritation did not prejudice either appellant's conviction or the extent of his punishment. It certainly did not help appellant. Consequently I would reverse for a new trial on this one issue.

For the reasons stated I respectfully dissent.

ARKANSAS STATE HIGHWAY COMMISSION *v.* Mrs. Dannie ELLIS et al

74-132 514 S.W. 2d 702

Opinion delivered October 28, 1974

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

Cotlett & Henderson, for appellees.

CARLETON HARRIS, Chief Justice. This is a highway condemnation case. The property involved is located on the north side of Rodney Parham Road about 1,500 ft. west of Breckenridge Drive and contains 40.6 ft. of frontage on Rodney Parham Road. The area is wooded, unimproved and consists of 13.5 acres. The commission, on October 1, 1970, acquired by condemnation 9.57 acres and on trial, the jury returned a verdict for appellees, Mrs. Dannie Ellis and Mrs. Louise Ellis, in the amount of $106,200. From the judgment so entered, appellant brings this appeal. For reversal, it is asserted that the court erred in allowing evidence of a sale which was not placed of record until January, 1971, and it is also urged that the verdict is excessive and not supported by substantial evidence.

C. V. Barnes, a realtor of Little Rock, after thoroughly detailing the basis for his computations, testified that the market value of the 13.5 acres before the taking was $202,500; that the value of the land remaining after the taking of the 9.57 acres, together with two easements, was $31,400, leaving the amount of damages at $171,100. Byron More, a licensed realtor and broker of Little Rock, engaged in the real estate business since 1956, gave a before taking value of $229,500, and an after value at $42,700, or damages in the amount of $186,800. Wesley Adams, engaged in the appraisal business in Little Rock, testified on behalf of the commission and reached the figure of $39,200 as the before taking value of the land. He testified to the after taking value as $7,800, leaving

damages at $31,400. James T. Johnson, a staff appraiser for the commission, considered the before value to be $37,125, and the after value as $8,300, or damages in the amount of $28,825.

It is at once apparent that this is one of those cases where the experts for each side are "miles apart" and there is no way to reconcile their differences. No point would be served in detailing the evidence, which is rather lengthy, and simply deals with the reasons given by the experts in reaching their conclusions. We are only concerned with whether the court erred in allowing evidence of a sale not made of record until January, 1971, somewhere between three and four months after the taking of the land by the commission, and further, whether the verdict is supported by substantial evidence. As to the first contention, we find no merit. C. V. Barnes testified that the consideration per acre in a sale of land immediately east, adjoining the subject property, from International Paper Company to Midland Corporation, was $20,000 (he valued the land here in litigation at $15,000 per acre); that the contract for the sale of the adjoining property mentioned by Barnes was entered into on June 3, 1970, but the deed was not recorded until January, 1971. Appellant moved to strike the testimony of Barnes with reference to this sale "which took place after the date of condemnation as it is being used to establish the before value of the subject property." Counsel for appellees then stated to the court that the evidence was not introduced for the purpose of establishing the before value of the lands but only as a part of the information gathered by Barnes in support of his opinion. In fact, the testimony relative to this sale occurred after Barnes had testified at length about factors which he considered relevant in reaching his determination of value; he was then asked, "What other factors did you take into account in arriving at the values on this property before the taking and condemnation at that $15,000 an acre?" At any rate, this was the only objection made, and clearly refers only to the fact that appellant is asserting (because of the late recording) that the sale took place after the date of taking, and was therefore not admissible. In its brief, appellant argues that the International Paper Company to Midland sale involved property unlike that belonging to appellees, for the former was "whole", i.e., there were no intervening ownerships However, no such objection was made to the trial court, and

we do not consider the point, although the question of the intervening ownerships will be subsequently discussed. As to the objection made, there was no error. In the first place, when we consider the purpose of the evidence, we find it admissible. In Vol. 5, p. 253, § 18.42 [1] Nichols on Eminent Domain, we find:

> "A distinction must also be drawn relative to the foundation which must be laid for such evidence based upon whether the comparable sales data is used as support for an expert's opinion or as independent substantive evidence of value. Quite obviously, when evidence of the price for which similar property has been sold is offered as substantive proof of the value of the property under consideration, a foundation should be laid showing that the other property is sufficiently near that in question and that it is sufficiently like the property in question as to character, situation, usability and improvements to make it clear that the tracts are comparable in value. However, where evidence of sales of similar property is offered not as substantive proof of value, but merely in support of, and as background for, the opinion of an expert as to the value of the land in question, the requirement of such foundation is not so strict."

The evidence clearly establishes that the contract between International and Midland was entered into on June 30, 1970, and the transaction consummated at that time, though the deed was not recorded until a few months later. No case is called to our attention which holds that the evidence was inadmissible because the deed was not recorded until after the taking, and it is our view that the admission of this evidence was within the discretion of the trial court, and no abuse of discretion has been shown. It might again be pointed out that there was no objection, nor motion to strike the testimony on the basis of the fact that the International to Midland sale reflected enhancement due to highway construction.

We have no hesitancy in stating that appellees offered substantial evidence in support of their position. Mr. Barnes was undoubtedly the most thorough of all the witnesses who testified. The witness described the Ellis lands in detail, using maps and aerials, and testified about the development and growth of the general area. He described the soil, mentioned

that all utilities were available, that no drainage problems existed on the property, the fact there was access to the property before the taking of that bordering on the Rodney Parham Road, and he commented that the area is the fastest growing in western Little Rock; further, that the growth rate from 1960 to 1970 in the particular area was 118%.

Morse had been personally involved in the sale or development of numerous properties in the area, including Brookfield Subdivision, Treasure Hills, and Sturbridge Subdivision, and the witness, through his testimony, demonstrated his familiarity with the area involved. Appellant's principal contention appears to be that there are eight different pieces of property owned by other individuals within the Ellis tract and this fact causes the evidence of appellees' witnesses to lose its substantiality. We do not agree, for each witness testified that he took this fact into consideration. Barnes, who valued the Ellis property at $15,000 per acre, said that his valuation would have been $20,000 per acre except for the intervening tracts. Morse, who valued the property at $17,000 per acre, stated that his figure would have been $20,000, except for the intervening ownerships. Barnes said that he realized these various intervening owners could not be forced to sell, but emphatically stated that the purchase of the Ellis lands at $15,000 an acre "would have been an excellent investment in October of 1970." Morse, although agreeing on cross-examination that the intervening ownerships would have to be purchased in order to properly use the Ellis property, was also emphatic in his valuation of $17,000 per acre, and said that he would have paid that for it. The witness had experience in buying tracts with intervening ownerships, and actually was in the process of assembling a tract at the time of the trial.

Except for the ruling on the admissibility of evidence already discussed, there were no objections by appellant to the qualifications of the experts, testimony of these witnesses, no motions to strike the value testimony of either, nor any objections to any of the instructions. Certainly, we could not hold as a matter of law that the evidence offered was not substantial. It is true that the experts on behalf of appellant reached far different conclusions as to the amount of damage sustained, but, of course, the question of which witnesses to believe, or which opinions to accept, was a function of the

jury and that body was more nearly persuaded by the witnesses for appellees. We say "nearly" for the reason that it awarded considerably less than the amount of damage mentioned by these witnesses, though considerably more than the amount of damage reached by witnesses for appellant. Our language in *City of Mulberry* v. *Edwards*, 256 Ark. 944 511 S.W. 2d 468 (1974) is *apropos* to the present case, this court stating:

> "As to excessiveness, the verdict was within the amounts set by the witnesses, and we are in no position to substitute our judgment for that of the jury."

Affirmed.

George SWIDERSKI, County Clerk *v.*
W. L. GOGGINS et al

74-215 514 S.W. 2d 705

Opinion delivered October 28, 1974

John B. Driver, for appellant.

J. D. Patterson, for appellees.

LYLE BROWN, Justice. Appellant is the county clerk of Searcy County. Appellees constitute the board of election commissioners of Searcy County. John A. Griffith timely filed with appellees his petition to have his name placed on the ballot as an independent candidate for county judge. Appellant requested of the commissioners that the petitions be turned over to him to the end that he could compare them with the voter registration list to determine the adequacy of the petitions. His request was denied. Appellant filed his petition for a writ of mandamus to compel the transfer of the petitions to his possession. This appeal is from a denial of that petition.

Appellant did not show a clear legal right to a writ of mandamus to compel the commissioners to turn the petitions over to him. Such a showing is a necessary prerequisite to the granting of such a writ. In *Naylor* v. *Goza,* 232 Ark. 515, 338 S.W. 2d 923 (1960) we said:

> Since * * * the purpose of a writ of mandamus is not to establish a legal right but to enforce one which has already been established, it is essential to the issuance of the writ that the legal right of plaintiff or the relator to the performance of the particular act of which performance is sought to be compelled must be clear, specific, and complete, or, as otherwise stated, plaintiff or the relator must have a clear and certain legal right to the relief or remedy sought by the writ; and, according to some decisions, the right to the writ must be clear, undoubted and unequivocal, so as not to admit of any reasonable controversy.

The method of filing as an independent candidate is prescribed by Ark. Stat. Ann. § 3-105 (Supp. 1973). Among other things it is provided that "The sufficiency of any petition filed under the provisions hereof may be challenged in the same manner as provided by law for the challenging of

Initiative and Referendum petitions". The same section provides that the petitions shall be directed to the official with whom certificates of nomination are required to be filed. Certificates of nomination for county office must be filed with the county election commissioners. Ark. Stat. Ann. § 3-121 (Supp. 1973). We have held that the county election commissioners have the right to determine the *prima facie* sufficiency of the petitions. We set out that the determination was to be made by counting the number of signers and comparing the total with the number required by law. With that action, we said the powers of the commissioners are at an end. We said a challenge to the petitions would have to be in a legal proceeding begun by an action to enjoin the commissioners from certifying the proposed candidate. *Carroll* v. *Schneider*, 211 Ark. 538, 201 S.W. 2d 221 (1947). The present statutory law is substantially the same as when *Carroll* was handed down.

We are unable to say the Legislature intended to strip the election commissioners of their authority as related in *Carroll*. Certainly we cannot say that under the status of the proceedings at the time the petition for mandamus was filed, appellant had a clear legal right to mandamus.

Affirmed.

William Jefferson SWAIM *v.*
STATE of Arkansas

CR 74-77 514 S.W. 2d 706

Opinion delivered October 28, 1974

[redacted]

Larry R. Froelich, for appellant.

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

JOHN A. FOGLEMAN, Justice. Appellant Swaim was found guilt of delivery of a controlled substance. He was arraigned August 23, 1973, on the charge, which was filed June 19, 1973. He entered a plea of not guilty. Thereafter he employed Larry R. Froelich, who had been admitted to the practice of law in Texas, but not in Arkansas, to represent him. Pretrial motions on behalf of appellant were filed by Froelich on September 7 and September 18. On Monday, October 1, 1973, the date set for trial of the case, the circuit judge forbade Froelich to participate in the proceedings, except by advising his co-counsel William H. Howell during recesses of the trial.

While the record is not as clear as it might be, it seems that the judge had originally approved the representation of Swaim by Froelich, so long as this attorney was associated with local counsel admitted to practice in Arkansas. Sometime during the week preceding the trial date, the judge advised Froelich that he was uninformed about Froelich's credentials. Later the judge called the Supreme Court clerk's office and learned that Froelich had not been admitted to practice in Arkansas. He also learned that Froelich had a Fayetteville telephone number listed in the name of "Howell & Froelich". When the case came on for trial, the judge advised Froelich, who seems to have been a resident of Arkansas, that he was engaging in the unauthorized practice of law in Arkansas and asked him not to participate in the trial in any way, except in the advisory capacity previously mentioned. When Froelich objected the judge said that he would have the sheriff keep Froelich out of the courtroom. Howell, who was present, protested that he could not go to trial. The trial judge and Froelich sharply disagreed about their prior understanding concerning Howell's participation. The judge understood that Froelich had said that Howell was associated in the case and would take over the trial. Froelich denied this and admonished Howell not to go to trial. The judge then

stated: "We are going to trial. You just make your record." Howell then moved for a continuance, stating that he was an associate and partner of Froelich, that Froelich had made the investigation of the case and interviewed the witnesses, that Howell's only participation in the preparation for trial had commenced on the preceding Friday, when he began doing research and working with Froelich, and that he felt that he could not adequately represent Swaim as "lead counsel" upon such short notice. After defendant's motion to quash the jury panel had been denied, the trial proceeded after a noon recess. The defense was entrapment. During the trial, the court noted that a secretary had been bringing messages to Howell into the courtroom during the morning when the motion to quash the jury panel was being heard.

After trial, appellant requested an evidentiary hearing on a motion for new trial, without success.[1]

Appellant asserts that he was denied the effective assistance of counsel, and that the court abused its discretion in failing to grant a continuance and erred in failing to grant a hearing on his "post-conviction" motions. We have concluded that Swaim was prejudiced by the denial of his motion for a continuance by reason of the fact that he was thereby denied effective assistance of counsel.

It is rather apparent that there was a misunderstanding between Froelich and the circuit judge of which both Howell and Swaim were unaware prior to the trial date. It seems clear that not even Froelich knew that he would be completely barred from the courtroom during the trial until the court's pronouncement at the very time the trial was scheduled to commence. We cannot agree that the opportunity for conferences during recesses of the trial afforded an adequate opportunity for Howell to avail himself of the knowledge and information acquired by Froelich in trial preparation. We cannot say that Howell or Swaim was guilty of any lack of diligence in the matter. We are not prepared to say that the record in the case dispels any thought that Howell was not

[1]Appellant filed a second motion for an evidentiary hearing on a motion for new trial, accompanied by an affidavit by Howell. We do not consider either this motion or the affidavit. Even though the state briefed the case as if the affidavit was properly before us, we find that the motion and affidavit were filed after appellant had filed his notice of appeal. The trial court correctly held that it had no jurisdiction to act at that time.

adequately prepared.

Appellant attempted to attack the composition of the jury panel by a motion to quash, and sought to support his motion by the testimony of an expert mathematician. Howell's examination of this witness failed to elicit critical testimony which would have tended to show that the disparity between the makeup of the jury panel and a cross-section of the community, as reflected by the expert's sampling of the voter registration list, could only have resulted from systematic exclusion. After presenting the testimony of the mathematician and of the jury commissioners, Howell had requested that, because of the handicap under which he was operating, he be given a short recess. He stated, for the record, that since he had not talked with the mathematician about his testimony prior to the convening of the court, he was uncertain that he had brought out the essential factors. After the jury was empanelled and sworn, the court granted Howell a 15-minute recess. Thereafter, Howell asked that the motion to quash be "reopened" and the mathematician be recalled for further testimony. When the prosecuting attorney objected, the court refused to grant this request, but permitted Howell to make a statement for the record. In that statement Howell said that the witness, if recalled, would testify that the chances that the particular disparity would occur without discrimination were 820,866,000 to 1.

The only other time, prior to the presentation of evidence, the court afforded Howell to enhance his information about the case and the theories of the defense, was a noon recess from 11:50 a.m. to 1:30 p.m. This recess followed a hearing on a motion in limine as well as the proceedings relative to the motion to quash the jury panel, but preceded the making of opening statements. The court also recessed the trial until 9:00 a.m., October 2, after the state, having presented the testimony of three witnesses, had rested sometime during the afternoon of October 1.

On several occasions, Howell attempted to elicit testimony pertaining to the entrapment defense through leading questions or offered testimony that was improper for the purposes he stated. Some of these will be later discussed in connection with other points for reversal. These errors could well be attributable to Howell's lack of preparation for trial.

Swaim was entitled to have a record made on his motion to quash the jury panel adequate for appellate review of the federal constitutional question he raised, and to be represented at trial by an attorney whose pre-trial preparation enabled him to develop a trial strategy and to plan the appropriate trial tactics for overcoming the effect of evidence he might anticipate would be presented on behalf of the state, and for carrying the burden of proving entrapment. It matters not that it may appear to us, on the record made, that the contentions of appellant on these issues are without merit. It does concern us that the attorney did not have adequate opportunity to acquaint himself with Swaim's version of the case, the state's evidence, the knowledge possessed by defense witnesses and the underlying theory of the defense.

In reviewing the denial of motions for continuance based upon alleged inadequacy of time for preparation for trial by a defendant's attorney, we have been hesitant about finding an abuse of discretion, because of the superiority of the trial judge's perspective, his grasp of the particular situation and his knowledge of developments which are not matters of record. See *Therman* v. *State,* 205 Ark. 376, 168 S.W. 2d 833. Before holding that there has been abuse, we view the totality of the circumstances, particularly on the question of prejudice. See *Wolfe* v. *State,* 255 Ark. 97, 498 S.W. 2d 878.

We find little help from opinions in cases where the inability of counsel to prepare for trial was attributable to the defendant's negligent or dilatory action. Neither can we rely upon those cases wherein prejudice was not alleged or shown. This case is also unlike those in which the inadequacy of trial counsel's preparation was not called to the judge's attention before the trial commenced. In this case, Swaim, the most interested party involved, cannot be held to blame. Even if it might be said that he should have employed an attorney admitted to pratice in Arkansas, we cannot hold him totally responsible when even the circuit judge was misled as to the status of Froelich. Certainly he cannot be said to have been privy to the misunderstanding between Froelich and the circuit judge. Upon the totality of the circumstances and the necessary emphasis upon a defendant's right to the effective assistance of counsel, we have concluded that the motion for continuance should have been granted and that the judgment must, for this reason, be reversed.

We find no error upon consideration of those remaining points for reversal asserted by appellant which are likely to arise upon a new trial.

One Jimmy Brewer was called as a witness by appellant. Howell asked leading questions of the witness and the prosecuting attorney's objections were sustained. Appellant sought to justify this type of examination on the basis that Brewer, who had testified that he had to "work a few deals" in order to get marijuana charges against him dropped, was a hostile witness. According to appellant, Brewer occupied the same position as a government agent would and, because of this, was a hostile witness.

Leading questions on direct examination are allowed under special circumstances which make it appear that the interests of justice require it. Ark. Stat. Ann. § 28-705 (Repl. 1962). Determination whether special circumstances justify direct examination of a witness by leading questions is a matter lying within the sound judicial discretion of the trial judge. *Southern Cotton Oil Co.* v. *Campbell*, 106 Ark. 379, 153 S.W. 256. One of the special circumstances under which a witness may be asked leading questions on direct examination arises when the witness appears to be hostile to the examiner. *Sinclair* v. *Barker*, 236 Ore. 599, 390 P. 2d 321 (1964). It is to be assumed, however, that a witness is not hostile to the party by whom he is called. III A *Wigmore on Evidence* (Chadbourne Rev.) 699, § 909 (1970). Although this assumption may not apply to an adverse party, still he is not necessarily a hostile witness. *Sinclair* v. *Barker*, supra. See *Superior Forwarding Co.* v. *Sikes*, 233 Ark. 932, 349 S.W. 2d 818. It is only when a witness is patently biased or manifestly appears, or is shown to be, hostile that leading questions are allowable on this ground. *Sinclair* v. *Barker*, supra; *Rossano* v. *Blue Plate Foods, Inc.*, 314 F. 2d 174 (5 Cir. 1963).

The determination whether a witness is hostile is to be made by the trial judge, in the exercise of a sound judicial discretion, and may be based upon such circumstances as the demeanor of the witness, his situation and relationship to and with the parties, his interest in the case and the inducements he may have for withholding the truth. *Sinclair* v. *Barker*, supra; III *Wigmore on Evidence* (Chadbourne Rev.) 167, (1970) § 774; 4 *Jones on Evidence* (6th Ed.) 97, § 24:12 (1972).

See also, *Rossano* v. *Blue Plate Foods, Inc.*, supra; *Superior Forwarding Co.* v. *Sikes*, supra. The mere fact that Brewer was cooperating with the police in investigating suspected illegal drug activities did not necessarily make him so hostile to the defendant that the trial judge had no discretion in determining whether leading questions were allowable. We find no abuse of discretion on the showing made here.

Appellant also asserts that the court erred in sustaining the state's objection to testimony offered through his witnesses Carnes and Gosnell. He contends that the evidence was admissible on the question of entrapment in that it had a bearing on his state of mind and willingness to engage in criminal conduct at the time of the alleged offense. In the case of Carnes, an objection was sustained as to evidence bearing on threats made against her by Bill Burnett, the officer who arrested Swaim and who engaged in the transaction upon which the charge against Swaim was based. The objection was that the question by which the testimony was elicited was leading. It obviously was. Appellant then attempted to show by this witness that Burnett, who had denied that he carried a gun or threatened or intimidated appellant, had threatened him, using a gun. This evidence was offered as an attack on Burnett's credibility. On that basis, the trial judge correctly ruled that this was a collateral inquiry and the testimony inadmissible.

Appellant has failed to specifically point out to us the testimony of Gosnell he contends was erroneously excluded or the purpose for which it was admissible. The state suggests that this testimony would have been that Burnett offered to sell drugs to Gosnell. If so, it seems that the testimony would have been irrelevant to the issue and, if an attack on Burnett's credibility, it was collateral. The state also suggests that it relates to other proffered testimony similar to that offered through the witness Carnes. The relevant inquiry was made by a leading question, to which an objection was sustained. Otherwise, the inquiry was about collateral matters. We find no error in the rulings as to these witnesses questioned here.

The judgment is reversed and the cause remanded for a new trial.

ARKANSAS STATE HIGHWAY EMPLOYEES LOCAL 1315 *v.* Maurice SMITH et al

74-91 515 S.W. 2d 208

Opinion delivered October 28, 1974
[Rehearing denied December 2, 1974.]

John T. Lavey, for appellant.

Bill S. Clark and *David A. Orsini,* for appellees.

J. FRED JONES, Justice. This is an appeal by Arkansas State Highway Employees Local 1315 from an order of the Pulaski County Circuit Court denying a petition for a writ of mandamus directing the Arkansas State Highway Commission to deduct union dues from the salaries and wages of the members of appellant Employees Local 1315.

The appellant contends that the trial court erred in dismissing its petition and argues that under Ark. Stat. Ann. § 13-349 (B) (7) (Supp. 1973) it is entitled to the relief prayed; that the statute places a mandatory duty on the Commission

to deduct union dues from wages when requested by the employee, and the Commission has no discretion in failing or refusing to do so when so requested. That portion of the provision of the statute on which the appellant relies, reads as follows:

> "Deductions from the payrolls of State employees, both regular and extra help, shall be permitted only for the following purposes:
>
> (7) payment of union dues when requested in writing by State employees."

The question before the trial court was whether this statutory provision was mandatory or permissive, and the question before us on appeal is whether the trial court erred in determining that it was permissive and not subject to mandamus. Ark. Stat. Ann. § 13-349 (B) (Supp. 1973) is a part of the "General Accounting Procedures" Law pertaining to public finances as finally digested following several legislative Acts and amendments.

Ark. Stat. Ann. § 13-349 (A) (Supp. 1973) pertains to monthly, weekly and hourly salaries, and subsection (B) in its entirety reads as follows:

> "PAYROLL DEDUCTIONS. Deductions from the payrolls of State employees, both regular and extra help, shall be permitted only for the following purposes: (1) withholding taxes; (2) social security contributions; (3) contributions to any State Retirement System or approved plan of deferred compensation; (4) group hospital and medical and life insurance deductions; (5) payments to State employees' credit unions; (6) value of maintenance (prerequisites); (7) payment of union dues when requested in writing by State employees; (8) purchase of United States Government Savings Bonds; and (9) for such other purposes as specifically authorized by law, but not enumerated in this subsection. Provided, that such deductions as are authorized by this subsection shall be made in compliance with rules, regulations and procedures established by the Chief Fiscal Officer of the State."

The legislative history and overall purpose of the statute are of some value in determining whether this payroll deduction provision of the statute is mandatory or permissive and, thus, whether its enforcement is subject to the extraordinary remedy of mandamus.

The original Act 412 of 1955 was entitled:

> "An Act to Provide for and Establish General Accounting Procedure for the State of Arkansas and Its Agencies, in Connection with Budget and Pre-Audit Practices, the Recording of the Receipts and Expenditures of State Funds, and Other General Fiscal Transactions."

The purpose of the Act, as recited therein, was as follows:

> "(A) To establish budget making procedure and define the duties and responsibilities in connection therewith of the Executive and Legislative Departments of the state government.
>
> (B) To provide for certain budget controls in order to prohibit deficit spending.
>
> (C) To establish and define a system of pre-audit procedure for the expenditure of all state funds.
>
> (D) To establish regulations and uniform procedure for the preparation of payrolls and other disbursement documents for state agencies; and to promulgate rules and regulations with respect to travel, revolving and petty cash funds, reimbursements and other general fiscal transactions.
>
> (E) To further define the powers and duties of the State Comptroller, and the additional duties of the State Auditor and State Treasurer in connection with general accounting procedure and fiscal practices."

Section 5 of the 1955 Act set up budget controls and provided for each agency to file certain information with the State Comptroller for an allotment system promulgated by the Comptroller with the approval of the Governor.

By Act 165 of 1963 Section 5 of Act 412 of 1955 was amended by adding a new paragraph providing in part as follows:

> "(2) The State Comptroller shall describe and explain to each State agency the requirements of the General Assembly in connection with the disbursements of appropriations made available to the agency, and particularly the procedure to be followed in establishing budget accounts within the item of appropriation for 'maintenance and general operation.' For the purpose of uniformity in procedure, and in order to carry out the intentions of the General Assembly in providing for such budget controls, the State Comptroller shall have the power and authority to make reasonable rules and regulations in connection with all budget practices, and shall have the authority to establish standards for, and set our definitions of the terms used in, the itemized listings of the proposed budget for 'maintenance and general operation' as provided for in the appropriation act for each State agency, and for such other items of appropriations as are classified by Section 11 of this Act."

Section 11 of the 1955 Act recited the purpose of expenditure analysis and budget control, and designated certain classifications under which the appropriations of the General Assembly should be classified. The general classifications so designated were for personal services including regular salaries and extra help, maintenance or general operation, grants and aid, permanent improvements and construction and special appropriations and allotments. Section 13 (B) provided that the State Comptroller should establish a system of classifying the disbursements of state funds in accordance with the object and purpose of such expenditures, and required that he "shall prepare an expenditure code manual covering the system of classifying expenditures, and shall supply all state agencies with a copy of the same."

By Act 165 of 1963 section 11 of the 1955 Act was also amended pertaining to classification for personal services under regular salaries and extra help and the payroll deduction provision was added to this classification as follows:

> "(A) Personal Services — For Regular Full-Time or

Part-Time State Employees:

(A-1) Regular Salaries. This classification shall be applicable to all salaries for state employees where the number and maximum amounts of such salaries are established by law, as provided by Article 16, Section 4 of the Constitution of the State of Arkansas.

(A-2) Extra Help. This title shall be applicable to all part-time or temporary employees, as provided for by law; and unless specifically provided for by the appropriation measure, the number and rates of pay for such temporary employees shall not exceed, at any one time, those established by law for regular salaries for comparable services for the agency having such appropriation for Extra Help.

(A-3) Payroll Deductions. Deductions from the payrolls of state employees, both regular and extra help, shall be permitted only for the following purposes: (1) withholding taxes; (2) social security contributions; (3) retirement systems; and (4) group hospital and medical insurance deductions, where paid in their entirety by the insured state employees; provided that the payroll for any agency shall not contain more than one group deduction for such hospital and medical insurance for any given pay period."

By Act 86 of 1965 subsection (A-3) of section 11 of the 1955 Act was amended to "Permit Payroll Deductions from the Salaries of State Employees for Payments to State Employees' Credit Unions," and provided as follows:

"SECTION 1. Subsection (A-3) of Section 11 of Act 142 of 1955, as amended, the same being Sub-Section (A-3) of Section 13-311 of the Arkansas Statutes of 1947, is hereby amended to read as follows:

'(A-3) Payroll Deductions. Deductions from the payrolls of state employees, both regular and extra help, shall be permitted only for the following purposes: (1) withholding taxes; (2) social security contributions; (3) retirement system; (4) group hospital and medical insurance deductions, where paid in their entirety by the

insured state employees; provided that the payroll for any agency shall not contain more than one group deduction for such hospital and medical insurance for any given pay period; and (5) payments to state employees' credit unions.' "

By Act 133 of 1967 section 11 of the 1955 Act was again amended to read as follows:

" 'Payroll Deductions. Deductions from the payrolls of state employees, both regular and extra help, shall be permitted only for the following purposes: (1) withholding taxes; (2) social security contributions; (3) retirement systems; (4) group hospital and medical insurance deductions, where paid in their entirety by the insured state employees; provided that the payroll for any agency shall not contain more than one group deduction for such hospital and medical insurance for any given pay period; payments to state employees' credit unions; and (5) payment of union dues when requested in writing by state employees.

SECTION 2. This Act shall take effect July 1, 1967."

This Act was approved February 23, 1967. Subsection (A-3) of the 1955 Act was again amended in the same 1967 session of the Legislature by Act 487, approved April 4, 1967, and this Act in its entirety reads as follows:

"AN ACT to Amend Act 412, Arkansas Acts of 1955, as Amended, Section 11 (A-3) [Ark. Stats. (1947) Section 13-311 (A-3)]; to Authorize Deductions From the Salaries of Employees for Value of Employees Maintenance; and for Other Purposes.

Be It Enacted by the General Assembly of the State of Arkansas:

SECTION 1. Act 142, Arkansas Acts of 1955, as amended, Section (A-3) [Ark. Stats. (1947) Section 13-311 (A-3)] is amended to read as follows:

'Payroll Deductions. Deductions from the payrolls of state employees, both regular and extra help, shall be permitted only for the following purposes: (1)

withholding taxes; (2) social security contributions; (3) retirement systems; (4) group hospital and medical insurance deductions; (5) payments to state employees' credit unions; (6) value of maintenance (prerequisite) as determined by the governing board, commission or head of a state agency; and (7) payment of union dues when requested in writing by state employees.'

SECTION 2. All laws and parts of laws in conflict with this Act are hereby repealed.

SECTION 3. The provisions of this Act shall be effective as of February 1, 1967, other than Item 7, above, which shall become effective July 1, 1967.

SECTION 4. It has been found and determined by the General Assembly that Public Law 89-601 establishes certain minimum wage and overtime payment requirements for certain state agencies, and that the value of maintenance (prerequisite) received by an employee is a definite factor in determining his rate of pay, especially in establishing uniformity of payment for comparable duties and responsibilities, therefore, an emergency is hereby declared to exist and this Act being necessary for the immediate preservation of public peace, health and safety shall be in full force and effect from and after its passage and approval.

APPROVED: April 4, 1967."

By Act 876 of 1973 the "General Accounting Procedures" law of 1955, with all amendments thereto, was outright repealed and the entire subject was covered in this one comprehensive Act with section 23 (B) of this Act reading as follows:

"PAYROLL DEDUCTIONS. Deductions from the payrolls of State employees, both regular and extra help, shall be permitted only for the following purposes: (1) withholding taxes; (2) social security contributions; (3) contributions to any State Retirement System or approved plan of deferred compensation; (4) group hospital and medical and life insurance deductions; (5) payments to State employees' credit unions; (6) value of

> maintenance (prerequisites); (7) payment of union dues when requested in writing by State employees; (8) purchase of United States Government Savings Bonds; and (9) for such other purposes as specifically authorized by law, but not enumerated in this subsection. Provided, that such deductions as are authorized by this subsection shall be made in compliance with rules, regulations and procedures established by the Chief Fiscal Officer of the State."

Section 28 of this Act, under "Rules and Regulations, provided as follows:

> "The Chief Fiscal Officer of the State is hereby empowered to make, amend, and enforce, such reasonable rules and regulations, not inconsistent with law, as he shall deem necessary and proper to effectively carry out the provisions of this act and the public policy as herein before set forth; and the same shall be published in an 'Administrative Procedures Manual' and distributed to the various State agencies."

This Act was made effective from and after July 1, 1973, and section 33 of the Act provides as follows:

> "This Act repeals and replaces Act 412 of 1955 and all laws amendatory thereto. (Sections 13-301, et seq. Ark. Stats. Ann.)"

As already stated, this case comes to us on the denial of a petition for writ of mandamus and, of course, mandamus is not a writ of right but is directed to the sound discretion of the court, and the parties applying for it must show a specific legal right and the absence of any specific legal remedy. *Goings* v. *Mills*, 1 Ark. 11. See also *Fitch* v. *McDiarmid*, 26 Ark. 482; *State* v. *Bd. Dir. School Dist. of Ashdown*, 122 Ark. 337, 183 S.W. 747.

In *Ark. State Highway Comm'n* v. *Otis & Co.*, 182 Ark. 242, 31 S.W. 2d 427, the legislative Act involved was stated as follows:

> "Section 1 of act 153 of the Acts of 1929 provides that, as soon as possible, the commission shall ascertain the

> amount of the valid outstanding indebtedness provided for in the act. To ascertain means to find out or to determine the amount of such indebtedness. In the discharge of the mandate of the statute, it became the duty of the commission to determine the amount and validity of the claims presented."

Twenty-four of the twenty-six claimants under this Act had reduced their claims to judgments and it was admitted that the claims of the other two claimants were correct as to amounts and the balances due upon them. In a mandamus action brought by the claimants the Highway Commission contended that according to the construction it placed upon the Act under which the claims accrued, it concluded it could not legally pay the claims. During the progress of the trial an opportunity was given the Commission to ascertain the validity and amount of each claim and the Commission refused to do so. The trial court awarded a writ of mandamus against the Arkansas State Highway Commission and adjudged that it should pay the amount of the claims. In reversing the judgment of the trial court on abuse of its discretion, this court said:

> "Mandamus is an extraordinary remedy which is awarded not as a matter of right but in the exercise of a sound judicial discretion. It is resorted to for the purpose of securing judicial or *quasi*-judicial action, and not for determining in advance what that action shall be. A party to be entitled to the right must show that he has a clear, legal right to the subject-matter and that he has no other adequate remedy. *Merritt* v. *School District,* 54 Ark. 468, 16 S.W. 287; *Rolfe* v. *Spybuck Drainage Dist. No. 1,* 101 Ark. 29, 140 S.W. 988; *Patterson* v. *Collinson,* 135 Ark. 105, 204 S.W. 753; *Snapp* v. *Coffman,* 145 Ark. 1, 223 S.W. 360; *Duncan Townsite Co.* v. *Lane,* 245 U.S. 308, 38 S. Ct. 99; and *Ex parte* Wagner, 249 U.S. 465, 39 S. Ct. 317."

In 55 C.J.S. § 64, at p. 104, is found the following language:

> "The duties which will be enforced by mandamus must be clear legal duties, that is, duties which are clearly, specifically, and peremptorily enjoined by law."

And at p. 108 of this section is found the following:

> "It is not sufficient that a statute or ordinance should merely authorize or permit an act to be done to authorize the issuance of a writ of mandamus to compel the performance of the act; the statute must be mandatory and not merely permissive, and must not confer any discretion in the matter; and it has been held that mandamus should not issue to enforce a duty gathered by doubtful inference from a statute of uncertain meaning."

By the above citations we are not saying that the appellant pursued the wrong remedy in the case at bar, nor do the appellees make such contention. What we do say, however, is that before we can reverse the trial court in its refusal to grant a petition for mandamus, we must find that the duties, the performance of which are sought to be mandated, are clear legal duties specifically and peremptorially enjoined by law, and that the trial court abused its discretion in denying the petition for the writ. We are unable to reach such conclusion in the case at bar.

From a careful examination of the language employed in Ark. Stat. Ann. § 13-349 (B) (Supp. 1973), as that subsection was amended from time to time, and when examined in the light and context of the entire Act, we are forced to the conclusion that the "payroll deductions" provision as confined to § 13-349 (B) is permissive rather than mandatory. Certainly we cannot say it is *clearly* mandatory.

This subsection of the statute had the attention of the Legislature at least on five different occasions. As first enacted in 1965, the wording was that "Deductions from the payrolls of state employees, both regular and extra help, shall be permitted only for the following purposes." This wording was never changed as additional purposes were added to the ones for which payroll deductions were first permitted.

Deduction for union dues was the only item or purpose requiring request, or authority, from the employee and certainly if deductions for union dues were mandatory upon written request of the employee under purpose No. 7, deductions would be mandatory for the remaining eight purposes

where no requests are required. We are forced to the conclusion that under this statutory provision payroll deductions are *permitted* for the purposes therein enumerated and are not permitted for any other purposes nor required.

It would appear that the entire payroll deduction provision of the statute was enacted for the protection of state employees against payroll deductions except for the purposes therein enumerated. The ninth purpose added to the list in § 23 (B) of the 1973 Act, *supra*, lends credence to such overall purpose interpretation. The wording of this added purpose with our own emphasis and bracketed comments states: "(9) for such *other* purposes as specifically *authorized* [not required] by law, but not enumerated in this subsection [obviously subsection (B)]. Provided, that such deductions as are *authorized* [not required] by *this subsection* [(B)] shall be made in compliance with rules, regulations and procedures established by the Chief Fiscal Officer of the State."

As above set out, the State Comptroller, and later the Chief Fiscal Officer of the State, was given considerable latitude in devising rules and regulations for the actual disbursement of money appropriated for the various state agencies and departments by the Legislature, and it would appear that the 1973 Act charged the State Fiscal Officer with establishing rules, regulations and procedures for the payroll deductions he was authorized to permit.

The judgment is affirmed.

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

CARLETON HARRIS, Chief Justice, dissenting. I cannot agree that the legislative provision here in question merely *permits* the Arkansas State Highway Commission (if so desired) to deduct union dues from the salaries and wages of members of appellant Employees Local 1315.

In my opinion, Section 23 (B) of Act 876 of the General Assembly of 1973 is mandatory. The provisions of that section include items that we all know to be mandatory, *viz.*, (1) withholding taxes; (2) Social Security contributions; (3) contributions to State Retirement System; the other authorized deductions certainly inure to the welfare of the employee, for

whose benefit, in my opinion, the act was passed. For instance, provisions No. 4 authorizes deductions for group hospital, medical and life insurance. Under the act, an employee can thus pay this important item on a semimonthly basis, a small amount at a time, without having to save for, or remember to send in quarterly, semiannual, or annual premiums. No. 5 authorizes deductions to State employee credit unions, and this is certainly a valuable benefit. There may be many employees who desire to borrow money but can offer no collateral to assure the repayment of the debt; the provision mentioned provides that collateral. This payroll deduction also affords a means for one to accumulate savings by adding small amounts each payday (about all that State employees can do with the present high cost of living) for the purchase of United States Government Savings Bonds. The examples, to me, clearly support my original premise, viz., that the act was passed for the benefit of the individual State employees, and was a mandate to the several State departments.[1]

Actually, since the deductions entail additional book work, and perhaps in some departments, even an extra employee, I seriously doubt that deductions would be made on a voluntary basis, i.e., simply because the department was permitted to do so. For that matter, appellees deducted union dues under the provisions of Section 23 (B) for about a year and a half before deciding that the provision was not compulsory.

Appellees cite the Federal case of *American Federation of Government Employees* v. *Hampton, et al*, 77 LRRM 2977, U. S. District Court, District of Columbia, which deals with 5 USCA § 7301, the section being entitled "Allotment of Dues". There, the court held that the statute was permissive rather than mandatory, but I should like to point out that there is a vast difference in the two statutes. 5 USCA § 7301 provides that "an agency *may* (my emphasis) deduct the regular and periodic dues of the organization from the pay of

[1]While I recognize that the testimony has no probative value, it is interesting to note that State Senator W. D. Moore, Jr., who sponsored the bill in the Senate, testified that in response to questions from the Senate floor during discussion of the measure, he informed the Senators that the provision here in controversy was discretionary on the part of the employee, *i.e.*, the employee had to make the written request — but the deduction was mandatory on the part of the employer (the State agency) once the request was made.

members of the organization in the unit of recognition who make a voluntary allotment for that purpose. Such an allotment is subject to the regulations of the Civil Service Commission, which shall include provision for the employee to revoke his authorization at stated six-month intervals." To the contrary, our statute provides:

> "Deductions from the payrolls of State employees, both regular and extra help, *shall be* (my emphasis) permitted only for the following purposes ***."

I agree with appellant's argument that the words "shall be" are mandatory, and require the various State agencies to implement the deductions requested by their respective employees. The words "permitted only", in my opinion, mean that the State agency can only make the payroll deductions for the particular classifications enumerated, *i.e.*, "permitted only" are simply words of restriction, which limit the type of payroll deductions, and prevent deductions from wages for other purposes not specifically mentioned.

It is my view that the statute imposes a clear legal duty on appellees to deduct the dues, and the petition for mandamus should have been granted.

I respectfully dissent.

BROWN and HOLT, JJ., join in this dissent.

Albert C. KRUZICH et al *v.* The
WEST MEMPHIS UTILITY COMMISSION

74-179 515 S.W. 2d 71

Opinion delivered November 4, 1974

Nance, Nance & Fleming and *Stephen K. Wood,* for appellants.

R. E. Wallin and *Jake Brick,* for appellee.

J. FRED JONES, Justice. This is an appeal by Albert C. Kruzich and other residents of West Memphis, Arkansas, from a decree of the Crittenden County Chancery Court

denying their petition for a return of money they paid for fuel adjustment charges added to their electric bills, and denying their petition for a permanent injunction restraining the appellee, West Memphis Utility Commission, from collecting fuel cost adjustment charges for electric services. The question presented is primarily one of law stated by the appellants in the point they rely on as follows:

> "The chancellor's holding, that although a schedule of rates for the several services furnished by the appellee was established by city ordinance, said rates may be amended by resolution of the city council to allow appellee to pass on to its consumers indefinite and increased operating expense, was contrary to the law and the evidence."

The facts appear as follows: Prior to 1954 the City of West Memphis purchased the privately owned electric power distribution system in West Memphis. In December, 1954, the appellee-defendant, West Memphis Utility Commission, was created by Municipal Ordinance No. 292 under authority of Act 562 of the Acts of 1953, Ark. Stat. Ann. §§ 19-4051 through 19-4060 (Repl. 1968). The utility rates in effect at the time of purchase were adopted under Ordinance No. 292 and were confirmed from time to time by additional ordinances in connection with bond issues.

The City of West Memphis purchases its electrical energy at wholesale from the privately owned Arkansas Power and Light Company and distributes the energy through its own distribution system to its local consumers. The last contract between the Arkansas Power and Light Company and the City of West Memphis was dated February 2, 1967, and was for a period of 20 years, with an automatic year to year extension clause in the absence of notice to the contrary. The contract between the city and AP&L provided that both the company and the city reserved the right to seek amendments as to increase or decrease in the rates and charges set forth in the contract in accordance with law, from any state or federal regulatory body having jurisdiction thereof; and further provided, that the charges and payments for electric service, required to be paid by the city under the agreement, should be made only from the gross

revenues of the city electric system as a necessary expense of its operation. The cost of electrical energy to the city increased from time to time and the city through the Commission absorbed the additional cost until September 20, 1973, when by Resolution No. 472 the city authorized the West Memphis Utility Commission to pass on to the consumer the fuel cost adjustment increases included in the cost of electric power from AP&L.

Only a portion of the original Ordinance No. 292 is exhibited in the record and it reads as follows:

> "The board shall, with the approval and confirmation of the city council, make a schedule of rates for the several services and for the different classes of consumers, and shall make such rates for the service rendered as will enable them at all times to pay operating expenses, interest, sinking funds requirements, amortization payments, reserve for working capital, remunerations and replacements, casualties and other fixed charges, and in the event service is furnished consumers or users outside the city, the rates charged such persons shall not necessarily be as low as the rates charged within the city. The commission, by and with the approval and confirmation of the city council, shall have the right to change the schedule of rates for utilities in the city and outside the city from time to time as in their judgment may be necessary or proper. Any rates approved by the city council shall be sufficient to provide for payment of all bond maturities or other indebtedness issued against the utility or constituting a lien against the systems or the revenue therefrom, including reserves therefor and provide for all expenses of operation, and replacement and maintenance of the plants or systems."

That portion of Resolution No. 472 complained of by the appellants reads as follows:

> "The City Council of the City of West Memphis authorizes fuel cost adjustment increases included in the cost of electrical power from Arkansas Power and Light Company to the West Memphis Utility Commission and/or the City of West Memphis be passed on to the

> ultimate consumer on bills or statements from said Commission in direct proportion to the amount of power ultimately consumed by the respective customers of the West Memphis Utility Commission."

The appellants argue that since the original rate schedule was authorized by municipal *ordinance*, it cannot be changed by municipal *resolution*. The appellee argues that the fuel cost adjustment charges fluctuate from month to month and are not actually a change in rate schedule. It argues that the additional costs are of a temporary nature; that the approval and confirmation by the city council is in the nature of an administrative act and may be accomplished by resolution. The chancellor agreed with the appellee and we agree with the chancellor.

In McQuillin, Municipal Corporations, rev. vol. 5, § 15.01, is found the following statement:

> "While the term 'ordinance' has been used in various senses, the term is generally used, in this country, to designate a local law of a municipal corporation, duly enacted by the proper authorities, prescribing general, uniform, and permanent rules of conduct, relating to the corporate affairs of the municipality."

In § 15.06 McQuillin says:

> "The general rule is that where a charter commits the decision of a matter to the council or legislative body alone, and is silent as to the mode of its exercise, the decision may be evidenced by resolution."

And, at § 15.02 McQuillin distinguishes resolutions and ordinances as follows:

> "A 'resolution' is not an 'ordinance,' and there is a distinction between the two terms as they are commonly used in charters. A resolution ordinarily denotes something less solemn or formal than, or not rising to the dignity of, an ordinance. The term 'ordinance' means something more than a mere verbal motion or

> resolution, adopted, subsequently reduced to writing, and entered on the minutes and made a part of the record of the acting body. It must be invested, not necessarily literally, but substantially, with the formalities, solemnities, and characteristics of an ordinance, as distinguished from a simple motion or resolution.
>
> A resolution in effect encompasses all actions of the municipal body other than ordinances. Whether the municipal body should do a particular thing by resolution or ordinance depends upon the forms to be observed in doing the thing and upon the proper construction of the charter. In this connection it may be observed that a resolution deals with matters of a special or temporary character; an ordinance prescribes some permanent rule of conduct or government, to continue in force until the ordinance is repealed. An ordinance is distinctively a legislative act; a resolution, generally speaking, is simply an expression of opinion or mind concerning some particular item of business coming within the legislative body's official cognizance, ordinarily ministerial in character and relating to the administrative business of the municipality. Thus, it may be stated broadly that all acts that are done by a municipal corporation in its ministerial capacity and for a temporary purpose may be put in the form of resolutions, and that matters upon which the municipal corporation desires to legislate must be put in the form of ordinances."

See also Charles S. Rhyne, Municipal Law, § 9, at p. 226.

Act 562 of 1953, Ark. Stat. Ann. §§ 19-4051 through 19-4060 (Repl. 1968), is the charter authority for the creation and function of the appellee commission in this case. Section 19-4051 provides that a city of the first class may, by the enactment of an ordinance, create a commission to operate, control and supervise such of its municipally owned light plants as may be prescribed by an ordinance and which are not already being operated by a commission created by or pursuant to valid special or local acts of the Arkansas Legislature.

Section 19-4053 authorizes the city council, by proper ordinance, to create a body consisting of five members for the purpose of directing, managing and controlling the operation of the plants and directs the terms and manner of selecting the commissioners, and the manner for filling vacancies on the commission.

Section 19-4055 provides for the manner in which the board shall be organized and § 19-4056, pertaining to the powers of the board, reads as follows:

> "Said board or boards created pursuant to the provisions of this act [§ 19-4051 — 19-4060] shall have the full power to operate and control the plant or plants entrusted to its direction by the city ordinance creating said board as provided in Section 1 [§ 19-4051] hereof and, subject to such *restrictions* as may be prescribed in the ordinance creating said board or boards, said board or boards shall have full power to buy and pay for out of the earnings or revenues of said plants for the welfare and benefit of the citizens and inhabitants of the Municipal Corporation, and may purchase and pay for out of the revenues derived from the operation of such power plants, all necessary equipment needed in the operation of such plants, for such lands as may be necessary and may also sell any property, real [or] personal, not necessary to be used in the operation of the plant or plants; but shall not sell or rent the right to own, use and operate the necessary equipment of such plant or plants." (Our emphasis).

Section 19-4057 provides that subject to such *restrictions* or *limitations* as may be imposed by municipal ordinances, the board or boards created pursuant to this act shall have plenary powers with reference to the selection, supervision and payment of compensation for all employees required in the operation of the plant provided:

> "that nothing herein contained shall be construed to limit or impair the rights of the City Council to approve any rates or charges for electric, water or sewer service and provided further that any ordinance passed by the City Council may make additional provisions for the

> control and operation of Light, Water or Sewer Plants, may provide a limitation as to salaries or wages to be paid by said Board including salaries to be paid to members of said Board for their services as members thereof."

This section then provides that unless otherwise limited or authorized by city ordinances, the salaries to be paid to the members of the board should be $10 a month or $5 for each meeting, whichever shall be the lesser sum.

It will be noted that this Act does not expressly authorize the commission to fix rates to be charged for electric services as does a later act, Act 115 of 1957, Ark. Stat. Ann. § 19-4061 through 19-4082 (Repl. 1968), pertaining to the creation of commissions for the operation of waterworks and distribution systems or electrical plants and systems where the city had owned and been operating same for a period of ten years; but in the 1953 Act, under which the appellee commission was created, § 19-4058 of the statute provides as follows:

> "Except as its powers may be *limited* by city ordinance, the board shall have the same rights and powers with reference to the nature, extent and performance of its duties and with reference to the employment of employees and other necessary assistants as is now provided by law with reference to the Boards of Commissioners of Municipal Improvement Districts." (Our emphasis).

Of course, prior to the 1953 and 1957 Acts, cities of the first class were authorized to construct and operate plants and systems for the distribution of public utilities through boards of commissioners of municipal improvement districts and the powers of such commissioners, as referred to in § 19-4058, *supra*, are found in Ark. Stat. Ann. § 20-315 (Repl. 1968) as authorized by Act 242 of 1949, as follows:

> " * * * As long as the Commissioners continue to operate such water and electric light districts they shall make an annual report to the City or Town Council showing in detail all receipts and disbursements made

by them; and as long as they continue such operation they shall have the right to fix the rates to be paid by consumers of water and electric light or power, and such rates shall be fixed as nearly as possible at amounts which will pay the bonds of the district [as they mature, so as to relieve the real property of the district] as far as possible from the burden of taxation therefor. From the rates fixed by the Board, any property owner may take an appeal to the circuit court of the county, which shall confirm or set aside said rates as it finds just, and if it sets aside rates fixed by the Board, it shall itself fix rates which will be reasonable and adequate for the purposes aforesaid."

We are of the opinion that when the city council of West Memphis enacted the initiatory Ordinance No. 292 in 1954, as authorized by Act 562 of 1953, the commission was invested by the statute with such authority therein conferred, subject only to "such restrictions as may be prescribed in the ordinance creating the board," as provided in § 19-4056, *supra*, and "except as its powers may be limited by city ordinances," as provided in § 19-4058, *supra*. The only limitation placed upon the administrative duties and authority of the board by Ordinance No. 292 was that the municipal council reserved the right to approve and confirm the rate schedule and any changes therein by the commission.

The powers thus conferred upon the commission were derived directly from the Legislature and subject only to such restrictions the municipal council might impose by ordinance. The only restriction the city council saw fit to place on the commission was that in exercising its powers conferred by the Legislature, the commission do so with the "approval and confirmation" of the city council. The statute does not provide for or direct the manner in which the city council must approve and confirm the actions of the commission pertaining to rates or changes therein. In fact, the legislative Act does not require that the action of the commission in this area be approved or confirmed at all.

We are of the opinion, therefore, that the rights to approve and confirm thus reserved in Ordinance 292 pertained to the administrative functions of the commission under

authority granted by the Legislature and the right to approve and confirm, as reserved in the ordinance, was simply a restriction placed on the administrative rights and duties of the commission as from time to time performed by it. We conclude that such approval and confirmation were legally expressed in this case by resolution and did not require the more solemn, formal and permanent form of a municipal ordinance.

The decree is affirmed.

BYRD, J., dissents.

Arthur B. SAUNDERS et al *v.* CITY of LITTLE ROCK

74-118 515 S.W. 2d 633

Opinion delivered November 4, 1974
[Rehearing denied December 9, 1974.]

Matthews, Purtle, Osterloh & Weber, for appellants.

Joseph C. Kemp, for appellee.

CONLEY BYRD, Justice. This case involves the validity of the annexation of approximately 55 square miles of contiguous lands to the City of Little Rock, pursuant to the provisions of Acts of Arkansas 1971, No. 298 [Ark. Stat. Ann. §§ 19-307.1, 19-307.2, 19-307.3 and 19-307.4 (Supp. 1973)]. The annexation was approved by the voters of the City of Little Rock at a special election by a vote of 10,651 FOR and 6,-919 AGAINST. The appellants Arthur B. Saunders, et al, property owners in the area, applied to the trial court pursuant to Section 3 of Act 298, *supra,* to have the annexation declared illegal and void because the 55 square miles contained lands used exclusively for agricultural purposes contrary to the proviso contained in Ark. Stat. Ann. § 19-307.1. The trial court entered a written opinion in which he made a specific finding as follows:

> "There is included within the area proposed for annexation several plots of acreage in size up to 250 acres or more, many of which, part or all of which, are currently devoted to agricultural or horticultural uses. This fact has been conceded by the City. . . ."

Notwithstanding the above clear cut finding the trial court ruled that proper and efficient land use planning required the lands to be annexed to the City. The City of Little Rock to sustain the annexation action of the trial court places great emphasis upon proper and efficient "land use planning" and makes the following argument:

> ". . . Appellee contends that the prohibition against annexing lands being used for agricultural or horticultural purposes is not absolute, but that the Legislature intended such prohibition only when such land did not qualify for annexation under the language employed in any one of the sentences of the first paragraph of said Section 19-307.1."

The statute on which the parties rely for their respective positions provides:

> "Any municipality may by vote of two-thirds of the total number of members making up its governing body adopt an ordinance to annex lands contiguous to said

> municipality provided the lands are either (1) platted and held for sale or use as municipal lots; (2) whether platted or not, if the lands are held to be brought on the market and sold as urban property when they reach a value corresponding with the views of the owners; (3) when the lands furnish the abode for a densely settled community, or represent the actual growth of the municipality beyond its legal boundary; (4) when the lands are needed for any proper municipal purposes such as for the extension of needed police regulation; or (5) when they are valuable by reason of their adaptability for prospective municipal purposes.
>
> Provided, however, that contiguous lands shall not be annexed when they are either; (1) used only for purposes of agriculture or horticulture; (2) are vacant lands and do not derive special value from their adaptability for municipal uses; or (3) are lands upon which a new community is to be constructed with funds guaranteed in whole or in part by the federal government under Title IV of The Housing and Urban Development Act of 1968. . . ."

Over the years the courts of this nation have been called upon to construe statutes containing both general provisions and specific or express exceptions. For instance in *Cook, Commissioner of Revenues* v. *Gore*, 214 Ark. 777, 218 S.W. 2d 82 (1949), we stated the general rule of construction to be given to such statutes as follows:

> ". . . It has been held that where a general statutory provision contains an express exception, courts are required to give effect thereto, even though it may render the principal clause meaningless. . . ."

In *Scott* v. *Greer*, 229 Ark. 1043, 320 S.W. 2d 262 (1959), we stated the rule of construction to be applied in this manner:

> ". . . Where general terms or expressions in one part of a statute are inconsistent with more specific or particular provisions in another part, the particular provisions will be given effect as clearer and more definite expressions of the legislative will. . . ."

When we apply the foregoing rules of construction, which were available to the legislators and presumably recognized by them at the time Act 298, *supra,* was enacted, we find that the annexation proceeding here involved must be nullified and voided. In so doing we note that our General Assembly is not the first legislative body to exclude lands used for agriculture from annexation or land use regulation. See *People* v. *City of Joliet,* 321 Ill, 385, 152 N.E. 159 (1926), *Gaspari* v. *Board of Adjustment of Township,* 392 Pa. 7, 139 A. 2d 544 (1958), and *Carp* v. *Board of County Com'rs. of Sedgwick,* 190 Kan. 177, 373 P. 2d 153 (1962).

Appellee also contends that this construction of the exception of lands "used only for purposes of agriculture or horticulture" would in effect absolutely prohibit any meaningful annexation by a city under the first five sentences of Ark. Stat. Ann. § 19-307.1, *supra.* This contention appears to arise from an overly broad interpretation of the agricultural use exception employed by appellee in its brief that was not shared by counsel for appellants during oral argument—*i.e.,* appellee contended that every plot of land used to grow a garden or pasture a horse would stymie the growth of the City. However, in view of the concession that appellee made with respect to the nature of the agricultural use of the lands here involved and the issues on which evidence was taken, we do not undertake to give an advisory opinion as to what may or may not constitute lands "used only for purposes of agriculture." As pointed out in *City of Little Rock* v. *Findley,* 224 Ark. 305, 272 S.W. 2d 823 (1954), "new attempts at annexation will unavoidably involve new parties and new issues. . . ."

Appellants also raise other issues including constitutional questions that we do not reach in view of the disposition herein made.

Reversed and remanded with direction to annul the annexation.

FOGLEMAN, J., concurs, and JONES, J., dissents.

FIRST FEDERAL SAVINGS & LOAN ASSOCIATION of El Dorado, Arkansas *v.* UNION FIDELITY SAVINGS & LOAN ASSOCIATION and ARKANSAS SAVINGS & LOAN ASSOCIATION BOARD

74-109 515 S.W. 2d 75

Opinion delivered November 4, 1974

J. S. Brooks, Edwin B. Alderson and *Wright, Lindsey & Jennings*, for appellant.

Brown, Compton & Prewett and *Smith, Williams, Friday, Eldredge & Clark*, by: *William L. Terry* and *Hermann Ivester*, for appellees.

FRANK HOLT, Justice. The appellee, Arkansas Savings and Loan Association Board (hereinafter referred to as Board), issued to appellee, Union Fidelity Savings and Loan Association (hereinafter referred to as appellee), a charter to do business in El Dorado. The application was opposed by the appellant. The Board's decision was affirmed by the circuit court and from that judgment comes this appeal. For reversal the appellant asserts that the court erred in finding there was substantial evidence to support the Board's decision to issue the charter. Appellant argues that the proof is insubstantial to show there is a public need for a new association; the volume of business in the area does not indicate a successful operation by appellee; and there is no substantial evidence that appellee's doing business in the area will not unduly harm any other existing association or other financial institution in that area. Ark. Stat. Ann. § 67-1824 (Supp. 1973). Since these issues are so closely related, we discuss them together.

The appellant recognizes our rule that in this type case we affirm the Board's action if there is any substantial evidence to support its findings. *Morrilton Fed. S&L* v. *Arkansas Valley S&L,* 243 Ark. 627, 420 S.W. 2d 923 (1967). Furthermore, in determining if substantial evidence exists, we consider only the appellee's testimony or that evidence adduced which is most favorable to the appellee. *Baldwin* v. *Wingfield,* 191 Ark. 129, 85 S.W. 2d 689 (1935); and *Washington Natl. Ins.* v. *Meeks,* 252 Ark. 1178, 482 S.W. 2d 618 (1972). In the case at bar, when we consider the evidence with all reasonable inferences deducible therefrom in the light most favorable to the appellees, as we do on appeal, we are firmly of the view there is substantial evidence to support the Board's findings.

The appellant, chartered in 1934, is the only savings and loan institution in El Dorado and Union County. Appellant is a 34 million dollar institution and is twelfth in size in the state. However, El Dorado is the ninth largest city in the state and the largest city with only one savings and loan association (with the exception of North Little Rock which is also served by several associations in Little Rock.) There are eight smaller cities in Arkansas with two existing savings and loan

associations (six of these eight smaller cities are less than one-half the size of El Dorado and two of these eight smaller cities are less than one-third the size of El Dorado). The Board, being knowledgeable of the existence and success of these associations in snaller areas, no doubt took into consideration whether an additional savings and loan association was needed, could be successful in El Dorado and would not unduly harm the only one existing there.

The fact there was a population decline in the county by 1.9% the past three years is only one factor for the Board's consideration. However, during the period 1960-1971 there was a 73.5% increase in personal income in Union County. There was evidence by appellee's economic expert witness, as abstracted, that "the increase in employment which appears to have occurred in Union County is a very recent phenomonon in the last eighteen months. Now, I think there are pretty strong indications of continued employment in the availability of new jobs in Union County. I think there will be a significant growth in employment over the next two or three years."

An executive of the El Dorado Chamber of Commerce detailed numerous industrial and commercial projects then under construction at a total cost of approximately 36 million dollars, which would create considerable additional employment. Appellee's expert economic witness was of the view that these new construction projects underway "means there seems to be a trend now toward greater industrialization of the area, a trend toward population growth and I think it is verifiable." There was evidence that appellant does not make loans on mobile homes, nor construction or interim loans on speculative building of houses. Local banks, which do not oppose appellees' charter, are making mortgage loans which characteristically is done by savings and loan associations and not by the banks. One executive of a bank in the county testified that "I don't think it [the new association]would have any effect on it [the bank]. In fact I think maybe it would help us." This view was on the basis that it was found necessary to make long term loans to their customers which they prefer not to do. One of appellant's witnesses admitted that during the current year, 1973, (the hearing was conducted on November 28, 1973) it had not made any commer-

cial loans in the county. It appears that a large shopping center mall, approximating a cost of 3 1/2 million dollars had recently opened and that financing was principally provided by a savings and loan association in Pine Bluff. On another occasion, appellant was approached to finance the purchase of a local office building and the local purchaser found it necessary to secure the loan from a savings and loan in Magnolia. Savings and loan associations in Camden and Pine Bluff have considered applying for branch charters in El Dorado.

There was evidence by appellee that appellant's advertising budget was very small. A witness for appellant admitted that it has "never done too much advertising." Another witness for appellant testified that the public "seems to have more confidence in the bank than they do in a savings and loan, more careful about keeping their account insured." Three of appellant's other witnesses admitted that the local economy was "good," "very good" and "definitely on the upswing." A building contractor with long experience in the county was very optimistic as to the growth of El Dorado and the county. This builder has consistently built new homes requiring speculative financing. From January, 1973, up to the date of the hearing (November 28, 1973), he listed interim financing by local institutions at $135,000 and out-of-town financial institutions at $330,000. As to permanent financing, local financial institutions provided him with $110,600 and out-of-town financial institutions provided $557,000. He had requested financing from each of the four local institutions. The demand for construction money and financing is greater now than it has been in the last twenty years. Retail sales in the county have increased 203% since 1960.

As previously stated we are firmly of the view, without detailing further evidence from the voluminous record, there is substantial evidence, when viewed most favorably to appellee, as we must do on appeal, to support the Board's finding that there is presently a need, which indicates a successful operation, for another savings and loan association in El Dorado and Union County and that it will not unduly harm the appellant, the only protestant, or other existing financial institutions in that area.

Neither do we agree with appellant's contention that the evidence is insubstantial to support the Board's findings that appellee will be "independent of the other financial institutions, that those persons named in the Articles of Incorporation as directors and officers do not have such affiliations with any financial institutions, or other businesses closely related to the savings and loan association's business, which would affect the independence of the proposed association, and the directors are representative of the community." Appellant invokes Ark. Stat. Ann. § 67-1824 (Supp. 1973), which in pertinent part provides that the Board find:

> The proposed association will be independent of other financial institutions, that those persons named in the articles of incorporation as directors and officers do not have such affiliations with any financial institutions or other businesses closely related to the savings and loan association business which would affect the independence of the proposed association, and that the directors are representative of the community.

It appears that the father of one of appellee's directors is a director of a local bank. The fathers of two of appellee's directors are directors of another local bank and one of appellee's directors is also a director of a local bank. However, four of the nine directors have no ties with any bank and one unnamed director, the managing officer, will have no ties to any local bank. Appellee's capitalization consisted of $560,000, $400,000 in permanent capital and $160,000 by appellee's stockholders. This is 2 1/2 times the minimum amount ($180,000 in permanent capital and $60,000 in paid-in surplus). The appellant does not take issue with the Board's finding that:

> The character, responsibility and general fitness of the persons named in the articles of incorporation and who will serve as directors and officers of the Association are such as to command confidence and warrant belief that the business of the proposed association will be honestly and efficiently conducted . . . . .

Suffice it to say that all of the directors have differing backgrounds and have attained successful careers in their

respective professions. They are representative of the community. Certainly, the Board was justified in finding that these individuals, successful in their own right, would be independent and conscientious in their new responsibility in preserving their own interest as well as the paramount interest of the public.

Appellant, in oral argument, vigorously insists that we should reverse and remand this cause to the Board for a definitive finding as to the basis of its decision as is required by the Administrative Procedure Act. *Ark. S&L Bd.* v. *Central Ark. S&L*, 256 Ark. 846, 510 S.W. 2d 872 (1974). Appellee insists that we should affirm the case on its merits as we did in *Ark. S&L Bd.* v. *Grant Cty. S&L*, 256 Ark. 858, 510 S.W.2d 863 (1974). Both of these decisions were handed down the same day and after appellant's reply brief was filed. We remanded in *Ark. S&L Bd.* v. *Central Ark. S&L, supra.* There the issue that the Board erred in failing to make specific findings of underlying facts as required by law was argued in the briefs although not in the trial court. We said that the specific findings by the Board were for the benefit of the reviewing courts. In *Ark. S&L Bd.* v. *Grant Cty. S&L, supra,* the issue was not presented and we affirmed. Of course, as we have said, specific findings of the underlying facts are of great benefit upon appeal. However, here, as in *Ark. S&L Bd.* v. *Central Ark. S&L, supra,* the issue was not raised in the briefs. Only at oral argument was appellant's contention asserted. By that time the court had studied the briefs and the issues there presented. Having done so and since the evidence is amply substantial to support the Board's findings, we find it unnecessary to remand the cause for the Board to detail the basis of its findings.

We need not consider what action we would have taken had not both the Board and the circuit court decided this case before our decision in *Ark. S&L Bd.* v. *Central Ark. S&L, supra.*

Affirmed.

Anthony RAGAR *v.*
JACK COLLIER EAST COMPANY, INC.

74-148 515 S.W. 2d 205

Opinion delivered November 12, 1974

Thurman Ragar Jr., for appellant.

Beresford L. Church Jr., for appellee.

CARLETON HARRIS, Chief Justice. Appellee, Jack Collier East, Inc., hereafter called East, instituted suit against appellant, Anthony Ragar and his then wife, wherein East sought to declare in default a promissory note secured by a mortgage on appellant's home because of the failure of Ragar to pay a $312.50 mortgage insurance premium, which, because of error on the part of an East employee, had not been collected at the time of closing. Ragar denied that he owed the premium; the court found that appellant was not in default, denied the foreclosure, but gave appellee judgment

for the $312.50. From the decree so entered, appellant brings this appeal.[1]

For reversal, three points are alleged, but all relate to whether there was a mutual mistake, or a unilateral mistake on the part of appellee.

The evidence reflects that appellant purchased a home in Little Rock belonging to Roy Rainey through John Hughes, a realtor of Little Rock. It was necessary that the purchase be financed, and Hughes contacted several mortgage bankers to ascertain interest rates and closing costs; he and Ragar decided that appellee was the most competitive of the ones contacted. Thereafter, the loan was processed, but at the time it was closed, Rosa Perrien, Secretary of Standard Abstract & Title Company, who prepared the closing statement and handled the closing, failed to collect a charge for a mortgage insurance premium of $312.50. Ms. Perrien testified that this was not collected because appellee company had failed to instruct her to collect it. The charge for coverage, termed MGIC,[2] insures the mortgagee that the borrower will pay the ' top portion'"[3] of the loan. Linda House, an employee of Jack Collier East, testified that she prepared the closing instructions and initial Truth in Lending statement for the Ragar loan and that she made an error. The witness said that she had only been in that particular department for approximately one month, and that the mistake occurred because of inexperience. Ms. Perrien testified that about a week after the loan was closed, Linda House called her, telling her about the mistake, and asked Ms. Perrien to contact Ragar and explain to him that the amount had not been collected due to such mistake. The witness said that Ragar told her he would send her a check, but the next day called and said that he had talked with his attorney; that he did not feel that he had to pay the premium and he would not send the check.

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[1]Appellee cross-appealed because of the failure of the court to order the foreclosure, but the cross-appeal is not here pursued.

[2]Mortgage Guaranty Insurance Company.

[3]First 20%, the balance of the payments being secured by the mortgage.

Thomas Purifoy, Vice President of appellee company, testified that Mr. Ragar was aware that the mortgage insurance charge would be made because he (Purifoy) discussed the matter with Ragar himself.

Hughes testified that all bankers have a mortgage insurance requirement, and he said that he discussed with the Ragars the down payment and all closing costs. When asked if he discussed the mortgage insurance requirement, Hughes replied, "Definitely"; that the matter was mentioned several times.

Mr. Ragar testified that he did not have any conversations with East employees about Mortgage Guaranty Insurance premiums; and that he did not discuss two ways of handling the insurance, as testified to by Hughes. He said that he didn't understand what the MGIC insurance was for; the witness stated that Rosa Perrien called him, notifying him that there had been a mistake, not a week after the closing (as she had testified) but rather two weeks later. He said that he told her that if he owed the amount, he would pay it, but that he subsequently talked with attorneys, and on the advice of the latter, told Ms. Perrien that he had been advised he didn't owe it. Subsequently, Purifoy called him about paying the money, but Ragar replied, "I have been advised that I do not owe the money, and I said 'I couldn't pay you right now if I wanted to, because I don't have it'." The only other pertinent fact to mention is that the Truth in Lending statement, prepared by Linda House, did not include the $312.50 charge.

The Truth in Lending Statute, 15 USCA § 1640, provides:

> "(a) Except as otherwise provided in this section, any creditor who fails in connection with any consumer credit transaction to disclose to any person any information required under this part to be disclosed to that person is liable to that person in an amount equal to the sum of
>
> (1) twice the amount of the finance charge in connec-

tion with the transaction, except that the liability under this paragraph shall not be less than $100 nor greater than $1,000; and

(2) in the case of any successful action to enforce the foregoing liability, the costs of the action together with a reasonable attorney's fee as determined by the court.

(b) A creditor has no liability under this section if within fifteen days after discovering an error, and prior to the institution of an action under this section or the receipt of written notice of the error, the creditor notifies the person concerned of the error and makes whatever adjustments in the appropriate account are necessary to insure that the person will not be required to pay a finance charge in excess of the amount or percentage rate actually disclosed.

(c) A creditor may not be held liable in any action brought under this section for a violation of this part if the creditor shows by a preponderance of evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to avoid any such error."[4]

Here, we do not have a case where a charge was erroneously itemized, but rather where the charge was not reflected in the closing statement. Nonetheless, the provisions just quoted would appear to be applicable, for Ms. Perrien testified that Ragar was notified of the mistake (in not including the charge) in approximately a week. Ragar testified that he was not notified for two weeks that a mistake had been made. Be that as it may, we have not only a conflict of when the notice was given (in which case the chancellor would properly determine the conflict of evidence), but actually, under Ragar's own testimony, he was notified within 15 days; not only that, but the record clearly discloses that he did not send to appellee any written notice of the error, nor did he institute

[4]We have not included subsections (d) and (e) because they are not pertinent to this cause of action.

any action. So — appellant is not entitled under the Truth in Lending Act to any relief.

It thus appears that the litigation is to be determined simply on the basis of which witnesses the trial court believed, although appellant argues that the mistake occurred only on the part of East, i.e., there was a unilateral mistake, and therefore parol evidence was not admissible. But it is apparent that if the court believed appellee's witnesses, the failure to include the charge in the closing statement really constituted a mutual mistake, i.e., both parties already understood that the charge would be made. Parol evidence is admissible to show a mutual mistake. *L. O. Galyen and Freda Galyen* v. *Mrs. Opal Gillenwater*, 247 Ark. 701, 447 S.W.2d 137. Certainly, the testimony concerning the date the appellant learned of the mistake was pertinent to the issue, and the testimony of Hughes and Purifoy relative to the fact that Ragar had been informed that such a charge would be made was strong evidence of a mutual mistake.

As stated, in the final analysis, we consider that only fact questions were involved, and where the crucial issue is the credibility of the parties testifying, the chancellor is considered to be in a much better position than the appellate court to test such credibility. *Dearien* v. *Lancaster*, 221 Ark. 98, 252 S.W.2d 72. The testimony of appellee's witnesses, evidently believed by the chancellor, was convincing evidence that Ragar was aware that the charge for MGIC insurance would be made.

Affirmed.

BYRD, J. dissents.

Lee REAVES et al *v.* Guy
Hamilton JONES Sr.

74-238 515 S.W. 2d 201

Opinion delivered November 12, 1974

[redacted]

John Harmon and *Phil Stratton,* for appellants.

Jim Guy Tucker, Atty. Gen., by: *Lonnie H. Powers,* Deputy, for appellee.

LYLE BROWN, Justice. On August 1, 1974, the Arkansas Senate voted to "expel and/or disqualify" Senator Guy Hamilton Jones, Sr., from that body. Jones brought this suit against Lee Reaves, Secretary of the Senate, and various other state officials, to prohibit those officials from acting on the assumption that the expulsion was valid. For example, Jones sought to compel the State Auditor to continue paying Jones' salary, and sought to prohibit the governor from calling a special election to fill a vacancy. The trial court held void the attempted expulsion of Jones. The principal findings of the trial court were that the senate did not follow the procedures outlined in House Concurrent Resolution 14; that Jones had no notice of the session at which he was expelled; and that his right to due process was in other respects violated. We are of the unanimous opinion that the trial court was in error and that the expulsion of Jones must be sustained.

Jones, a legislative veteran, was elected to the Senate in November 1972. In December 1972, he was found guilty in the United States District Court for the Eastern District of Arkansas of filing fraudulent income tax returns and making and subscribing to false returns. In January 1973, before being sentenced, Jones was seated in the senate. On April 3, 1973, he was fined $5,000 and placed on probation for a period of three years. In May of that year the Arkansas At-

torney General issued an opinion that Jones had been convicted of an infamous crime under Ark. Const., art. 5, § 9 and was no longer qualified to serve as a senator.

On July 9, 1974, Jones was given notice that his qualifications to serve had been challenged as a result of the recited conviction, and that the senate would conduct a hearing. The senate adopted rules of procedure for the hearing and the same was conducted. The motion to expel failed of adoption. The senate thereupon recessed under the provisions of House Concurrent Resolution 14 to reconvene on August 1, 1974. More will be said later about that resolution but suffice it for the present to say that at the meeting held on August 1, a motion was made to expunge the record by which the expulsion motion of July 12 failed to carry. That motion carried. A motion was then made and carried by more than two-thirds vote that Senator Jones be expelled and/or excluded from the senate. This suit for mandamus and declaratory judgment followed.

The fundamental privileges and immunities possessed by the two houses of the legislature are imbedded in two provisions of our constitution. Our principal reason for rejection of Senator Jones' contentions is founded on those provisions. Ark. Const., art. 5, § 11 provides:

> Each house shall appoint its own officers, and shall be the sole judge of the qualifications, returns and elections of its own members.

In *Evans* v. *Wheatley*, 197 Ark. 997, 125 S.W. 2d 101 (1939), Evans appeared before the Arkansas Senate in 1937 and challenged the right of Walter Wheatley to serve in that body. The basis of the challenge was that Wheatley had previously been convicted of violating the State's "bone dry" law and sentenced to one year in the penitentiary. The senate seated Wheatley. Then in 1938 Wheatley was again elected to the senate and the latter body again seated him. Appellant brought suit in the Pulaski Circuit Court to have Wheatley ousted and to restrain the auditor and treasurer from issuing and cashing warrants for Wheatley's services. We held that "qualifications" in art. 5, § 11, include "eligibility", and that the court was without jurisdiction because the senate is the

sole judge of the eligibility or qualifications of its members:

> By the above provision, art. 5, § 11 of the Constitution, a clear mandate is given to each house of the General Assembly to be the sole judge of the qualifications of its members, and the courts of this state have no authority or jurisdiction to question the wisdom of their actions in seating or refusing to seat one elected to membership.

Then we have the case of *Irby* v. *Barrett,* 204 Ark. 682, 163 S.W. 2d 512 (1942). There the chairman and the secretary of the state democratic committee refused to certify Irby as a candidate for senator, on the ground that he had been convicted of embezzlement. We held such action to be without authority; that notwithstanding Irby had been held by this court ineligible to hold the office of county judge, the senate would not be bound to follow that opinion as respects election to the senate. That is, of course, because the senate is the sole judge of the qualifications of its members.

The constitution, art. 5, § 12, provides, among other things, that each house has the power to determine its own rules of proceedings. In that connection we have two landmark cases, *St. Louis & S.F.R. Co.* v. *Gill,* 54 Ark. 101, 15 S.W. 18 (1891); *Bradley Lumber Co.* v. *Cheney,* 226 Ark. 857, 295, S.W. 2d 765 (1956).

In *Gill* it was alleged that certain legislation affecting railroads was not passed in accordance with the joint rules of the general assembly. We said: "The joint rules of the general assembly were creatures of its own, to be maintained and enforced, rescinded, suspended, or amended, as it might deem proper. Their observance was a matter entirely subject to legislative control and discretion, not subject to be reviewed by the courts."

The decision in *Bradley Lumber Co.* reiterates the holding in *Gill.* Under the house rules, action in receding from an amendment was required by its own rules to be recorded in the journal. The action of the house on an amendment was not recorded and that raised the contention that the act was invalid. We said: "Subject to the restrictions imposed by the constitution each branch of the legislature is free to adopt any

rules it thinks desirable. It follows, both as a matter of logic and as a matter of law, that each house is equally free to determine the extent to which it will adhere to its self-imposed regulations."

We return to a discussion of HCR 14. Jones contends that under that resolution he was entitled to have notice and that the failure to give notice made the proceedings void. He further avers that the failure to give notice violated his constitutional right to procedural due process.

HCR 14 provided that both houses would recess at the close of business on Friday, July 12, 1974, and should reconvene on Thursday, August 1, 1974; that each house was authorized to convene from time to time as desired; that in the interim all bills passed would be checked for errors; that if errors were found the speaker of the house and the president of the senate would notify the members that the reconvening of the full membership would be necessary for the sole purpose of correcting errors in bills and consideration of vetoed bills; that unless such notice was given then five members of each house could reconvene on August 1 and adjourn *sine die.*

Appellee's argument is without merit. Art. 5, § 12, and the decisions we have cited thereunder come into play. First, the rule adopted by the resolution was a matter of internal rule-making and could be changed at will. Secondly, the general assembly did not, either on April 12, or at any time thereafter until after the expulsion vote on August 1, adjourn *sine die.* The meeting on August 1 was clearly authorized, and on the basis of the constitutional rule-making independence it was the prerogative of the senate to act on such matters as it desired just so long as any action taken was not prohibited by the constitution.

We are not impressed by the argument of due process and res judicata. The latter is invariably tied into the civil processes of our courts and we are nowhere cited any authority for restricting the legislature in its power to amend, modify, or in fact obliterate its previous actions. As to the due process argument, the constitution, art. 2, § 8 says no man shall be deprived of life, liberty or property without due

process of law. We hold that nothing in that wording supports appellant's argument. We have many times held that the right to hold office is not a property right. *McFarlin* v. *Kelly*, 246 Ark. 1237; 442 S.W. 2d 183 (1969).

Jones insists that the proceedings of July 12 were a bar to any subsequent effort to reconsider petitioner's qualifications, arguing that it constituted double jeopardy. He bases his argument on the provision of const., art. 5, § 12 which says a legislative member cannot be expelled twice for the same offense. The quick answer to the argument is that the vote of July 12 did not expel Jones. The vote on August 1 was the first expulsion.

Jones next contends that Governor Bumpers was absent from the State on August 1 and that Lieut. Gov. Bob Riley became acting governor and therefore could not constitutionally preside over the senate on that date. Mr. Riley was on August 1 at least de facto president of the senate; actions of a de facto officer are not open to question in a collateral proceeding. *Faucette, Mayor* v. *Gerlach*, 132 Ark. 58, 200 S.W. 279 (1918). The perfect answer to the argument is found in *Simon* v. *State*, 86 Ark. 527, 111 S.W. 991 (1908). There the president of the senate continued to attest bills while performing duties as governor. We said he was de facto president of the senate and his actions were valid.

Jones relies on two United States Supreme Court decisions, *Bond* v. *Floyd*, 385 U.S. 116 (1966) and *Powell* v. *McCormack*, 395 U.S. 486 (1969). Bond met all requirements of a state legislator but the house of representatives refused to seat him on the ground that he could not conscientiously take the oath of allegiance. The court held that the action amounted to adding a standard which violated Bond's First Amendment rights to freedom of speech. In Powell's case the house voted to exclude Powell because he allegedly misappropriated public funds and abused the process of New York courts. The court said Powell met all the qualifications prescribed by Const., art. 1, § 5, and Congress was limited to considering the qualifications expressly prescribed.

We find no analogy between the case before us and the two cited cases. In fact the question foremost in our minds in

a consideration of this case has been whether the senate exceeded its constitutional powers. We find no such abuse and therefore we are without authority to reverse the senate.

We agree with Jones that the trial court had jurisdiction because it was necessary to determine whether the senate was lawfully in session as prescribed by the organic law as expressed in the constitution.

The cause is reversed and remanded with directions that the trial court enter an order not inconsistent with our opinion. In view of the fact that a special election will be needed to afford representation to the 21st Senatorial District in the coming general assembly an immediate mandate shall issue.

Reversed and remanded.

Charles DENNISON et ux *v.*
Richard MOBLEY, Chancellor

74-106 515 S.W. 2d 215

Opinion delivered November 12, 1974

[redacted]

Francis T. Donovan, for appellants-petitioners.

R. L. (Jack) Roberts, William C. Brazil and *Guy Jones Jr.,* for appellee-respondent.

JOHN A. FOGLEMAN, Justice. Appellants Charles and Modelle Dennison seek review of an order of the Faulkner Chancery Court holding them in contempt of court for violation of an order of the court relating to the custody of their three-year-old granddaughter. The order, insofar as material, reads as follows:

> 1. ****Charles and Modelle Dennison failed to comply with the Court's order of reasonable visitation in that they failed to return the above named child after a three (3) hour visitation on December the 11th, 1973.
>
> 2. That said Charles and Modelle Dennison aided and abetted **** Clinton Eugene Dennison, their son, in allowing him to take Jessica Lynn Dennison outside the boundaries of the Court and the border of the State of Arkansas.
>
> 3. That the Court doth find a deliberate violation of its order of December the 11th, 1973 and that Charles and Modelle Dennison are hereby adjudged to be in contempt of this Court in that they aided and abetted one Charles Eugene Dennison from returing Jessica Lynn Dennison after the reasonable visitation had been awarded previously by this Court. The original order of December the 11th, 1973 was directed towards Charles and Modelle Dennison in that they were to comply with all Court orders directed towards Clinton Eugene Dennison.
>
> 4. That the Court finds and hereby levies a fine of $100 to be placed upon Charles and Modelle Dennison jointly. Also, a $100 a day fine, per day, until said child,

> Jessica Lynn Dennison is returned to the jurisdiction of this Court and to the above named plaintiff, Pearlie Mae Dennison. That said Charles and Modelle Dennison are to remain in jail until said child is returned to this Court and that in addition to the time they are in jail an additional three (3) days is to be served by Charles and Modelle Dennison.

We first dispose of the contention of appellee that this appeal should be dismissed because review of such an order may be had only upon certiorari. Appellee is correct as to the mode of appellate review. *Johnson* v. *Johnson*, 243 Ark. 656, 421 S.W. 2d 605. This court in its supervisory capacity, however, has always been rather liberal in elevating substance above form in order to deal with a particular proceeding in a manner consistent with justice in order to expeditiously dispose of issues, when it can be done without prejudice to one not immediately before the court and there is no statutory or constitutional impediment. To this end an appeal may, in the discretion of this court, be treated as a petition for certiorari, particularly when the entire record of the proceeding is before us. *Bridges* v. *Arkansas Motor Coaches*, 256 Ark. 1054, 511 S.W. 2d 651 (1974); *Whorton* v. *Hawkins*, 135 Ark. 507, 205 S.W. 901. The entire record is before us. We find no statutory or constitutional impediments to our treating this matter on certiorari. We do not see how doing so could possibly result in prejudice to anyone not before this court. The motion to dismiss is denied, because it seems to us that the ends of justice require that we expeditiously dispose of the issues raised by appellants. We will therefore treat this appeal as a petition to quash the order on certiorari. The appellants will hereinafter be referred to as petitioners and appellee as respondent.

We may just as quickly dispose of the contention of petitioners that the chancery court was without jurisdiction over them because they were not parties to the divorce suit in which temporary custody of their granddaughter was awarded to her mother and reasonable visitation allowed her father, their son. They admit that they were present at the hearing which resulted in the entry of the order. At the inception of the hearing at which the order was entered and in the

presence of petitioners, the chancellor emphatically announced that he would jail everybody connected with the case if he had any trouble on either side, "including relatives, kinsfolk, everybody else" and would fine and put on the county farm anyone who violated his order. At the conclusion of the hearing, the chancellor forcefully cautioned that he did not expect "any more running off or snatching the child" or anything of that sort. Petitioners' attorney had admitted in open court at this hearing that they were parties to the proceeding. The chancellor directed petitioners' attorney, who was their son's attorney in the divorce suit, to explain the remark to his *clients*. A certified copy of an order awarding custody to the mother on her ex parte application and fixing the date of the hearing had directed the sheriff to accompany the mother to obtain custody and to serve a certified copy of the order on petitioners. Although no return showing service of this order on them appears in the record, Charles Dennison testified at the contempt hearing that he was present at the custody hearing because he and his wife and his son had been made parties defendant, that he fully understood what the court said on that date, and that the remarks were directed to him and his wife. One who has full knowledge of a court order and its import, as petitioners did, cannot flout it with impunity. *Hickinbotham* v. *Williams*, 228 Ark. 46, 305 S.W. 2d 841; See also *Whorton* v. *Gaspard*, 240 Ark. 325, 399 S.W. 2d 680; *Hudkins* v. *Arkansas State Board of Optometry*, 208 Ark. 577, 187 S.W. 2d 538. The petitioners were clearly subject to the jurisdiction of the chancery court in the contempt proceeding.

Petitioners contend that contempt on their part was not proved by a preponderance of the evidence. This presents a problem of some apparent complexity. The argument on behalf of petitioners is based wholly upon their contention that the evidence preponderates in their favor, even when they concede that the court may have punished them for both civil and criminal contempt. They say that, since the evidence preponderates in their favor, there could not have been that degree of proof required to sustain a finding of criminal contempt. They are correct as to the degree of proof required in the trial court, but they overlook the difference in appellate review of the evidence on certiorari, not only as distinguished

from its consideration by the trial court, but as between the two types of contempt. The distinction between the two and the overtones of each inherent in a child custody proceeding growing out of a divorce action were clearly recognized by the chancellor. See *Songer* v. *State*, 236 Ark. 20, 364 S.W. 2d 155.

In cases of civil contempt the enforcement of the rights of private parties to litigation is the objective. On the other hand, the primary reason for punishment for criminal contempt is the necessity for maintaining the dignity, integrity and authority of, and respect toward, courts and the deterrent effect on others is just as important as the punishment of an offender. *Hickinbotham* v. *Williams*, 228 Ark. 46, 305 S.W. 2d 841; *Lee* v. *State*, 102 Ark. 122, 143 S.W. 909; *Turk* v. *State*, 123 Ark. 341, 185 S.W. 472. The two purposes merge in a case such as this. *Songer* v. *State*, supra.

The distinction and the reasons therefor have been discussed by us in *Blackard* v. *State*, 217 Ark. 661, 232 S.W. 2d 977, as well as in *Songer*. In *Songer* we said:

> *****It is not questioned that punishment for civil contempt will be upheld by this Court unless the order of the trial court is arbitrary or against the weight of the evidence. However, it is not necessary for us to hold the petitioner was found guilty of only civil contempt in order to sustain the trial court. We think the trial court should be sustained even if the petitioner were guilty of criminal contempt.

After stating the rule of appellate review set out in *Blackard*, we said:

> Weighing the testimony under the above rules, we find there is substantial evidence to support the order of the trial court.

In *Blackard*, we had said:

> One of the reasons for the distinction between criminal contempt and civil contempt is because it is generally held that in criminal contempt proceedings the proof must be beyond a reasonable doubt. In the case at bar

> the proceedings involve criminal contempt; and the trial court held that the proof had to be beyond a reasonable doubt, just as in a criminal case. This ruling was correct. *****
>
> On review by this Court in such proceedings by *certiorari,* we do not try the criminal contempt case *de novo,* despite any such language so intimating as contained in *Jones* v. *State,* 170 Ark. 863, 281 S.W. 663. Rather, we review the evidence just as we would in an appeal in any criminal case. The trial court in the first instance, in a criminal contempt proceeding, must find the cited person guilty beyond a reasonable doubt. Then, on *certiorari* proceedings this Court reviews the record to determine whether the evidence, when given its full probative force, is sufficient to sustain the finding of the trial court.*****
>
> *****As previously stated, we review the evidence in this case just as we would an appeal in an ordinary criminal case, that is, to determine whether the evidence, when given its full probative force, is sufficient to sustain the finding of the trial court.

Of course, in a criminal case, we do not consider whether the guilt of an accused is proven beyond a reasonable doubt, since the test on appellate review is whether there is any substantial evidence to support the fact finder's verdict. *Pharr* v. *State,* 246 Ark. 424, 438 S.W. 2d 461; *Morrow* v. *Roberts,* 250 Ark. 822, 467 S.W. 2d 393; *Graves v. State,* 236 Ark. 936, 370 S.W. 2d 806. In *Graves* we said:

> Upon the conflicting testimony the issues of fact were properly submitted to the jury. The appellants are in error in arguing that the State's failure to prove its case beyond a reasonable doubt entitles them to a reversal. The jury must be convinced of the accused's guilt beyond a reasonable doubt, but there is no requirement that the members of this court be similarly persuaded by the proof. Here the test is that of substantial evidence. If the verdict is supported by such proof we are not at liberty to disturb the conviction, even though we might think it to be against the weight of the evidence. *Fields* v. *State,* 154 Ark. 188, 241 S.W. 901.

In a criminal case we do not disturb the fact finder's findings on fact issues unless there is no substantial evidence to support them. *Inklebarger* v. *State*, 252 Ark. 953, 481 S.W. 2d 750.

Even though civil contempt findings are reviewed to determine where the preponderance of the evidence lies, we only examine the record for substantial evidence in criminal contempt cases and affirm a judgment finding criminal contempt unless we find no substantial evidentiary support. If we did not make this quite clear in *Blackard* and *Songer* we set the matter at rest in *Morrow* v. *Roberts*, supra and *Vandergriff* v. *State*, 239 Ark. 1119, 396 S.W. 2d 818. We must be able to say that there was no substantial evidence to connect the alleged contemnor with the acts charged before we can quash the order on certiorari. See *Whorton* v. *Gaspard*, 240 Ark. 325, 399 S.W. 2d 680. It must also be remembered that, as in criminal cases, circumstantial evidence is substantial evidence when it is properly connected and does more than arouse suspicion. See *Songer* v. *State*, supra; *Whorton* v. *Gaspard*, supra; *Ledford* v. *State*, 234 Ark. 36, 351 S.W. 2d 425.

The chancellor's findings and the punishment mated out, particularly when considered along with his opening and closing admonitions, clearly indicate that he considered the proceeding as one for both civil and criminal contempt in the light of such cases as *Songer*. The $100 fine and three days' jail sentence, characteristic of punishment for criminal contempt, were in addition to the civil contempt penalty obviously calculated to bring about compliance with the custody order, i.e., the fine of $100 per day and a commitment to jail until the child was returned to her mother.

Inasmuch as we are unanimously of the view that the order must be quashed, insofar as the alleged civil contempt is concerned, as clearly against the preponderance of the evidence, we will summarize the evidence only insofar as necessary to determine whether there was any substantial evidence to support the finding of criminal contempt. In doing this, we view it as we would in an ordinary criminal case, i.e., in the light most favorable to the court's findings, drawing all inferences and resolving all conflicts against petitioners. *Graves* v. *State*, 256 Ark. 117, 505 S.W. 2d 748 (1974); *Elser* v. *State*, 243 Ark. 34, 418 S.W. 2d 389.

Pearlie Maye Dennison and Clinton Eugene Dennison, son of petitioners, were married February 7, 1970. Jessica Lynn, aged three at the time of the custody hearing, was born to that marriage. Pearlie Maye had two children by a previous marriage. In December of 1971, she left Jessica Lynn with petitioner Modelle Dennison and her two other children with their maternal grandmother. Her purpose in doing so was to go to Alaska to aid in getting the son of petitioners out of jail. She wrote and signed a note dated December 19, 1971, stating that she had placed Jessica Lynn in the custody of the senior Dennisons, because of ill feelings between her mother and Mrs. Modelle Dennison. It read:

> "I, Pearl Dennison leave my Daughter, Jessica Lynn Dennison in the custody of Mr. and Mrs. Charles Dennison.
>
> In the event anything should happen to myself, she shall remain in their custody."

Pearlie May Dennison had understood that her husband would be placed in her custody or otherwise released upon her arrival in Alaska, but this did not occur. She related that it took her until February, 1972 to get him out of jail, that they obtained jobs but their employers failed to pay them, that the two separated, that she had undergone surgery, and that she had been unable to come back to get the baby until March, 1973. In the interim her mother supported her while she saved money for a plane ticket to return. When she did, she found that Jessica Lyrn had been taken to Louisiana. Petitioners did not want her to see the child when she got there and Modelle Dennison struck her on the back of the head when she attempted to hold the baby while visiting her at petitioners' home.

On November 26, 1973, Pearlie Maye filed suit for divorce in which she sought custody of Jessica Lynn. The ex parte order mentioned earlier was issued the following day. On December 11, 1973, the temporary custody order was entered. Immediately after this hearing, the Dennisons (father and grandparents) picked up the child for a three-hour visitation from 5:00 p.m. to 8:00 p.m. The mother's con-

cern about the 8:00 p.m. termination was attributed to the fact that she put this child and her two others to bed at that hour. She denied that the baby was sick, as petitioners contend, or had a high fever. She attributed the child's "runny nose" to the fact that the weather had just turned cold. The mother of the child stated that Mrs. Dennison, Sr. drove the car to her house when the child was picked up because her son, the child's father, did not have a driver's license and "she absolutely will not let him use any of the vehicles around the house."

Petitioner, Charles Dennison, admitted that as soon as they reached his home with the child, he told his son to take the child to the doctor immediately to get a statement from the doctor. The elder Dennison wanted the son to see "the welfare" the next day and have the doctor find out "just how sick she is," hoping to gain some advantage for the son at the next hearing. He said he found that the son had taken the child to a doctor in Louisiana when he "called down there" and learned "he took her to a doctor as soon as he got to his place." He knew that his son had been in trouble "with the law" previously. Sheriff Martin, a character witness called by petitioners, testified upon inquiry by their attorney that the son's reputation was "not too good."

Petitioner Modelle Dennison "guessed" that she left the keys in the car her son used in taking the child away, and said she saw him drive it out the driveway. About 8:20 p.m., she called her attorney, who was then her son's attorney, to advise him that the son had taken the child to a doctor, "in case anything came up."

It is true that there are conflicts in the testimony here and that conflicting inferences might have been drawn. Yet, every presumption must be indulged in favor of the court's judgment. *Davies* v. *State*, 73 Ark. 358, 84 S.W. 633. When there are conflicts in the testimony, it is our duty to give the same force to the findings of the trial court in contempt proceedings as we do in other cases when there is a conflict in the testimony. *Ex Parte Winn*, 105 Ark. 190, 150 S.W. 399.

Perhaps there is no case in which the court's observation of the parties, and their demeanor and conduct, including

their manner of speaking and tone of voice, their facial expressions and body movements, can be more important than on a charge of contempt, particularly criminal contempt, of which attitudes of the alleged contemnor can be such an integral part. When we accord due deference to the superior position of the chancellor, we must resolve all inferences in favor of his finding. We must say that the child was not sick, but only had a runny nose, just as many other children had at that season, according to her mother. The mother's testimony in this regard must be taken as corroborated by the high-sounding name, "upper respiratory infection", which may be used to describe a cold or "running nose." See *2 Gray's Attorney's Textbook of Medicine,* 37-2 § 37.01. We must say that the mother permitted her son to use the car he had not been previously permitted to drive to take the child away, and that the parents were not motivated by concern for the baby's well being but were endeavoring to gain an advantage for their son in the battle for custody. How did the grandmother know at 8:20 p.m. that her son nad not returned the child to its mother by 8:00 p.m., or anticipate that something might come up about the failure, if she was ignorant and innocent of any violation of the terms of the visitation? The grandfather certainly knew how to locate his son and grandchild to "learn" about the trip to the Louisiana doctor.

When all the circumstances are considered, we cannot say that there was no substantial evidence to support the finding of criminal contempt. Whether the idea of taking the child outside the jurisdiction of the court originated with petitioners or their son is immaterial, for they are guilty of contempt if they maintained in motion contemptuous conduct originated by him. *Bates* v. *State,* 210 Ark. 652, 197 S.W. 2d 45. This they did by aiding and assisting him, if reasonable inferences to be drawn from the testimony are drawn in favor of the court's findings.

When there are mitigating circumstances and the ends of justice can be adequately sustained by the payment of a fine and the serving of some part of a jail sentence, it has been our practice to modify the judgment by reducing the punishment imposed. See *Garner* v. *Amsler,* 238 Ark. 34, 377 S.W. 2d 872; *Pace* v. *State,* 177 Ark. 512, 7 S.W. 2d 29; *Baker* v. *State,*

177 Ark. 13, 5 S.W. 2d 337; *Lockett* v. *State,* 145 Ark. 415, 224 S.W. 952; *Poindexter* v. *State,* 109 Ark. 179, 159 S.W. 197. There are mitigating circumstances here.

These grandparents had the responsibility for the child for most of her life, which could be calculated to have produced a genuine concern on their part for her welfare. Even though the mother made an explanation for failing to reclaim custody sooner, there is still reason to doubt that she was always motivated by a normal concern for her baby's welfare during her prolonged absence. There seems to have been a Louisiana decree purporting to award custody to their son. The child was taken to a doctor upon his arrival in Louisiana. The petitioners were immediately committed to jail at the conclusion of the hearing on the citation. They remained in jail until released on bail by order of this court entered the next day. They must have remained in jail at least overnight. In view of these circumstances and our reversal of the civil contempt feature of the chancery court's order, we are not convinced that the ends of justice require that petitioners be again confined to jail on the criminal contempt conviction. Accordingly, we reduce the jail sentence to the time served.

As thus modified, that part of the chancery court's order holding petitioners in criminal contempt is sustained, but that part holding them in civil contempt is quashed.

George SWIDERSKI *v.* W. L. GOGGINS et al

74-298 515 S.W. 2d 644

Opinion delivered November 12, 1974

Matthews, Purtle, Osterloh & Weber, for appellant.

James W. Daniel and *J. D. Patterson,* for appellees and cross-appellant.

FRANK HOLT, Justice. This appeal results from a dispute about the number of absentee ballots which the Searcy County Election Commissioners must furnish the Searcy County Clerk for the general election on November 5, 1974, as well as the county clerk's standing to obtain a writ of mandamus requiring the election commissioners to so act. The case was advanced and a per curiam order issued on October 30, 1974. This written opinion is pursuant to our per curiam.

The record shows that 450 absentee ballots were furnished the appellant by the appellees for the 1970 general election. There were 300 to 400 absentee votes cast. Approximately 145 of these were counted. For the 1972 general election, the appellees furnished appellant 100 absentee ballots. All of these were either mailed to voters or voted in the clerk's office. The appellant testified that 50 additional people applied for absentee ballots and that 79 voters were listed by him as requesting ballots. They did not formally apply when they learned absentee ballots were no longer available. Of the 100 ballots furnished, 72 were actually counted.

For the 1974 general election, 108 absentee ballots were furnished the appellant by the appellees. Appellant then petitioned the circuit court to issue a writ of mandamus ordering appellees to furnish him a total of 450 absentee ballots. After a hearing, the circuit court issued a writ requiring the appellees to provide 42 additional absentee ballots or a total of 150. Since no evidence was adduced showing that the 28 absentee votes not counted in 1972 were cast by citizens other than qualified electors, the circuit court ruled that 100 electors voted. Therefore, 150 absentee ballots should be furnished appellant pursuant to Ark. Stat. Ann. § 3-610 (Supp. 1973) for the 1974 general election.

Appellant asserts that Ark. Stat. Ann. § 3-902 (Supp. 1973) requires absentee ballots be furnished by appellees to the county clerk to enable the mailing of ballots by him to "all qualified applicants." Appellant claims 450 are needed. The pertinent part of § 3-902 reads:

> The county election commissioners shall prepare official absentee ballots and deliver same to the county clerk for mailing to all qualified applicants as soon as practicable before the last day on which such ballot will be counted but in any event not less than twenty-five (25) days before any election . . . .

Appellees assert that § 3-610 requires the county election commissioners to determine the number of electors voting at the last preceding comparable election and to supp-

ly the appellant the number of ballots by the method provided in that statute, which reads:

> The County Election Commissioners of each county in this State not using voting machines shall, in due time for each general or special election, provide for each election precinct, and for each ward of a city or incorporated town in their County, one hundred and fifty (150) printed ballots for each one hundred (100), *or fraction of one hundred, electors voting thereat* at the last preceding comparable election; and no ballot shall be received or counted in any election to which this Act [§§ 3-101 — 3-1306] applies, unless it is provided by the County Election Commissioners as herein provided. (Emphasis added.)

It appears the applicability of this statute was not questioned by the parties. This statute is obviously designed to provide a formula to insure sufficient absentee ballots for absentee voters to enable county election commissioners and the county clerk to fulfill their statutory duty as directed by § 3-902.

The appellant and the appellees disagree as to which was the last preceding comparable election. It is appellant's contention that the last preceding comparable election was the 1970 general election at which time 300 to 400 absentee ballots were cast. Therefore, if we accept the minimum of 300 absentee ballots as being cast, the appellant should be furnished the requested 450 absentee ballots pursuant to the statutory formula. (150 x 3)

The appellees assert that the statutory formula (§ 3-610) should apply to the 1972 general election, as being the last preceding comparable election, where 100 ballots were furnished and used. Since only 72 of these 100 absentee ballots cast were counted, the statutory formula would require them to furnish only 108, which they did. (72 x 1½ = 108) This obviously is not accurate because the statute requires that 150 ballots be furnished for each 100 or a fraction of 100 electors voting. However, the undisputed evidence is that after the 100 absentee ballots were used by the absentee voters, 50 applied for the right to vote absentee and 79 were listed as requesting the right to vote absentee. Therefore, 129 could not cast

absentee ballots since none were available. In other words, it appears a total of 229 voters would have cast absentee ballots. After a careful review of the statute, we are of the view that it was the legislature's intent, in establishing the voting formula, to make it reasonably certain that every absentee voter would be assured of the right to exercise his voting franchise. When we apply the statutory formula (150 for every 100 or fraction thereof) to the number of 229 individuals who either voted or attempted to vote absentee, the appellant is entitled to the requested 450 absentee ballots.

Appellees are concerned that the absentee ballots will not be properly voted. Statutory remedies exist, however, to correct improper procedures or illegal voting.

Appellees cross-appeal asserting that appellant has failed to show a clear legal right to a writ of mandamus. In *Sweiderski* v. *Goggins, et al*, 257 Ark. 164, 514 S.W. 2d 705 (1974), we held that the same appellant here did not there show a "clear legal right to a writ of mandamus." There appellant sought the writ to compel the commissioners, the appellees here, to transfer to him for his determination the sufficiency of certain petitions placing an independent candidate on the ballot. There we said that by statute the county board of election commissioners clearly had the right and duty to determine the sufficiency of the petitions. However, in the case at bar the pertinent statute, Ark. Stat. Ann. § 3-901 (Supp. 1973), provides:

> The County Clerk shall be custodian of the absentee ballots. The County Clerk shall be furnished a suitable room at the County Court House and shall exercise all the powers and duties concerning the *application* for, the issuance of, and the voting of absentee ballots required by law of the County Clerk. (Emphasis ours.)

Further, § 3-902 reflects that the county clerk is unable to fully perform his statutory duty until the county election commissioners prepare and furnish him the requested absentee ballots. Appellant, therefore, has the legal right and standing to seek and secure a writ of mandamus.

Affirmed as modified on direct appeal and affirmed on cross-appeal.

Leodis RANDLE *v.* STATE of Arkansas

CR 74-104 516 S.W. 2d 6

Opinion delivered November 18, 1974
[Rehearing denied December 16, 1974.]

Kenneth Coffelt, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Gary Isbell,* Asst. Atty. Gen., for appellee.

CARLETON HARRIS, Chief Justice. Appellant, Leodis Randle, was charged by Information with the crime of burglary and the trial court, sitting as a jury, found Randle guilty and fixed his punishment at three years confinement in the Arkansas Department of Correction. From the judgment so entered, appellant brings this appeal. For reversal, six points are alleged, and we proceed to a discussion of the contentions.

It is asserted that the evidence was not sufficient to sustain the conviction. The proof reflects that Officer McGill of the Little Rock Police Department answered a burglary alarm at approximately 7:45 p.m., on December 8, 1972, at the Sol Alman Company. Upon arrival, he found a hole in the wall of the building approximately one and one-half feet in diameter. While other officers went inside the building to investigate, McGill remained outside, and discovered Randle crawling out of the hole. Appellant was then placed under arrest and taken to the police unit. After entering the building, McGill observed that the office door, which was in the rear of the structure, "had been bursted open and several of the desk drawers had been gone through, and two fifths of whiskey was sitting just outside the office door." Alman, owner of the building, testified that when he left his place of business on the afternoon of December 8, "everything was normal." Upon returning to the building, the owner testified that a hole had been "knocked in the east side door" and this

condition did not exist when he had left the building in the afternoon. He corroborated the evidence that the office had been "ransacked and drawers overturned, and it looked as though someone were going through all the drawers and files, and it was in disorder, disarray." The State rested and appellant offered no evidence.

We do not agree that the evidence was insufficient to support the verdict, and this contention is answered by our case of *Scates and Blaylock* v. *State,* 244 Ark. 333, 424 S.W. 2d 876, where we said that a larcenous intent could fairly be inferred from the facts. We also referred to an earlier case, *Clay* v. *State,* 236 Ark. 398, 366 S.W. 2d 299, wherein it was stated, "We have held that the offense of burglary is complete even though the intention to commit a felony[1] is not consummated."

In *Scates,* we pointed out that the defendants were found inside a locked cafe containing amusement and vending machines, when they had no permission or lawful right or reason to be there. Here, appellant had no lawful right or reason to be in the Alman building; he was found there after office hours; although no tools were found in his possession, there is testimony that the hole was present, which was not there when the building was secured. Of course, as mentioned, the testimony reflected that the office appeared to have been thoroughly "ransacked". The evidence was sufficient to sustain the conviction.

It is asserted that two terms of court had elapsed between the date of the filing of the information and the judgment of conviction, and the charges against defendant should have been dismissed under the provisions of Ark. Stat. Ann. § 43-1708 (Repl. 1964). This contention is unsound for three reasons. In the first place, we have held that a proper construction of the statute contemplates two terms of court passing *in addition to the term in which the defendant is indicted.* See *O'Neal* v. *State,* 253 Ark. 574, 487 S.W. 2d 618. In addition, the record reflects that two of the applications for continuance were made on motion of the appellant, and these

[1] By Act 185 of 1955, the General Assembly amended the statute to read that the offense of burglary is committed on the unlawful breaking or entering with the intent to commit any felony, or larceny.

delays could not be held against the State. Not only that, appellant had been released on bail and the applicable statute is, therefore, Ark. Stat. Ann. § 43-1709 (Repl. 1964) which provides that one on bail shall be discharged (unless the delay happened on his application) if he is not brought to trial before the end of the third term of the court in which such indictment is pending. See also *State* v. *Davidson,* 254 Ark. 172, 492 S.W. 2d 246.

It is next asserted that the defendant did not waive a jury trial but the transcript is clear to the effect that appellant appeared in person and by his attorney, and on motion of the appellant, the jury was waived.

It is next alleged that the State "apparently withheld information beneficial to the defendant since the result of the interrogation of him was not revealed." The quick answer to this contention is that the record does not reveal any motion by appellant for discovery, or bill of particulars. Ark. Stat. Ann. § 43-2011.2 (Supp. 1973) provides the procedure for discovery and appellant did not avail himself of the provisions of this statute.

It is contended that the record does not reflect that the defendant was advised of the nature and possible effects of the charge against him or of his rights under the law. We disagree. The Information clearly sets out the burglary charge against Randle and the transcript also reflects that the defendant and his attorney[2] were present at arraignment "and the defendant is called to the bar of the Court and informed of the nature of the charge filed herein," and a plea of not guilty was entered.

Finally, it is asserted that Federal constitutional rights were violated, but no additional argument is presented, and we find no merit in the contention.

It follows, that the judgment should be, and hereby is, affirmed.

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[2]The attorney representing appellant on appeal is not the same attorney who represented him on trial.

The court desires at this time to call attention to the first sentence of Rule 9 (f) which has not been complied with in this case, and which reads as follows:

"Arguments shall be presented under subheadings numbered to correspond to the outline of points to be relied upon." This is not the first time that this rule has been violated, nor is present counsel the only attorney to violate it. The six points relied upon for reversal are set out individually as required by subsection (c); however, the argument under all points, covering two and one-half pages, is "mingled" together under the general heading, "Argument", and even then such argument is not consecutively set forth, as stated in the points. The purpose of Rule 9 (c) and (f) is to aid the court in following the arguments, and to enable it to determine whether there is merit in any alleged point of error. To "dig out" the particular sentence or paragraph which deals with a specific asserted point is discomfiting and burdensome. Preparation of a brief in the manner described above can only create confusion. Nothing herein said is meant to imply that an attorney cannot argue points that are interlinked (where one can hardly be argued without including the other), and likewise, it is, of course, entirely proper to mention that a particular point was covered by the argument under a preceding point, for we desire no reiteration. Accordingly, we take this occasion to urge the members of the Bar of Arkansas to follow strictly the procedures mentioned in these rules which will substantially aid this court in handling its work load more efficiently and expeditiously.

Barbara Lynn PERRY *v.* Larry Eugene PERRY

74-104 515 S.W. 2d 640

Opinion delivered November 18, 1974

Frierson, Walker, Snellgrove & Laser, by: *Stanley R. Langley,* for appellant.

W. B. Howard, for appellee.

GEORGE ROSE SMITH, Justice. This suit, originally a divorce case, has narrowed down to a dispute about the custody of the parties' four-year-old daughter, Amy. In December of 1972 the appellee, the husband, obtained an uncontested decree of divorce upon allegations of desertion and adultery. The chancellor awarded custody of the child to the appellee, finding that he was a proper person to have the care of the child and that the mother was morally unfit for that responsibility.

A few months later the appellant, who had married David Jaworski three weeks after the divorce, sought custody of her daughter, asserting a change of conditions. After an extended hearing the chancellor entered an order enlarging the mother's visitation privileges but denying her request for a

change of custody. This appeal is from the latter part of that order.

We need not detail the testimony, which simply presents contested issues of fact. The weight of the evidence shows that the appellee filed suit for divorce after the appellant had left him, had taken Amy with her to Memphis, Tennessee, and there had occupied an apartment with Jaworski. In the court below the appellant admitted that while she was living in that apartment she had permitted another young woman to spend the night there upon a number of occasions with any one of several different men.

We cannot say that the chancellor was wrong in not finding a change of conditions sufficient to require a change of custody. In the original decree of divorce the court found that the appellant was morally unfit to have the custody of her daughter. Later events of an external nature, such as the appellant's marriage to Jaworski, her attendance at church services, and her ability to provide a home for Amy, fall short of compelling one to conclude that the appellant's character has also changed. For that reason the cases relied upon by the appellant are not persuasive. For example, in *Perkins* v. *Perkins,* 226 Ark. 765, 293 S.W. 2d 889 (1956), we pointed out that there was nothing in the record to indicate that the mother was not a proper person to have the custody of her child. No such statement can be made in this case.

In electing to decide the case upon its merits we are to some extent bypassing the appellee's insistence that the appeal should be dismissed because of the appellant's asserted failure to obtain from the trial court, in the time and manner specified by Ark. Stat. Ann. § 27-2127.1 (Supp. 1973) and by Supreme Court Rule 26A, an extension of time for the filing of the record in this court. Upon this point the proof, which is not entirely clear, suggests that the extension was sought not because the court reporter was unable to meet the deadline for filing the record but because counsel wanted more time for the preparation of the appellant's brief in this court. In fact, a motion for an extension of brief time was sent to our clerk before the record had been lodged here and hence before we had jurisdiction of the case.

As we pointed out in *Gallman* v. *Carnes,* 254 Ark. 155, 492 S.W. 2d 255 (1973), the legislative intent in the enactment of Section 27-2127.1, *supra,* was to eliminate unnecessary delay in the docketing of appeals to this court. Certainly the legislative purpose was not to provide a means by which needless postponements could be obtained. We expect compliance with the spirit of the statute, to the end that lawsuits may progress as expeditiously as justice requires.

Affirmed, the appellee to recover his costs.

Gregory Wilder HOLMAN *v.* STATE of Arkansas

CR 74-142 515 S.W. 2d 638

Opinion delivered November 18, 1974

No briefs.

GEORGE ROSE SMITH, Justice. The appellant was found guilty of delivering marihuana, a three-year sentence being imposed. On October 7, 1974, his attorneys sought to perfect an appeal by tendering the record to the clerk of this court. The clerk correctly refused to accept the record, because it was tendered more than seven months after the entry of the judgment. Counsel then filed the present motion, under our Rule 5, to require the clerk to docket the case. It is asserted that the error occurred because both the trial judge and the attorneys mistakenly believed that the trial judge could grant

an extension for a period of seven months beginning 90 days after the filing of the notice of appeal, when in fact the seven months runs from the entry of the judgment. Ark. Stat. Ann. § 43-2705 (Supp. 1973) and § 27-2127.1 (Supp. 1973). The trial judge has filed a statement acknowledging his error and recommending that the record be accepted.

In a recent case, *Dorsey* v. *State*, we entered a per curiam order allowing the record to be filed in somewhat similar circumstances. There was, however, a significant difference, in that Dorsey was an indigent person represented by court-appointed counsel. Inasmuch as postconviction relief may be available to an indigent prisoner whose right to an appeal has been lost through the carelessness or incompetence of appointed counsel, we have avoided circuity of action by allowing a belated appeal, as in *Dorsey*.

Here, however, the appellant appears to be represented by retained counsel. It was formerly the general rule that the failure of retained counsel to perfect an appeal did not entitle the client to any relief. See annotation, 74 A.L.R. 2d 1457 (1960). Since the decision in *Douglas* v. *California*, 372 U.S. 353 (1963), however, some courts have held that gross incompetence or gross negligence on the part of retained lawyers may involve a denial of due process or equal protection. *United States ex rel. O'Brien* v. *Maroney*, 423 F. 2d 865 (3rd Cir. 1970); *Shipman* v. *Gladden*, 453 P. 2d 921 (Ore., 1969).

We need not explore that area of developing legal theory, for in the case at hand a misunderstanding shared by counsel and by the trial judge brought about the tardy tender of the record. A litigant should not be prejudiced by the action of the court. *Wallis* v. *State*, 245 Ark. 29, 430 S.W. 2d 860 (1968). Moreover, when, as in the present case, a fairly recent statutory change had led to an error on the part of an attorney, we have allowed a short period of grace before requiring strict adherence to the new law. *Gallman* v. *Carnes*, 254 Ark. 155, 492 S.W. 2d 255 (1973). We therefore permit the record to be filed in this instance, but after January 1, 1975, the statute will be applied according to its terms.

The requested rule on the clerk is granted.

Lester Jewell GLOVER *v.* STATE of Arkansas

CR 74-75 515 S.W. 2d 641

Opinion delivered November 18, 1974

Acchione & King, for appellant.

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

JOHN A. FOGLEMAN, Justice. Appellant contends that the circuit court erred in refusing to release him from custody on his petition for habeas corpus. He was held on a warrant issued by the Governor of Arkansas honoring the requisition of the State of Texas for his extradition upon a charge of Driving While Under the Influence of Intoxicating Liquor alleged to have been committed in McLennon County, Texas, on April 9, 1972. Appellant asserts that the affidavit upon which the charge by information was made was insufficient to show that appellant had committed a crime in Texas and that the offense charged is a petty offense for which an alleged offender is not extraditable. Since we do not agree with either contention, we affirm.

The affidavit was made by one Oron Land, who deposed that "Lester Jewell Glover in the County of McLennon, and State of Texas, heretofore on or about the 9th day of April, A.D. 1972, did then and there unlawfully drive and operate a motor vehicle in and upon a public highway, there situate, while he, the said Lester Jewell Glover was under the influence of intoxicating liquor against the peace aad dignity of the State." Appellant quotes the applicable Texas Statute Art. 6701*l*-1, "Intoxicated Driver; Penalty," [Vernon's Annotated, Revised Civil Statutes of State of Texas, Vol. 19½ (Pamphlet Supp. 6701*l*-1] as follows:

> "Any person who drives or operates an automobile or any other motor vehicle upon any public road or highway in this State, or upon any street or alley within the limits of an incorporated city, town or village, while

such person is intoxicated or under the influence of intoxicating liquor, shall be guilty of a misdemeanor and upon conviction shall be punished by confinement in the county jail for not less than three (3) days nor more than two (2) years, and by a fine of not less than Fifty ($50.00) Dollars nor more than Five Hundred ($500.00) Dollars. Provided, however, that the presiding judge in such cases at his discretion may commute said jail sentence to a probation period of not less than six (6) months."

The Arkansas Uniform Criminal Extradition Act permits the recognition of a written demand for extradition of one charged with a crime in the demanding state when it is accompanied by a copy of an indictment, or an information supported by affidavit to the facts or by affidavit before a magistrate. Ark. Stat. § 43-3003, 43-3005 (Repl. 1964). This act must be considered along with the federal statutes, because the federal act controls where there is an inconsistency, but the legislature of the asylum state may permit its Governor to surrender a fugitive on terms less exacting than those imposed by Congress. *Gulley* v. *Apple*, 213 Ark. 350, 210 S.W. 2d 514.

After the requisition has been honored by the Governor, the circuit court can consider a petition for habeas corpus for only two purposes, i.e., to establish the identity of the prisoner and to determine whether he is a fugitive, if the requisition shows facts necessary to return of the alleged fugitive. *State* v. *Allen*, 194 Ark. 688, 109 S.W. 2d 652. The only question involved here is the sufficiency of the requisition, and the answer turns upon the question whether there is a substantial charge of a violation of the laws of Texas. *Stuart* v. *Johnson*, 192 Ark. 757, 94 S.W. 2d 715.

Appellant places his principal reliance upon *Kirkland* v. *Preston*, 385 F. 2d 670 (D.C. Ct. App. 1967) wherein it was held that a police officer's affidavit stating the crime of arson in the conclusory language of the Florida statute was insufficient to show probable cause. We note that there was no verified information in *Kirkland*, however, as there is in this case. Even if this is not an appropriate distinction, there is respectable authority holding that, under the Uniform Ex-

tradition Act, charging the accused with a crime substantially in the language of the statute upon which it is purported to be based will not be held insufficient for want of a precise or technical accusation. *Ex Parte Hubbard,* 201 N.C. 472, 160 S.E. 569, 81 A.L.R. 547 (1931); *State* v. *Booth,* 134 Mont. 235, 328 P. 2d 1104 (1958). Statutes concerning rendition and extradition are not to be construed narrowly and technically by the courts, but liberally, in order to effectuate their purposes. *People* v. *Sheriff,* 225 App. Div. 156, 232 N.Y.S. 217 (1929).

It is quite generally held that an affidavit in accordance with the standards of the criminal procedural law of the demanding state is a sufficient charge of an offense against the laws of that state to warrant extradition and that its sufficiency must be tested by the laws of that state. *Ex Parte Paulson,* 168 Ore. 457, 124 P. 2d 297 (1942); *People* v. *Sheriff,* 251 N.Y. 33, 166 N.E. 795 (1929); *Collins* v. *Traeger,* 27 F. 2d 842 (9 Cir., 1928); *Goodale* v. *Spain,* 42 App. D.C. 235 (1914); *In Re Acton,* 103 N.E. 2d 577 (Ct. App. Ohio 1949); *People* v. *Moran,* 137 Misc. Rep. 905, 244 N.Y.S. 590 (1930); *Annot,* 40 A.L.R. 2d 1151, 1161 (1956). It is not for the asylum state to apply its own rules of procedure. *People* v. *Sheriff,* 251 N.Y. 33, 166 N.E. 795 (1929). See also *Ex Parte Reggel,* 114 U.S. 642, 5 S.Ct. 1148, 29 L. Ed. 250, 5 Am. Crim. Rep. 218 (1884); *People* v. *Babb,* 415 Ill. 349, 114 N.E. 2d 358, 40 A.L.R. 2d 1142 (1953).

It is quite clear that the affidavit in this case is sufficient to support a charge of driving while intoxicated in violation of the Texas statute. *Cisco* v. *State,* 411 S.W. 2d 547 (Tex. Cr. App. 1967). Consequently, we hold that appellant was lawfully charged by information supported by an affidavit as to the facts, in the sense of Ark. Stat. Ann. § 43-3005 III (Repl. 1964), sufficiently to warrant the issuance of the warrant of extradition by the Governor. Affidavits couched in language just as conclusory as that in this case have been held sufficient for extradition purposes in other jurisdictions. See, e.g. *People* v. *Mulcahy,* 392 Ill. 290, 64 N.E. 2d 474 (1945).

Appellant's second contention is completely without merit. We cannot in good conscience relegate an offense which might carry a penalty of two years in jail, in addition to

a fine as large as $500.00, to the category of a petty offense. The Texas statute makes the offense charged a misdemeanor. Even though it is now codified in the Revised Civil Statutes of Texas, as appellant points out, the offense is still a misdemeanor and is still punishable as a crime. Even though our statute covering this offense is digested under the title "Motor Vehicles, Traffic on Highways" and not the title "Criminal Offenses," appellant is the first to suggest to this court that this misdemeanor is not criminal in nature under Arkansas law.

The provisions of Article 4 § 2 of the U.S. Constitution include every offense punishable by the law of the state in which it is alleged to have been committed. *Ex Parte Reggel,* 114 U.S. 642, 5 S. Ct. 1148, 29 L. Ed. 250 (1884), 5 Am. Crim. Rep. 218; *Kentucky* v. *Dennison,* 65 U.S. 66, 16 L.Ed. 717 (1860); *Starks* v. *Turner,* 365 P. 2d 564 (Okl. 1961); *People* v. *Babb,* 415 Ill. 349, 114 N.E. 2d 358, 40 A.L.R. 2d 1142 (1953); *Ex Parte Hubbard,* 201 N.C. 472, 160 S.E. 569 (1931); *Annot,* 40 A.L.R. 2d 1151, 1152 (1955). Misdemeanors are definitely extraditable offenses. *Ex Parte Reggel,* supra; *Kentucky* v. *Dennison,* supra; *Starks* v. *Turner,* supra.

Since we find no merit in appellant's points for reversal, the judgment is affirmed.

WEST & CO. of LA., Inc. *v.* A. Gene SYKES, INSURANCE COMMISSIONER, STATE of Arkansas

74-157 515 S.W. 2d 635

Opinion delivered November 18, 1974

Campbell, Campbell, Marvin & Johnson; Chambers & Chambers and Reed Williamson, for appellant.

W. H. L. Woodyard III, W. R. Ruddell and *S. Doak Foster,* for appellee.

CONLEY BYRD, Justice. The issue here is whether appellant West & Co. of Louisiana, Inc. by furnishing to its employees a group hospital and surgical benefit plan is transacting the business of insurance contrary to the provisions of Acts 1959, No. 148, Ark. Stat. Ann. § 66-2001 et seq. The trial court held in favor of appellee, A. Gene Sykes, Insurance Commissioner, State of Arkansas and enjoined appellant from "assuming and agreeing to pay, and paying out of its own funds, all or any portion of such benefits" until it had complied with the Arkansas Insurance Code.

Appellee concedes that the facts are not in dispute. They show that West & Co. of Louisiana, Inc. operates a group of Department Stores in Louisiana, Arkansas, Mississippi, Alabama and Texas. It furnishes to its employees a number of fringe benefits such as sick leave, profit sharing and the "group hospital and surgical benefit plan" that is here involved. The cost of the group hospital and surgical plan is shared with those employees who participate therein. A single employee pays $9.00 per month and an employee with a family pays $18.00 per month irrespective of age, health or number of dependents covered. Appellant sustains the balance of the cost of the plan including all administrative expenses. The record shows that for the last five years appellant

in addition to the administrative expenses has paid out in benefits $102,781.72, more than the employees have paid in. The undisputed evidence is that the plan, very similar to a number of medical plans offered by insurance companies generally, if carried by an insurance company would cost each employee in excess of $40.00 per month.

To sustain the action of the lower court appellee relies upon the following provisions of the Arkansas Insurance Code:

> "Ark. Stat. Ann. § 66-2002 (Repl. 1966). INSURANCE DEFINED. 'Insurance' is a contract whereby one undertakes to indemnify another to pay a specified amount or provide a designated benefit upon determinable contingencies.
>
> "Ark. Stat. Ann. § 66-2003 (Repl. 1966). INSURER DEFINED. 'Insurer' includes every person engaged as indemnitor, surety, or contractor in the business of entering into contracts of insurance.
>
> "Ark. Stat. Ann. § 66-2009 (Repl. 1966). TRANSACTING INSURANCE. 'Transact' with respect to insurance includes any of the following:
>
> (1) Solicitation and inducement.
> (2) Preliminary negotiations.
> (3) Effectuation of a contract of insurance.
> (4) Transaction of matters subsequent to effectuation of a contract of insurance and arising out of it."

The appellee then quotes from 12 Appleman, *Insurance Law & Practice*, § 7001 as follows:

> "Whether the contract is one of insurance must be determined from its purpose, effect, content, terminology, and conduct of the parties, and not from its designation therein, since a contract which is fundamentally one of insurance cannot be altered by the use or absence of words in a contract itself. The Court must look also to the intention of the parties in making this determination."

The appellant on the other hand relies upon 12 Appleman, *Insurance Law & Practice,* § 7002, which provides in part as follows:

> "A statute designed to regulate the business of insurance, growing out of experience with them and evils developing in them, is not intended to apply to all organizations having some element of risk assumption or distribution in their operations. The question of whether an arrangement is one of insurance may turn, not on whether a risk is involved or assumed, but on whether that or something else to which it is related in the particular plan is its principal object and purpose. The courts of the District of Columbia have been prone to regard non profit group medical and hospitalization plans as not constituting insurance.
>
> "The courts have been prone, doubtless because of the charitable and self-sufficient nature of railroad relief associations, to hold that they are not insurance companies within the provisions of regulatory acts. Similarly, a contract made by a corporation conducting a hospital, providing that for a stated consideration a woman should be received into the hospital and cared for the rest of her life, was not considered to constitute insurance, nor to be ultra vires nor against public policy. Pure endowment or annuity contracts have been considered not true insurance contracts."

Keeton, *Insurance Law-Basic Text,* 8.2(a), makes the observation that statutory definitions of insurance as provided in Calif. Ins. Code § 22 (West 1955) and Mass. Gen. Laws Ann. ch. 175, § 2, (1958), are "so broad and general as to be virtually useless as guides to determine applicability of the regulatory system in a disputed setting." The Calif. Ins. Code § 22 provides:

> "Insurance is a contract whereby one undertakes to indemnify another against loss, damage or liability arising from a contingent or unknown event."

In a footnote at page 543 *Keeton, supra,* states:

"Arguably these statutes should be read not as stating that every transaction having the stated characteristics is insurance but only as saying that no transaction is insurance unless it has these characteristics. If so construed, there would seldom be any occasion to invoke them since it is not likely that a transaction lacking these characteristics would be alleged to be insurance even if there were no statutory definition of that term. Reading these statutes instead as stating that all transactions having these characteristics are insurance would be to give them a meaning plainly inconsistent with the much narrower scope of regulation in practice. Many arrangements having these characteristics are never asserted to be insurance even by the most aggressive of regulatory officials."

Other jurisdictions generally support the above quotations from *Appleman* § 7002, *supra,* and *Keeton, supra.* See *State* v. *Pittsburgh, C.C. & St. Louis Ry. Co.,* 68 Ohio St. 9, 67 N.E. 93 (1903) and *Colaizzi* v. *Pennsylvania R. Co.,* 208 N.Y. 275, 101 N.E. 859 (1913), holding that the operation of "railroad relief associations" do not constitute the doing of an insurance business. In *California-Western St. Life Ins. Co.* v. *State Bd. of Eq.,* 151 Cal. App. 2d 559, 312 P. 2d 19 (1957), the retirement fund there involved was handled by the employer, a life insurance company, in much the same manner as the "West Plan" here involved. After noting that the plan offered to the employees was optional; that it was not offered to persons other than employees; and that the plan was not actuarially sound and was intended that way, the court in holding that the plan did not constitute an insurance contract, stated:

". . . Regardless of the noted similarities in so many of the provisions contained in the plan to those found in annuity policies regularly sold by insurers, the great dissimilarity which inheres is the total absence of profit motive — never ignored by successful insurers — compels a conclusion that the establishment and maintenance of respondent's employees' retirement plan cannot be classified as insurance business done by it in this state. Such was not its purpose and such was not its nature. . . ."

In holding that a guaranteed maintenance contract on trucks was not an insurance contract, the California Supreme Court, in *Transportation Guarantee Co.* v. *Jellins,* 29 Cal. 2d 242, 174 P. 2d 625 (1946), made the following observations:

> "[8, 9] In construing the contracts in question it must be borne in mind that nearly every business venture entails some assumption of risk, some element of gambling. The retail merchant when he purchases his stock assumes the risk of lower prices, of receding demand, of spoilage or deterioration of perishable goods; he gambles on his ability to dispose of the stock before it loses value or, perhaps, to hold it until there is an increment of value. The lawyer who contracts to prosecute a case to final judgment for a fixed or contingent fee assumes the risk of long litigation, of repeated trials and reversals. The lessee who agrees to hold his lessor harmless for damage to property of, or injury to, third persons occurring on the leased premises; the lessor who agrees to keep the premises in repair; even the surety on a note, assume a risk and indemnify another against loss. If the defense in this action is to prevail it is but another step to assert that same defense in actions arising out of any of the risk-indemnification agreements mentioned. We are satisfied that a sound jurisprudence does not suggest the extension, by judicial construction, of the insurance laws to govern every contract involving an assumption or risk or indemnification of loss; that when the question arises each contract must be tested by its own terms as they are written, as they are understood by the parties, and as they are applied under the particular circumstances involved."

The appellee to sustain its contention that the contract in question constitutes the transacting of an insurance business under the Arkansas Insurance Code, points to our decision in *Bost* v. *Masters*, 235 Ark. 393, 361 S.W. 2d 272 (1962), involving service upon the United Furniture Workers Insurance Fund as an unauthorized insurer under the "Unauthorized Insurers Process Act," Ark. Stat. Ann. §§ 66-2903 through 66-2907 (Repl. 1966). The fund there was a separate fund classified by its settlors as an "insurance fund" and presumably actuarially sound since it was funded by a

"stated percentage of the wages" paid by the contributing employers to their employees during the preceeding month.

Now obviously the statutory definitions if given a literal interpretation are broad enough to support appellee's position that the "West Plan" is an insurance contract. However, if we give to the definitions the literal interpretation that appellee espouses then the definitions encompass among other things the ordinary landlord and tenant arrangement where one or the other agrees to rebuild within a specified time or be subject to certain specified liquidated damages. Of course, as pointed out by the authorities, discussed above, the regulation of landlord and tenant contracts was never considered not contemplated in the drafting or enacting of insurance codes. Since it at once becomes obvious that we should not give a literal interpretation to the statutory definitions, the question resolves itself as to where we should draw the line as to what is and what is not included. Under these circumstances we believe that the best policy is to approach the matter on a case by case basis and in accordance with the purpose of the evils to be regulated as disclosed by the authorities and the adjudicated cases from this and other jurisdictions. When the matter is approached from that view, we find that fringe benefits furnished to employees on an optional basis that are substantially supported by the employer's profits and that are not intended to be actuarially sound are generally regarded as not being regulated by the insurance codes of the several states. Consequently, it follows that the trial court was in error when it enjoined appellant from paying out benefits under its plan.

Reversed and dismissed.

R. N. BROWN, et ux *v.*
Warren E. WOOD, Judge, et al

74-36 516 S.W. 2d 98

Opinion delivered November 18, 1974
[Rehearing denied December 23, 1974.]

Oscar Fendler, for petitioners.

Smith, Williams, Friday, Eldredge & Clark, by: *W. A. Eldredge, Jr.* and *J. D. Watson*, for respondents.

FRANK HOLT, Justice. A nonresident attorney, James S. Cox, was enrolled by the Pulaski County Circuit Court in an ex parte proceeding permitting him to appear there as an attorney of record for petitioners in the case entitled R. N. Brown, et ux, v. Harold Chakalas, M.D. The trial court granted defendant's subsequent motion to strike the previous order of enrollment. By a petition for certiorari and mandamus, the petitioners now seek an order reinstating Cox to his former status in the case. This method of appellate review is not in issue. Petitioners first assert that the trial court acted beyond its scope of authority in striking its previous order of enrollment which was pursuant to Ark. Stat. Ann. § 25-108 (Repl. 1962). We find no merit in this contention.

The statute reads:

> Nonresident attorneys at law of record shall be allowed to practice law in all the courts of this state of equal jurisdiction of the court or courts to which they have been admitted to practice and are members of the bar in good standing in the state of their residence, *under such terms aad conditions and requirements as may be prescribed by the rules of practice of any court in which any such nonresident attorney at law seeks to practice.* (Emphasis ours.)

Petitioners argue that after a nonresident attorney demonstrates that he is admitted to practice in a court of equal jurisdiction and is a member of the bar in good standing in the state of residence, as here, the court must enroll the attorney after compliance with any reasonable rules and regulations prescribed by the enrolling court. In support of this argument the petitioners cite Ark. Stat. Ann. § 25-111 (Repl. 1962) which reads in pertinent part:

> A nonresident attorney at law, enrolled under this act (§§25-108 - 25-111), shall be and remain a member of the bar of the court in which he has been enrolled and shall not again be required to be enrolled in the same court, ...

This evinces the legislative intent, say petitioners, that the practice of law in Arkansas by nonresident attorneys, once enrolled, is unrestricted as to "frequency of practice." The first answer to these arguments is that the Supreme Court has vested in it the power to regulate the practice of law in this state regardless of a statute. Ark. Const. (1874), Amendment 28. The next answer is that we held adversely to this contention in the recent case of *McKenzie* v. *Burris*, 255 Ark. 330, 500 S.W.2d 357 (1973), where Cox was also the enrollee. There we said:

> 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 attorney, 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 court, and is a rather general practice.

We further said:

> . . . . [S]tatutes 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.

Appellant next asserts that even if the trial court had the authority to strike Cox's enrollment order, it grossly abused its discretion in doing so. Although this court has not exercised its inherent power by promulgating rules as to the practice of law in our state by nonresident attorneys, our local courts, in the absence of any rule by this court, certainly have the inherent authority to formulate reasonable rules and regulations which allow or prevent a nonresident attorney from practicing law in an Arkansas court. *McKenzie* v. *Burris, supra;* and *Letaw* v. *Smith, Chancellor,* 223 Ark. 638, 268 S.W.2d 3 (1954). The circumstances in each case might necessitate that the court "properly protect" a legitimate interest of the public as well as the individual litigants. In *McKenzie* we mention certain areas where a court may exercise its discretionary authority in considering pro hac vice admissions:

> 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. (Citing cases.)

In the case at bar the petitioners had first consulted with a local law firm which has demonstrated expertise in tort actions. However, this being a medical malpractice case, the firm declined to represent petitioners and referred them to

Cox, a Memphis attorney, who is acknowledged to possess an expertise in this particular phase of law. The referral of an individual to another attorney who has a greater expertise in a particular phase of the law is in keeping with the professional duty of an attorney to make competent legal counsel available to individuals. ABA Code of Professional Responsibility, Canon 2. Cox regularly represents plaintiffs, such as the petitioners, as well as members of the medical profession. Upon consulting with Cox, he accepted their case and, since the statute of limitations was about to run, personally prepared the complaint and delivered it for filing to a Little Rock attorney and associated him in the case. It is unquestioned, as recited in the court's enrollment order, that Cox is "a member in good standing of the bar of Tennessee. . . ."

In striking the ex parte enrollment order, after an evidentiary hearing, the court did so stating: Cox's participation in Arkansas litigation is ever increasing; petitioner Brown employed Cox at his Memphis office; Cox dictated and had the complaint typed there and, since the statute of limitations was about to run, drove to Little Rock where he delivered the pleading to a local attorney for filing; Cox, therefore, associated local counsel with him rather than being associated as co-counsel by local counsel as was done in *McKenzie, supra;* there Cox was enrolled as an associate of local counsel to assist them in all phases of trying the cause of action; such an entry in the present case would be substituting form for substance; Cox is practicing law in Arkansas without being licensed to do so; there are competent licensed attorneys in the state; Cox was currently connected with either four or six cases in Pulaski County; Cox tries lawsuits all over the United States and there is no doubt his commitments for trial in other jurisdictions would conflict with cases set for trial in Pulaski County; it is obvious to the court that numerous matters of procedure could not be cleared through a resident attorney because they would have to be cleared with Cox; concern about the availability of attorneys of record and the court's ability to know that such attorneys speak for all parties concerned with their phase of the case, in relationship to the orderly administration of the court; and Cox forwards files in medical malpractice cases to one Paula

Stone, a lay person in another state, who, for a minimum fee of $500, contacts medical doctors and obtains from them evaluations of the cases and commitments to testify.

Respondents add that interrogatories in two local cases had not been answered by Cox or local counsel associated with him, although the interrogatories were filed in one case two years previously and about five months before the other local case. Cox's testimony is no request for immediate response or any time limit was set which would result in a request for a default judgment. He admits, however, that local counsel are relying upon him for the necessary work in answering the interrogatories. Further, he has "an extremely heavy trial load involving trials all over the country." He testified that he had represented fourteen cases in Arkansas, twelve or thirteen of which went to suit and six of which were in the circuit court of Pulaski County.

We agree with respondent that the burden is upon the petitioners to show that the granting of the motion to strike Cox's enrollment was an abuse of discretion. Indeed, that is a heavy burden. First we observe that the method of review before us, certiorari and mandamus, is not an issue. However, the law is well settled that upon review by certiorari it is essential that there be demonstrated a plain, manifest, clear, great or gross abuse of discretion by a trial court before an appellate court is justified in granting the relief sought. 14 Am. Jr. 2d 787, Certiorari § 10; 14 C.J.S. 174, Certiorari § 30; 14 Am. Jur. 2d 796, Certiorari § 20; and 1 Bailey on Habeas Corpus 738, § 188 (1913). Cf. *State* v. *Nelson, Berry Pet. Co.*, 246 Ark. 210, 438 S.W.2d 33 (1969); and *Ark. State Highway Comm.* v. *Light, Judge,* 235 Ark. 808, 363 S.W. 2d 134 (1962).

As to mandamus, in order to grant the relief sought by petitioners, it is essential for us to hold the trial court was guilty of such a gross abuse of discretion that it may be said to have been so arbitrary that it amounted to a refusal by the trial court to proceed. Otherwise, mandamus will not lie. *Edmondson* v. *Bourland,* 179 Ark. 975, 18 S.W.2d 1020 (1929). This view is widely held and so expressed by the text writers. 55 C.J.S., Mandamus, § 63. When the findings of the court,

in the case at bar, are tested by the foregoing rules of law governing certiorari and mandamus, we cannot say the heavy burden was met by the petitioners.

There was a very substantial basis for the court's concern about the extent of Cox's practice in Arkansas, and elsewhere, and the potential effect of this extensive practice on the ability of the judge to control and expedite his docket as well as the progress of cases in which Cox participated without sacrificing the interest of litigants, witnesses and other participants in his court. We must accord the trial court the right to take into consideration the possibility that Cox might not be able to appear at trial, pre-trial unavailability, unavailability for discipline in order to require him to answer interrogatories, his being unavailable or present to conduct a hearing on a motion, availability when depositions were scheduled, and that his nonavailability to any one of these instances would work a hardship on Arkansas residents in whose case he is enrolled as well as other residents of the state who have cases pending in the same court. We emphasize that comity is a courtesy and not a right.

Neither can we say that petitioners have been prejudiced since nothing is presented which indicates that the Bar of Arkansas is inadequate with respect to trial advocacy and, consequently, the participation of Cox, in the case at bar, is absolutely essential to adequate presentation of their claim.

The question is not what this court or any member of it would have held on the question or whether we think the court in the exercise of its sound discretion should have reached a different result. The question is whether the abuse of that discretion, if abused, is plain, clear, manifest, gross, great, or serious. This means that the abuse must be such that the action of the trial court was arbitrary and capricious, or at least that the error in the discretionary action is so apparent as to be without argument. We certainly cannot say on the record as a whole before us that the trial court grossly, arbitrarily and capriciously abused the discretionary authority which is properly accorded to him.

The case at bar, together with *McKenzie* v. *Burris, supra,* convinces us that the time has come when appropriate

regulations should be promulgated concerning nonresident attorneys by comity. In this connection we invite suggestions from the bench and bar of the State of Arkansas.

Writs denied.

BROWN, JONES and BYRD, JJ., dissent.

CONLEY BYRD, Justice, dissenting. As I read the record in this case the lawyers representing Harold Chakales, M.D., were not attacking Mr. Cox's ability to represent his clients but were complaining because he was too successful in representing them and consequently complained that he had received $111,000 in fees from malpractice settlements or payments made by one liability insurance company. I submit that Mr. Cox has appeared in no more lawsuits than did Justice Thurgood Marshall for litigants in this State and I have never heard anybody suggest that Thurgood Marshall was involved in the unauthorized practice of law. Furthermore, Wils Davis of Memphis, Tennessee,(1) regularly appeared in litigation before the trial courts of this State and I never heard it contended that he was involved in the unauthorized practice of law. Thus in view of past history it appears to me that the trial court was arbitrary in refusing to permit Mr. Cox by comity from participating in the trial of this litigation.

It also appears to me that by preventing Mr. Cox from representing Mr. and Mrs. Brown in this malpractice action we are encouraging the trial courts to give more emphasis to the income protection of local lawyers than we are to the rights of the litigants. The record shows that after consulting with legal counsel Mr. and Mrs. Brown were referred to the law firm of McMath, Leatherman and Woods. Ex-Governor McMath refused to take the case, not because of lack of merit, but because he had considerable business with Dr. Chakales. Henry Woods, Ex-Governor McMath's law partner and a former president of the Arkansas Bar Association, finally suggested to the Browns that they consult Mr. Cox, a Memphis, Tenn. lawyer. Since Mr. Cox, a specialist

(1)Mr. Wils Davis was admitted to practice in both Arkansas and Tennessee but Mr. Cox cannot be so admitted under our rules without becoming a resident of Arkansas with the intention to maintain an office in Arkansas.

in medical malpractice, after consultation thought that Mr. and Mrs. Brown had a meritorious claim, I can only conclude that Mr. and Mrs. Brown have a meritorious cause of action that they are entitled to have submitted to a jury for a factual determination. Under these circumstances I challenge any member of the majority or the trial court to come forth with the name of any lawyer in Arkansas that has had any plaintiff success in the medical malpractice field in the trial courts and in persuading physicians and surgeons to break the so-called "conspiracy of silence." Had I been practicing law and had the Browns consulted me, I would have given them the same advice they got when they were referred to Mr. Cox. After all it would appear that the regulation of the practice of the law is for the benefit of the litigants not necessarily for the lawyers. If the regulation turns out in practice to be for only the benefit of the lawyers then we are subject to being chastised for operating a monopoly.

For the reasons stated, I respectfully dissent.

Marvin LOY et ux *v.* CITY OF HOT SPRINGS

74-181 516 S.W. 2d 3

Opinion delivered November 25, 1974

Sam Edward Gibson, for appellants.

Curtis L. Ridgway Jr, for appellee.

GEORGE ROSE SMITH, Justice. This litigation presents a decidedly novel fact situation. In January of this year the appellants, Marvin Loy and his wife, brought this suit to enjoin the City of Hot Springs from interfering with the Loys' possession of a house and lot on which they had occupied as their home for more than 20 years. The city asserted title to the property under a warranty deed by which the Hot Springs Humane Society of Garland County, a charitable corporation, purportedly conveyed the property to the city on October 11, 1973. The chancellor entered a decree in favor of the city, finding that the deed was valid and that the Loys had no standing to maintain the suit. The Loys were ordered to vacate the property within 30 days. In this court the Loys question both grounds for the decree.

In 1945 the Garland Circuit Court, upon a petition signed by twelve persons, entered an order incorporating the "Hot Springs Humane Society of Garland County, Arkansas," as a charitable corporation. The articles of incorporation defined the purposes of the Society as being to provide a shelter for dumb animals, to supervise the care and regulation of animals in Hot Springs, to raise money by subscription, membership dues, donations, or otherwise, to buy, sell, and own property, and to engage in other related activities.

In 1952 the Society employed Marvin Loy as its Animal Control Officer. Loy's compensation consisted of a monthly salary and the right to occupy the property now in question, rent free. The Society had purchased that property, for $2,000, with its own funds. Through the years the Society's income was derived from gifts, annual contributions (referred to as membership dues) in whatever amount the various donors chose to give, dog license fees, and, in some years, monthly contributions of $200 by the city and $100 by the county. An animal shelter was maintained upon the property until 1969.

The Society's affairs were largely conducted by three or four devoted persons, who served as officers. Finally, in 1969, the city adopted an animal control ordinance, established its

own animal shelter, and superseded the Society in its field of activity. Loy was employed by the city from 1969 until 1971 and continued to occupy the property now in dispute. The city terminated Loy's employment in 1971, but he remained in possession of the house and lot. By then the Society had become totally inactive. All its records had been destroyed, but the title to the property in issue was still in the Society.

In August of 1973 the city began taking steps to acquire the land. A "Petition for Reinstatement", directed to the circuit court, was prepared. The petition recited the Society's incorporation in 1945, the city's subsequent operation of an animal shelter, and the Society's ownership of the property now in question, which assertedly was not being used for any public purpose. The petition then alleged that "it is necessary to formally reinstate this corporation so that title to this property may be legally conveyed to the City of Hot Springs, Arkansas to be used for public purposes." (The city's answer in the case at bar asserts that it intends to lease the property to the Garland County Retarded Children's Association.) The petition concluded with a prayer that the circuit court reinstate the Society so that it could convey title to the city. At the end of the petition there were blank lines for 12 signatures.

The two people who had been serving as president and secretary of the Society when it ceased to function were still residents of Hot Springs, and testified at the trial, but they were not given notice of the proposed petition to the circuit court. Instead, the petition was signed, at the mayor's request, by 12 persons who happened to go into the mayor's office upon business of their own. All 12 testified that they had never been members of the Society and had never contributed to it. In October the petition was presented to the circuit court, by someone not identified in the record, in an *ex parte* proceeding. The court entered an order reinstating the corporation "for the purpose of adopting a resolution authorizing the transfer of this property to the City of Hot Springs."

On the night of October 11 seven of the twelve signers of the petition met in the mayor's office. They elected a president and a secretary, who then executed a warranty deed, for a recited consideration of one dollar, conveying the property

to the city. There is no contention that the city actually paid any consideration for the deed.

Upon the foregoing facts we cannot sustain the trial court's decree. Ordinarily, it is true, the plaintiff in a suit involving the possession of land must recover upon the strength of his own title. We have held, however, that a plaintiff's prior peaceable possession entitles him to recover land from a mere trespasser or interloper. *Wyatt* v. *Griffin,* 242 Ark. 562, 414 S.W. 2d 377 (1967); *Vanndale Spec. Sch. Dist. No. 6* v. *Feltner,* 210 Ark. 743, 197 S.W. 2d 731 (1946). Thus the Loys are not necessarily without standing to maintain this suit.

The question is whether the city's claim of title rises above that of an interloper. It does not. Exact rules are essential to the determination of the title to land. Here the Society originally purchased the property with its own funds. The city acquired no legally enforceable interest in the land either by its own contributions to the Society, which were not exclusive of other contributions made by the county and by individual donors, or by the city's ultimate assumption of responsibility for the care of stray animals. Needless to say, a lawyer examining the abstract of title could not approve municipal ownership based upon such nebulous considerations.

There remains only the deed executed by the "reinstated" charitable corporation, pursuant to the circuit court's order.We think that proceeding to have been void, and therefore open to collateral attack, for want of jurisdiction over the Society. *Black* v. *Burrell,* 175 Ark. 1138, 1 S.W. 2d 805 (1928); *Crittenden Lbr. Co.* v. *McDougal,* 101 Ark. 390, 142 S.W. 836 (1911). The 12 signers of the petition had no semblance of authority to act for the Society. They were volunteers who acted as the city's puppets in ostensibly obtaining the Society's property without notice to its surviving officers and without the payment of any consideration whatever. The law provides for the dissolution of defunct corporations, but it cannot be said that the procedure followed here, even if motivated by complete good faith, had the effect of divesting the Society's title.

Reversed and remanded for further proceedings.

STIMSON TRACTOR COMPANY *v.* Allen HEFLIN

74-140 516 S.W. 2d 379

Opinion delivered December 2, 1974

Gill, Clayton & Johnson, for appellant.

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

CARLETON HARRIS, Chief Justice. Appellant, Stimson Tractor Company, an Arkansas corporation engaged in selling Allis Chalmers farm equipment in Dumas, sold a new FR Allis Chalmers Gleaner Combine to Allen Heflin, appellee herein, pursuant to the terms of a security agreement. The purchase price was $20,115.21, the down payment being $5,-115.21, and the balance of $15,000 due in installments spread over a four year period. Actually, the down payment consisted of a trade-in of $7,184.74 on an older C2 Allis Chalmers Combine which belonged to appellee, less a balance still due on that machine of $2,069.53. Delivery was made around the first of September, 1971. Heflin did not make the

first payment due on December 1, 1971, and appellant, after accepting reassignment from Allis Chalmers, picked up the Combine and sold it at public sale on October 11, 1972 for $10,000. The parties stipulated that the requirements of the Uniform Commercial Code were complied with by appellant relative to the recovery of the combine, notice of sale, and the subsequent sale. Thereafter, appellant instituted suit for a deficiency of $5,418.35 (including all costs of the sale), and Heflin answered and counter-claimed, asserting a breach of warranty of fitness for the purpose for which the machine was sought, and asked for damages in the amount of his down payment. The counterclaim, after stipulation, included an allegation that appellant had breached an implied warranty of merchantability. Appellant's complaint was treated as amended to include an assertion of contractual limitation of the warranty of fitness for a particular purpose, and also an allegation that Heflin was precluded from asserting a breach of warranty by virtue of using the combine to harvest 200 acres of soybeans and approximately 60 acres of clover and Bahia grass. After stipulating that the combine was properly recovered and disposed of and agreeing that appellant's Retail Installment Contract could be introduced, appellee assumed the burden of going forward with his evidence. At the close of this evidence, appellant moved for a directed verdict, which was denied; appellant then introduced witnesses and at the conclusion of all evidence again moved for a directed verdict. The court again denied the motion and submitted the case to the jury, which returned a nine to three verdict for Heflin in the amount of $5,115.21. From the judgment entered in accord with this verdict, appellant brings this appeal.

Heflin's testimony detailed unsatisfactory performance of the machine, according to appellee, almost from the time he started using it, the witness mentioning a bent shaft and a burned out bearing. He stated, however, that the company fixed the shaft and put in another bearing. Heflin said that he started combining clover but the machine drew too much foliage into it and the chain broke. He fixed it, but a belt broke and the company replaced the belt. Appellee said that he didn't combine over 40 or 50 acres of Bahia with the combine and he next used it to combine beans, but that it picked up a chunk of wood, which twisted the auger. He mentioned

several instances of chunks being picked up, which would "strip the bolts" but he fixed the machine and combined 100 acres, combined a field for a neighbor, but constantly had trouble with the machine picking up too much foliage. Heflin said the machine wouldn't "do the job, *** just wasn't performing like it should — broke down too much." However, he said that he got out most of his crop.[1] His complaints could be summarized as stating that the machine "broke down" in the clover; "broke down" in the Bahia grass and "broke down" in the soybeans three times.

Company employees testified that appellee reported only two problems to the company, *viz.*, a broken belt, and a burned out bearing due to heavy foliage, which were promptly repaired. This evidence was not disputed by appellee, who stated that either he repaired the machine or the company repaired it on all occasions, and he agreed that the complaints made were not attributable to the mechanism of the machine itself, but were due to its picking up heavy foliage and chunks. Of course, it is manifest that these repairs were only minor, else Heflin could not have made some of the repairs himself.

An important fact is that the proof does not reflect that appellee was induced, or persuaded, by any assurances of appellant to purchase the combine; rather, the record clearly reflects that Heflin picked out the combine himself. The evidence shows that Heflin made two trips to the company office, desiring to purchase an FR combine, a different model from the C-2 traded in by appellee. Heflin testified that he realized it was different, and he said that company officials, on the first visit, told him that he lived so far away that service would be difficult, the witness further stating that he was told that Stimson was in the hospital and that his permission would have to be obtained to make the sale. On the second

[1]From the record:

"Q. All right, let me summarize then. Did you get your crop that year?

A. Most of it, just part of it. I didn't get it all.

Q. All right, how much in total do you think that you combined that year with that combine?

A. Around two hundred acres."

trip, permission was obtained from Stimson, and at that point it was sold. Heflin testified that he had farmed all of his life, and, under the evidence just mentioned, there was certainly no pressure on him to purchase the machine.

Heflin's criticisms of the combine related to the fact that there was no slip clutch, no throw out switch, and that the machine was chain driven, rather than belt driven. We reiterate that these were facts known to Heflin when the purchase was made, Heflin agreeing that he knew the combine was chain driven, and further stating that he was not told that it had a slip clutch. From the record:

> "They said they'd put slip belts on it, put belts on it that would slip, and I told-Well, I didn't tell them whether I'd take it or not and he said he'd come paint the cab. He did say that, but I just-I just wasn't satisfied with the combine, so I let them have it back."

The evidence reflected that to convert to a belt from a chain would have cost approximately $30.00, and Heflin was apprised of that fact.

Ark. Stat. Ann. § 85-2-608 (Add. 1961) sets out the grounds for revocation of acceptance in whole or in part. That section reads as follows:

> "(1) The buyer may revoke his acceptance of a lot or commercial unit whose non-conformity substantially impairs its value to him if he has accepted it
>
> (a) on the reasonable assumption that its non-conformity would be cured and it has not been seasonably cured; or
>
> (b) without discovery of such non-conformity if his acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances.
>
> (2) Revocation of acceptance must occur within a reasonable time after the buyer discovers or should have

discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it.

(3) A buyer who so revokes has the same rights and duties with regard to the goods involved as if he had rejected them."

The proof on the part of appellee does not reflect there was any defect to be cured for he knew, as previously pointed out, when picking out the machine, that it was different from the combine he was then operating. Certainly, there was nothing to prevent this experienced farmer, who examined the machine, from being thoroughly acquainted with it, and as already stated, there were absolutely no assurances from the seller. But, even if defects had been shown, or there had been testimony of the seller's assurances that any defects that existed would be corrected, still, there must have been a revocation of appellee's acceptance of the machine within a reasonable time after he discovered such defects. This brings us to the evidence in that regard.

Heflin testified that he notified appellant about November 20, 1971, that he did not want the combine and the company should pick it up. He stated that on January 5, 1972, he again told the company to pick up the machine. However, this testimony is clearly contradictory to later statements made by appellee, Heflin admitting that he told company representatives in January (after the two notices he said he had given the company) that he had not then decided whether or not he would keep the machine. Not only that, but Heflin, in April, 1972, while the combine was still in his possession, offered to pay $10,000 for it. It follows from what has been said that Stimson was entitled to recover the purchase price since there was no revocation within a reasonable time, and no proof in this record of a breach of warranty; the court should have granted a directed verdict for appellant.

However, this is not to say that Heflin cannot recover damages for breach of warranty. Comment 1 to Ark. Stat. Ann. § 85-2-608 (Add. 1961) points out that a buyer is no

longer required to elect between revocation of acceptance and recovery of damages for breach. Both are available to him, and accordingly, Heflin may still have a right to recover money damages provided he establishes a breach of warranty on remand of the case. Under Ark. Stat. Ann. § 85-2-607 (3) (a) and (4) (Add. 1961), the buyer is charged with the responsibility of giving notice of the alleged breach to the seller, and, of course, the burden of proof rests upon him. The type of damages to which Heflin might be entitled is set out in Ark. Stat. Ann. § 85-2-714 (Add. 1961). It would not appear that appellee is entitled to damages under Ark. Stat. Ann. § 85-2-715 (1) (Add. 1961) (incidental damages), since Heflin accepted the goods and, as pointed out, appellee did not establish revocation of his acceptance. Subsection (2) allows the buyer in appropriate circumstances to recover consequential damages.

We recognize that to permit Heflin to now seek damages for breach of warranty is contrary to our holding in *Hudspeth Motors* v. *Wilkinson*, 238 Ark. 410, 382 S.W. 2d 191, where this court held that there was no rejection or revocation by the buyer and we thus remanded the case for entry of a judgment in favor of the seller. *Hudspeth* was decided during the early years after the Uniform Commercial Code became effective in this State, and we were without benefit of briefs from both parties, only appellant submitting an abstract and a brief. We have now concluded, under the authority of the statutes cited in the previous paragraph, that this holding was in error and accordingly *Hudspeth* is overruled to the extent that the Circuit Court was directed to enter judgment for Hudspeth without first giving Wilkinson the opportunity to show damages for breach of warranty.

In the case before us, we are unable to say that on a retrial the evidence could not be more fully developed wherein it could be shown that appellee would be entitled to damages because the machine failed to perform its designed function of harvesting crops.

Reversed and Remanded.

JONES, BYRD, and HOLT, JJ., dissent.

CONLEY BRD, Justice, dissenting. I disagree with the majority that the appellee has failed to prove a defect in the FR Combine that he purchased. It may be that the majority's trouble is that they do not comprehend the weather conditions during combining season. However, I think everybody should take judicial knowledge of the fact that soy beans are generally harvested from the latter part of October through the early part of December — the record shows that this was the time that Mr. Heflin was attempting to use the combine involved. During that time of the year the days are short, there is much rain and heavy dew caused by the cold nights and heavy humidity. A combine will not work when the beans are wet with dew — appellant's witness Billy Cruse admits as much when he discussed the reason for the variable speed fan on the combine. Thus with a short time in which to gather beans because of the inclement weather and the short work days caused by heavy dew, any breakdown of a combine materially interrupts the harvest of the bean crop.

Another fact that the majority seemingly overlooks is that the combine delivered, although purchased in 1971, had apparently been on appellant's lot for some time since the cab was rusty and the drive belt was weather beaten. Heflin testified that appellant did not deliver the combine that he looked at when he made his purchase — this fact was controverted by appellant's salesman Mr. William · but of course in reviewing the evidence we are supposed to ta that view of the evidence most favorable to the jury's verdict.

With respect to the operation of the particular combine that was delivered, the proof is undisputed that it would lock down if a chunk should happen not to be lined up properly when it went into the combine. It is conceded by all witnesses that a small chunk did lock the combine down and that in so doing it bent the main auger flight. Appellant contended throughout that its warranty did not cover the cost of repairing the bent auger flight.

With respect to the operation of the combine Heflin testified that it choked down in combining clover, Bahia grass and soy beans. With reference to the combine's performance in the harvesting of soy beans he testified:

"Q. All right, and would you explain that to the jury and what occurred?

A. Well, I started combining beans. I worked about an hour and I picked up a little old chunk. It wasn't as big as a quart fruit jar and it twisted my auger, the big auger that pulls foliage into the combine, and I had to take the combine to a neighbor's house there and take the auger completely out of it and replace the bolts. They had stripped out. After it got that chunk, well, it couldn't pull it through and it stripped the bolts out of the end of the auger.

Q. What? Just broke down?

A. Yes, sir.

Q. All right, sir, then what did you do?

A. Well, I got started the next day and went back out there and combined about three or four hours and I picked up another little old chunk. Of course, we've got a lot of little old chunks in this country. And it stripped the bolts out again.

Q. All right, broke down again?

A. Yes, sir.

Q. Then what did you do?

A. I had to take it in and fix it at the same place and I got that fixed and I went on and combined for, I'd say, a hundred acres.

Q. All right, sir, a hundred acres. Then what occurred?

A. I picked up too much foliage in another man's field.

Q. Where did you go? Did you finish this combining?

A. I finished that field, yes, sir.

Q. Then where did you go?

A. I went to a man over close to Hampton, Lucian Goodwin.

Q. Allright, sir, what did you do there?

A. He had a hundred acres of beans I was combining and it picked up too much foliage and it stripped them bolts again. I was down another day."

Mr. Heflin testified that the chunks in his field were comparable to the fields in the area and that the smaller Allis-Chalmers combine that he traded in on the one in question performed satisfactorily.

Appellant's witness Billy Cruse who explained that none of the Allis-Chalmers combines have ever had an auger slip clutch on the header then testified as follows:

"Q. Let me direct you for a second. Does FR—Does a 1971 FR, does it have a slip chain drive on it?

A. From the factory."

It's true that in discussing the cost for Mr. Heflin to change from a chain drive to a belt drive that Billy Cruse first stated: "He would have had to have purchased two pulleys and one belt, approximately $30.00 or something or another in this range." In subsequent examination by the same witness the following occured:

"Q. No, sir, there's been testimony about a belt breaking due to weather, for instance, to wear due to weather.

A. After you once replaced a weathered belt you should have the equivalent to a new machine.

Q. Would you compare it to the fan belt on a automobile?

A. Yes, anything can weather. Their belts, I mean, it would be compared to a fan belt.

Q. What's the cost of a belt?

A. *They vary widely. Fan belts on them would be maybe $2.50, where the engine drive belt would be $85 or $90, anywhere in that range.* [Emphasis mine.]

Appellant's shop foreman testified that it would take $250 to replace the bent auger flight.

Thus we can see from the foregoing testimony that a 1971 model FR combine had a "slip chain drive on it" to protect the auger and prevent the break-downs of which appellee complained. There is testimony from which the jury could have found that appellant did not deliver a 1971 model machine and certainly not the machine at which appellee looked in making the purchase. Furthermore, there is ample testimony that it took a whole day to repair the combine in question after it "locked down" on a chunk. Of course nobody would want a passenger automobile if it got bent every time they had a flat and it took all day to repair the same — I don't think any equipment company should expect a farmer to spend all day repairing his combine after picking up a chunk that would ordinarily go through and be automatically ejected — obviously Allis-Chalmers does not expect to sell them to farmers because it installed the "slip chain drive" on the 1971 models.

Finally the majority take Mr. Heflin's testimony completely out of context and state that he did not properly revoke his acceptance of the combine within the purview of the Uniform Commercial Code. It must be remembered that not only did appellant's witness Williams understand that Heflin had revoked his acceptance but Heflin had already written a letter to Allis-Chalmers notifying them to come and get the combine. Furthermore, it must be remembered that the statement was made by a man with no formal education and to appellant's agents when they were trying to get Heflin to reconsider and keep the machine. Furthermore Heflin also testified with reference to contact by Cruse and Manes on January 7th as follows:

"Q. All right, now I'm going to ask you what, if any, additional or other contact you had with anybody at Stim-

son or Allis-Chalmers that you remember?

A. Well, they came over. I don't know what month it was. And tried to get me to keep the combine and I told them I didn't want it.

Q. Do you know who came over?

A. I can't think of his name. It was a salesman from Mississippi.

Q. Okay, fine."

In all of the appeals that have been before this court we have heretofore considered the evidence in the light most favorable to the jury's finding. When we view this record from that view point there is obviously ample evidence to sustain the jury's finding. To do otherwise we must consider the evidence out of context and most strongly against the person in whose favor the jury made its findings.

Therefore, I respectfully dissent.([1])

HOLT, J., joins in this dissent.

C. J. HENSON *v.* GOVERNMENT EMPLOYEES FINANCE & INDUSTRIAL LOAN CORPORATION

74-190 516 S.W. 2d 1

Opinion delivered December 2, 1974

([1])In my disposition of this case I do not reach the issue with respect to *Hudspeth Motors* v. *Wilkinson,* 238 Ark. 410, 382 S.W. 2d 191 (1964), but if I did I would agree that it should be overruled.

Jeff Duty, for appellant.

Dobbs, Pryor & Hubbard, for appellee.

GEORGE ROSE SMITH, Justice. This is an action in replevin brought by the appellee, a finance company engaged in business at Arlington, Virginia. The appellant is the owner of a garage at Bentonville, Arkansas. The parties assert rival claims to a Rover sedan that had been owned by Sam R. Laws. The issue, upon facts that do not seem to have yet been fully developed, is that of priority between the finance company's security interest in the Rover and the appellant's possessory claim to the vehicle. The trial judge, sitting as a jury, upheld the finance company's priority and entered a money judgment against Henson, on the ground that the vehicle had unaccountably disappeared while it was in Henson's possession.

We state the facts most favorably to the appellee. In the latter part of August, 1972, Laws brought a disabled Rover to Henson's garage at Bentonville. Efforts to repair it were not successful. Henson sold Laws a 1964 Lincoln car, on credit, for $595. Laws promised to have the money within a week and left the Rover as security for the debt. Some two months later Laws brought back the Lincoln, which, according to Henson, had "busted rings" and would not start. Apparently Laws had obtained a license for the Lincoln by registering it in Colorado. Upon Henson's refusal to rescind the sale without having been paid, Laws departed, leaving both cars.

On November 2, 1972, which was apparently a few days

later, an employee of the appellee finance company telephoned Henson and asserted a first lien against the Rover under a chattel mortgage that had been executed by Laws in Virginia more than a year earlier. Henson informed the caller that he planned to sell the Rover on November 4 to satisfy his claim.

On November 3, the day after that telephone call, Robert Blaylock, an employee of Arkansas Automobile Recovery, acting for the finance company, went to Henson's place of business to take possession of the Rover. Blaylock offered to pay any repair bills that were owed on the Rover, but Henson refused to accept the offer or to surrender the vehicle, which was then on the premises.

On November 7 the finance company filed this action in replevin to recover the Rover. That afternoon one of the company's attorneys accompanied a deputy sheriff to Henson's garage to serve the writ of replevin. Henson stated that he did not know where the Rover was, though he said he had not sold it. At the trial Henson again disclaimed any knowledge of the Rover's whereabouts.

The trial judge found that Henson "wrongfully held possession of the [Rover] owned by the plaintiff on November 2, 1972, and that the plaintiff was entitled to possession at that time." The court awarded the appellee a judgment against Henson for $1,750.63, which was the unpaid balance upon the plaintiff's mortgage and also the agreed value of the Rover.

We cannot sustain the court's finding that upon the facts shown the appellee's claim is prior to that of the appellant. All that the finance company relies upon is a chattel mortgage that is not shown to have been filed, pursuant to the Uniform Commercial Code, either in Virginia or in Arkansas. Without such a filing the appellee's security interest has not been perfected. Ark. Stat. Ann. § 85-9-302 (Supp. 1973). The appellee argues that the record contains no proof that its chattel mortgage was not duly filed, but it is elementary that the appellee, as the plaintiff, had the burden of proving its right to prevail.

On the other hand, Henson had possession of the Rover

when, as found by the circuit court, he "wrongfully" refused to surrender it. The Code, recognizing the validity of a common-law pledge, provides that a security interest in goods may be perfected by the secured party's taking possession of the collateral. Ark. Stat. Ann. § 85-9-305. Goods, as far as this case is concerned, are defined to include all things that are movable at the time the security interest attaches. § 85-9-105. Thus the common-law validity of a possessory lien is carried forward in the Code. See Anderson, Uniform Commercial Code, §§ 9-302:10 and 9-305:4 (2d ed., 1971); Ruud, *Secured Transactions: Article IX,* 16 Ark. L. Rev. 108, 125 (1961).

It follows that the trial court was in error in giving priority to the appellee's chattel mortgage. The cause must therefore be remanded for a new trial, which may involve a re-examination of any or all issues. *Clark* v. *Ark. Democrat Co.,* 242 Ark. 497, 413 S.W. 2d 629 (1967); *Hartford Fire Ins. Co.* v. *Enoch,* 79 Ark. 475, 96 S.W. 393 (1906). Therefore we need not discuss issues that depend upon the development of the proof, such as the appellee's standing if its mortgage was actually filed or the effect of either party's compliance with our motor vehicle title registration act. See Ark. Stat. Ann. § 85-9-302(4) and § 75-160 (Supp. 1973).

Reversed and remanded for a new trial.

David J. POTTER *v.* W. P. CITTY, Coroner of Miller County

74-196 516 S.W. 2d 597

Opinion delivered December 2, 1974

[Rehearing denied January 13, 1975.]

Tackett, Moore, Dowd & Harrelson, for appellant.

No brief for appellee.

LYLE BROWN, Justice. Appellant David J. Potter brought this action to enjoin the coroner, W. P. Citty. Potter alleged that the coroner, in connection with the death of Jimmie J. Potter, had conducted an illegal inquest; that the coroner was in a position to conduct further acts with regard to the death "without jurisdiction or authority to do so". Potter prayed that the coroner be enjoined from such further activities. The trial court sustained a demurrer to the complaint. Appellant here contends that the trial court had jurisdiction over the subject matter.

The demurrer must be sustained because nowhere in the complaint, which is the only evidence before us, is it alleged in what capacity appellant brought this action. Consequently, the trial court could not tell whether appellant was an interloper who happened to have the same name as the deceased.

Secondly, appellant alleges that the coroner "is in a position to perform further acts in regard to the death of Jimmie J. Potter" without jurisdiction or authority to so act. It is not alleged that the coroner is threatening such actions; nor do we know from the pleading the particulars of those acts. Facts must be alleged which show that action is imminent; and that such acts would be so manifestly beyond the authority of the coroner as to constitute an abuse of power. *Moore* v. *Board of Directors*, 98 Ark. 113, 135 S.W. 819 (1911). A demurrer does not admit any facts that are not well pleaded. *Palmer* v. *Cline*, 254 Ark. 393, 494 S.W. 2d 112 (1973).

Finally, appellant was in error in seeking an injunction to prohibit the coroner from performing an act of discretion. The statute provides that if the circumstances of a death be unknown, or if the circumstances of a death indicate foul play, a coroner's jury shall be summoned. Ark. Stat. Ann. § 42-301 (Repl. 1964) *et seq*. "It is not the duty of the coroner to inquire of sudden deaths, unless there is reasonable ground to believe that they are the result of violence or unnatural causes. The authority is to be exercised within the limits of a sound discretion, and when exercised, the presumption is that the coroner has acted in good faith on sufficient cause." *Clark County* v. *Calloway*, 52 Ark. 361, 12 S.W. 756 (1889).

Affirmed.

TITAN OIL & GAS, INC., et al *v.* Sam SHIPLEY et al

74-115 517 S.W. 2d 210

Opinion delivered December 2, 1974

[Supplemental opinion on Denial of Rehearing Jan. 20, 1975, p. 299A.]

Spencer & Spencer, for appellants.

Hale, Hale, Fincher & Hoofman, P. A., for appellees.

JOHN A. FOGLEMAN, Justice. At the very threshold we are

confronted with the most difficult question presented on this appeal, the answer to which determines whether we even consider appellants' other points for reversal. The case was tried before a special chancellor, whose election was timely questioned by appropriate objections made by appellants' attorney. These objections are brought forward here by the assertion that the purported election was invalid and, as a result, the special chancellor had no authority to hear or decide this case. Let it be understood that the Hon. Jack Young, the Special Chancellor, was serving by virtue of his selection at the questioned election — not on exchange or assignment. If his election was not in the manner prescribed by law, he had no judicial power, his acts are coram non judice, and, on direct attack, the decree must be set aside as void and the cause remanded for trial as if it had never been tried. *Trotter* v. *Neal,* 50 Ark. 340, 7 S.W. 384; *Hyllis* v. *State,* 45 Ark. 478; *Gaither* v. *Wasson,* 42 Ark. 126; *Dansby* v. *Beard,* 39 Ark. 254; *Abercrombie* v. *Green,* 235 Ark. 776, 362 S.W. 2d 12.

Ark. Stat. § 22-436 (Repl. 1962) provides that a special chancellor may be elected for the same causes and in the same manner as special circuit judges. We have held this act to be controlling. *Fortuna* v. *Achor,* 254 Ark. 1035, 497 S.W. 2d 251. The causes for and manner of selection of circuit judges are set out in Article 7, § 21 of the Arkansas Constitution. The first clause of that section is no longer fully applicable to chancery courts because of the abolition of terms of these courts. Ark. Stat. Ann. § 22-406.1 (Repl. 1973). Insofar as pertinent that section reads:

> Whenever the office of judge of the circuit court of any county is vacant at the commencement of a term of such court, or the judge of said court shall fail to attend, the regular practicing attorneys in attendance on said court may meet at 10 o'clock a.m. on the second day of the term, and elect a judge to preside at such court or until the regular judge shall appear; and if the judge of said court shall become sick or die or unable to continue to hold such court after its term shall have commenced, or shall from any cause be disqualified from presiding at the trial of any cause then pending therein, then the

> regular practicing attorneys in attendance on said court may in like manner, on notice from the judge or clerk of said court, elect a judge to preside at such courts or to try said causes, and the attorney so elected shall have the same power and authority in said court as the regular judge would have had if present and presiding; but this authority shall cease at the close of the term at which the election shall be made.

The order entered reflecting the action questioned by appellant reads:

> The regular Chancellor being on vacation and not returning until Tuesday, October 23rd, on Tuesday, October 16th Mr. Ben E. Rice was elected Special Chancellor and was unavailable to be here Wednesday, and will be unable to be here this day, it becomes necessary to elect another Special Chancellor to preside for hearings already set by the Chancellor.
>
> Whereupon, the hour of ten A.M. having arrived and the Honorable Darrell Hickman, being absent from the County, and Ben E. Rice, Special Chancellor, being unable to attend, the Clerk posted notices and gave all members of the bar present notice that an election of a Special Chancellor should be held at that time, and said Clerk did thereupon hold said election, at which time all the regular members of the bar voted, and Jack Young, a regular member of the bar of the Court having received the majority of the votes cast at said election, was declared duly elected Special Chancellor.
>
> Whereupon, the said Jack Young took the oath prescribed by law, and entered upon his duties as Special Chancellor of Pulaski Chancery Court, Third Division, when the following proceedings were had, to-wit:

We have long been committed to the rule that it is not required that the reasons for the election be stated upon the record of the proceedings for the election of a special judge under this constitutional provision and that the presumption will be indulged that the facts which make the election

necessary exist. *Lambie* v. *W. T. Rawleigh Co.,* 178 Ark. 1019, 14 S.W. 2d 245; *Fernwood Mining Co.* v. *Pluna,* 136 Ark. 107, 205 S.W. 822.

In determining whether the presumption has been overcome, we must examine the facts shown in support of the attack on Young's election. In doing so, we are not, in this case, restricted by the statement once made that irregularity in the election of a special judge cannot be raised by "bill of exceptions" but must be raised by amendment to the record, as would appear from *Arkadelphia Lumber Co.* v. *Asman,* 72 Ark. 320, 79 S.W. 1060. We have both previously and subsequently held that irregularities in the election of a special judge can be shown when the protest or objection is shown on the record in the trial court and this could be spread upon the record, under former practice, by bill of exceptions. See *Caldwell's Admn.* v. *Bell & Graham,* 6 Ark. 227, *Sweeptzer* v. *Gaines,* 19 Ark. 96; *White* v. *Reagan,* 25 Ark. 622; *Gordon* v. *Reeves,* 166 Ark. 601, 267 S.W. 133; *Fernwood Mining Co.* v. *Pluna,* supra. This, of course, is appropriate and proper, and as will be shown appellant here did attempt, albeit unsuccessfully, to contradict the record made. The party unsuccessfully challenging the action taken cannot very well dictate the content of the record of the factual statements therein. Appellant was not challenging the statements made on the record in *Arkadelphia Lumber Co.* v. *Asman,* supra, but was attempting to supply by a bystander's bill of exception an omission in the record which did not even show that a special judge presided in the case. In this respect, our decisions are not really in conflict. Insofar as the *Arkadelphia Lumber Co.* case would bar appellate review of appellant's challenge, we hold it to be inapplicable. In so saying, we are not oblivious to the fact that this case was cited with approval in *State* v. *Howard,* 251 Ark. 551, 473 S.W. 2d 443. It was fully applicable in *Howard* and correctly cited. Unlike the present attack, there was no attempt there to show the true facts allegedly not recited in the record in *Howard.* There was no record before us there, save the record made of the election. No evidence was introduced or offered to contradict the facts stated in the order. In such cases the real defect is that the party seeking review did not produce a record showing that an attack on the election was made in the trial court, as is

required, because we cannot consider the question on appellate review, unless it was raised in the trial court and the grounds of objection shown. See *Sweeptzer* v. *Gaines,* 19 Ark. 96; *Blagg* v. *Fry,* 105 Ark. 356, 151 S.W. 699. We hold that appellants' challenge to the election is properly subject to our review and do not consider this holding to be inconsistent with our holding in *Howard.*

We now proceed to outline the facts disclosed by the record. Hon. Darrell Hickman is the duly elected and commissioned judge of the court. There was testimony that, before commencing a vacation, Chancellor Hickman advised the clerk of the court he had "appointed" the Hon. Ben E. Rice and the Hon. Jack Young to try cases during his absence. Judge Hickman presided over the court on Thursday, October 10, 1973 and was scheduled to have held the Chancery Court of Lonoke County on Friday, October 11. He had not appeared in the Pulaski Chancery Court since October 10.

In compliance with Ark. Stat. § 22-406.2 (Repl. 1973) the chancellor had prepared a court calender. This calender was hung on the wall of the clerk's office and showed the dates the judge of each division would hold court in other counties and all other dates were devoted to Pulaski county. The dates for Judge Hickman's division were marked on a calender hung on the wall in his office. October 16, 17, and 18, 1973, were among the dates prescribed for the holding of the court presided over by Judge Hickman in Pulaski County. In August, 1973, this case had been specifically set for trial commencing on October 17 and continuing on the 18th and 19th. Rice had been elected chancellor on October 16, but did not appear on either October 16th or 17th. On October 17th, there was a purported election of Young as special chancellor which recited that Hickman was absent from Pulaski county. This election was held void by Young on that date upon objection by appellant.

On October 18, another election was held, and the clerk declared Young elected and he assumed the bench and proceeded to call this case for trial. Rice was in his office in Jacksonville at 9:00 a.m. on that date, and did not appear in

the courthouse in Little Rock on that day. On the morning of the day of the election, he advised the clerk by telephone merely that he "would not be available". The only notice of election of any kind was an unsigned one posted October 17th by the clerk on each entrance to the courtroom in which the Third Division of the Pulaski Chancery Court was normally held. The notice read:

> You are hereby notified that a special chancellor will be elected at 10:00 A.M. October 18, 1973, for Third Division of Pulaski Chancery Court, in the Third Division Chancery Court Room.

Twelve to fifteen attorneys appeared in the courtroom and participated in the election held at 10:00 a.m. at which Young was again elected. There was no written communication to the clerk from either Hickman or Rice, or any other document attesting the whereabouts of either, or the inability of either to be present on October 18.

After preliminary matters relating to pleadings in this case had been disposed of by Judge Young, appellants' counsel renewed the motion challenging the qualifications of the special chancellor. He showed by testimony of the clerk that she had learned that Judge Rice was unavailable only by his statement to that effect when she called him at his office in Jacksonville about 9:00 a.m. on the morning of the 18th, that Rice gave no reason for his inability to attend, that the notice referred to in the order was posted at each door of the courtroom the preceding day, October 17, that no notice was given to any attorney except by the notices posted, that there were probably only 12 to 15 lawyers present, and that a number of votes were cast in the election.

The special chancellor found that the notice, as well as the time and manner of election met constitutional requirements, and that the manner of determining the absence of the regular judge and any previously elected special judge was adequate for the proper administration of justice. He held that the necessity for election of a special chancellor did exist and that he had been properly elected.

It was essential to the election of a special judge in the circumstances prevailing here that the judge die, or be sick or *unable to hold court*. Appellant argues that inability to hold court in the sense of constitutional provision means a physical *disability*, relying to some extent upon our language in *State* v. *George*, 250 Ark. 968, 470 S.W. 2d 593, where we held that a special judge could be elected only to try cases pending at the time of the election. The expression upon which appellant relies relates to the provisions governing election of special judges after the term has begun where we said that after the term had begun and "the regular judge is physically unable to continue court . . . the attorneys may elect a judge". Appellant emphasizes the word "physically" in the above quotation in arguing that a judge must have suffered a physical *disability* before this clause applies. We think appellant overemphasizes this word. The sentence in that opinion was not written as a comprehensive or exclusive one, but was a general description of conditions under which this provision governed. We are unwilling to give such force to this dictum or to say that either Hickman, the regular chancellor, or Rice, assuming that he was duly elected special judge, was not *unable* to continue to hold court. Earlier cases had categorized this constitutional provision as coming into play when the regular judge falls ill or dies or is "unable for any cause to hold the court." *Cates* v. *Wunderlich*, 210 Ark. 724, 197 S.W. 2d 482; *Hyllis* v. *State*, 45 Ark. 478. If appellant's interpretation of the *George* language was correct, the words "shall become sick or die" would have sufficed without being followed by the words "or unable to continue to hold such court". We read our cases as being harmonious and do not interpret the language of *George* to be so restrictive as to limit the language either of the constitutional provision or the earlier opinions.

There is nothing in this record to show that the regular judge was not on vacation, or that he was able to continue to hold the court. Even if appellants' version of the *George* language is applied, one physically absent from Pulaski county would be physically unable to hold court. There is nothing in the record to show that Hickman was in the courthouse or in Pulaski county on the days when this case had been set for trial, which were also days designated for the holding of this

division of the court in Pulaski county. The inference that Rice was in Pulaski county is certainly permissible, but that fact alone does not mean that he was able to continue to hold the court. The reason for his unavailability does not appear, but in order to overcome the presumptive correctness of the record made, it was necessary that it be shown that he was able to hold court. We held in *George* that the very purpose of Article 7 § 21 was to avoid delay in the trial of pending cases which are about to be reached on the docket or which in fact have been reached, in emergency situations. We reiterated our position in *State* v. *Stevenson,* 89 Ark. 31, 116 S.W. 202 that the purpose of this constitutional provision was to keep the sessions of the court from failing and the courts in motion by special judges, whose function was to hold sessions of court and try those matters pending at the time of their appointment and until they are legally succeeded. We have recognized that the absence of the regular judge on a day properly fixed for holding court constituted such an emergency. *Little Rock & Ft. Smith Railway Co.* v. *Barker,* 39 Ark. 491, *Fernwood Mining Co.* v. *Pluna,* 136 Ark. 107, 205 S.W. 822.

The judge's determination of the necessity for his being absent from court on a day fixed for its being in session is conclusive and the record showing his absence and the election of a special judge in accordance with the requirements of the constitution is impervious to attack, not only collaterally, but on appeal, unless the facts which would defeat the election are recited in the record. *Fernwood Mining Co.* v. *Pluna,* supra. We cannot say that this record discloses facts showing that the election was unnecessary or improper. It was not even necessary that the record of the election recite that either Hickman or Rice was dead, sick or unable to hold court in order for it to be impervious to attack on appeal in the absence of an affirmative showing to the contrary. *Lambie* v. *W. T. Rawleigh Co.,* 178 Ark. 1019, 14 S.W. 2d 245. The mere absence of both Judge Hickman and Judge Rice on a day legally appointed for the holding of court made it the duty of the clerk to certify their inability to hold the court and to hold an election for a special judge to preside over the trial of pending cases. *Fishback* v. *Weaver,* 34 Ark. 569. As to Judge Hickman, mere physical absence might not have been sufficient if it had been shown that he was detained in another

county because of his judicial duties in connection with the holding of the chancery court there on a day legally fixed for the holding of that court. *Red Bud Realty Co.* v. *South,* 145 Ark. 604, 224 S.W. 964; *Caldwell* v. *Barrett & Turner,* 71 Ark. 310, 74 S.W. 748; *Street* v. *Reynolds,* 63 Ark. 1, 38 S.W. 150; *State* v. *Williams,* 48 Ark. 227, 2 S.W. 843. But see, Ark. Stat. § 22-406.2, 406.3 (Supp. 1973), 22-407 (Repl. 1962); *Brown* v. *Lewis,* 231 Ark. 976, 334 S.W. 2d 225 (in which the applicable statute is referred to as 22.408.1 as it was then digested). But a sufficient answer here is that it was not shown in attempting to overcome the presumptive validity of the election proceeding that this was the case. On the contrary, it appears that October 18 was a day lawfully fixed for holding the chancery court of Pulaski county.

There has been no implementation of Article 7 § 21 by statute or rule to prescribe procedures to be followed in the giving of notice or the conduct of the election of a special judge. Even though the posted notice was not signed, the clerk posted it on the day before the election. Notice to the "regular practicing attorneys in attendance on said court" was all that was necessary. It is not required that notice be given to all attorneys regularly practicing before the court or that it be published in any particular manner or be written or signed. The regular practicing attorneys in attendance were those present at the time regularly appointed for holding court when the words "in attendance on said court" are given their plain, ordinary meaning. The only statute which would possibly have any bearing is Ark. Stat. Ann. § 22-339 (Repl. 1962), passed prior to the adoption of our present constitution. It implemented § 9 of Art. VII of the Constitution of 1868 which provided for election of special judges. It was contained in Title XV, Chap. IX, Art. II, Miscellaneous Proceedings, which was no more specific as to the manner of proceeding than Article 7 § 21 of the present constitution. Section 22-339 provides for an election by the "attorneys then present". We have treated the words "regular practicing attorneys in attendance on said court" to convey virtually the same meaning. See *Abercrombie* v. *Green,* 235 Ark. 776, 362 S.W. 2d 12; *Bradley* v. *State,* 213 Ark. 927, 213 S.W. 2d 901; *Neal* v. *Shinn,* 49 Ark. 227, 4 S.W. 771. Although the challenge there was not directed to the notice, in *Fernwood Mining Co.* v.

Pluna, 136 Ark. 107, 205 S.W. 822, notice was given by the clerk to the attorneys assembled in the courtroom. In *Howard*, the record recited that the notice was given to "members of the bar present" and to "all members of the bar in attendance on said court".

Appellant also challenges the jurisdiction of the chancery court to entertain an action under Ark. Stat. Ann. § 67-1256 (Repl. 1966). This is a two-pronged argument. The first is that, since the statute provides that the action may be brought either in law or equity, there was an adequate remedy at law. The second is that the General Assembly cannot confer on the chancery courts any jurisdiction they did not possess at the time of the adoption of the Constitution of 1874. The answer to the first argument is that no motion to transfer to law was made by appellant. Error in bringing a suit in equity when there is an adequate remedy at law is waived by failure to move to transfer the cause to the circuit court, so that the chancellor's decree is not subject to reversal for failure to transfer the case where the adequacy of the remedy at law is the only basis for questioning equity jurisdiction, unless the chancery court is wholly incompetent to grant the relief sought. *McMillan Feeder Finance Corp.* v. *Stephens*, 240 Ark. 167, 398 S.W. 535; *Reid* v. *Karoley*, 232 Ark. 261, 337 S.W. 2d 648; *Hemphill* v. *Lewis*, 174 Ark. 224, 294 S.W. 1010; *Higginbotham* v. *Harper*, 206 Ark. 210, 174 S.W. 2d 668; *Newell Contracting Co.* v. *McConnell*, 156 Ark. 558, 246 S.W. 854; *Sledge Norfleet Co.* v. *Matkins*, 154 Ark. 509, 243 S.W. 289; *Moody* v. *Brinkley*, 17 Ark. 340. The underlying basis for this holding is that this is the sort of question which cannot be first raised on appeal. *Owen* v. *Johnson*, 222 Ark. 872, 263 S.W. 2d 480; *Columbia Compress Co.* v. *Reid*, 160 Ark. 436, 254 S.W. 825; *Sessoms* v. *Ballard*, 160 Ark. 146, 254 S.W. 446; *Gerstle* v. *Vandergriff*, 72 Ark. 261, 79 S.W. 776. See also, *King* v. *Payan*, 18 Ark. 583. Furthermore, it is not error to refuse to transfer a case to the court of law where the jurisdiction of the two courts is concurrent. *McClelland* v. *Linton*, 121 Ark. 79, 180 S.W. 482; *Goodrum* v. *Merchants & Planters Bank*, 102 Ark. 326, 144 S.W. 198; *Cribbs* v. *Walker*, 74 Ark. 104, 85 S.W. 244; See also, *Wilson* v. *Lucas*, 185 Ark. 183, 47 S.W. 2d 8. On the other hand, it is reversible error to transfer a case brought in equity to the law court, if equity has concurrent

jurisdiction. *Vaughan* v. *Hill*, 154 Ark. 528, 242 S.W. 826. Where there is concurrent jurisdiction, the court which first acquires jurisdiction may, as a rule, retain it. *Bagnell Tie & Timber Co.* v. *Goodrich*, 82 Ark. 547, 102 S.W. 228.

As will be seen, the chancery court was not wholly incompetent to grant the relief sought here, so the question of the adequacy of the remedy at law has been waived and cannot be raised for the first time on appeal. And, as appellants point out, the statute itself makes the jurisdiction concurrent. Ark. Stat. Ann. § 67-1256. While we think that there was no reversible error in the chancery court's entertaining jurisdiction in this case for the reasons hereinabove set out, appellants further argue that the chancery court had no jurisdiction of the action, because it was brought under the statute. Appellants contend that the statute is an unconstitutional extension of the jurisdiction of the chancery court relying upon Article 7 § 15 of the Arkansas Constitution and such cases as *Nethercutt* v. *Pulaski County Special School District*, 248 Ark. 143, 450 S.W. 2d 777; *Patterson* v. *McKay*, 199 Ark. 140, 134 S.W. 2d 543; *Gladish* v. *Lovewell*, 95 Ark. 618, 130 S.W. 579; *Hester* v. *Bourland*, 80 Ark. 145, 95 S.W. 992. For the most part these cases fall into that classification wherein the chancery court is, and always has been incompetent to act, and for that reason are not controlling here, as we will show. *Patterson* v. *McKay*, however, is different and is actually somewhat supportive of the opposite point of view, i.e. a statute that does not grant jurisdiction but only establishes a statutory method of exercising jurisdiction already existing does not run afoul of the constitutional prohibition.

In considering the question thus posed, we must examine the statute in question insofar as it relates to the case at hand. Appellees alleged that Titan Oil & Gas, Inc. sold undivided working interests in non-producing oil and gas leases on lands in Lubbock County, Texas, in violation of the Arkansas Securities Act [Ark. Stat. Ann. § 67-1235 et seq (Repl. 1966 and Supp. 1973)] in that they were securities which had not been either registered or exempted from registration and the sales were effected through means of fraudulent representations and statements which operated as a fraud or deceit upon them. They offered to deliver to the

court the certificates issued to them and to pay into the treasury of the court all income they had received on the securities. They prayed for recovery of the consideration paid for these certificates. They amended the complaint to specify the purchases, considerations paid and the representations, statements and actions which they contended operated as fraud and deceit upon them. They alleged that they were entitled to recover the consideration paid by them, interest, costs and a reasonable attorney's fee pursuant to Ark. Stat. Ann. § 67-1256 and to have the contracts rescinded, cancelled and held for naught, and for recovery of the consideration paid, under traditional principles of equity. Thus it will be seen that appellants proceeded not only under the statute but under preexisting equity principles.

Under the Arkansas Securities Act is is unlawful for any person, in connection with the offer or sale of any security[1] (1) to employ any device, scheme, or artifice to defraud, (2) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make statements made, in the light of circumstances under which they are made, not misleading, or, (3) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person. Section 67-1256 provides that one who offers or sells a security by means of such untrue statement or omission is liable to a buyer who did not know of the untruth or omission, either at law or in equity, for the consideration paid for the security, interest at 6% per annum, costs and reasonable attorney's fees, less income on the security received by purchaser, or for damages if the buyer no longer owns the security.

It will be seen that the cause of action under the statute is not a great deal broader than the common law actions of fraud and deceit and the equitable proceeding for cancellation of a contract and rescission, particularly when we consider that type of fraud usually referred to as "legal or constructive fraud," i.e., misrepresentations having a tendency to deceive others, but made as true without knowledge of their

[1]Although appellants express doubt that the certificates involved here are securities under the Act, referring to *Shepherd* v. *State*, 246 Ark. 744, 439 S.W. 2d 627, they did not urge the inapplicability of the statute as a point for reversal.

falsity and without any moral guilt or evil intention. See *Hunt* v. *Davis,* 98, Ark. 44, 135 S.W. 458; *Cribbs* v. *Walker,* 74 Ark. 104, 85 S.W. 244; *Standard Motors Finance Co.* v. *Mitchell Auto Co.,* 173 Ark. 875, 293 S.W. 1026; *Miskimins* v. *City National Bank of Ft. Smith,* 248 Ark. 1194, 456 S.W. 2d 673. The general rule is that where there is fraud, equity has either exclusive or concurrent jurisdiction. *Wadkins* v. *Bank of Vandervoort,* 176 Ark. 1206, 3 S.W. 2d 696. Where courts of equity have subject matter jurisdiction they do not lose it by reason of a statute giving similar jurisdiction to courts of law. *Vaughan* v. *Hill,* 154 Ark. 528, 242 S.W. 826; *King* v. *Payan,* 18 Ark. 583.

The exercise of equity jurisdiction was not frozen in a rigid mold by the constitutional limitation. While new subject matter jurisdiction cannot be conferred by legislative act, it is quite clear that new procedures, approaches and treatment may be prescribed, followed and applied. Otherwise, the maxim that equity suffers no wrong to be without a remedy, the very foundation of chancery court jurisdiction, would be meaningless. The statute here defines what constitutes the legal wrong (fraud) entitling a buyer to have rescission and restitution. There is no reason why the remedy for the wrong should not be granted by the court which has always had jurisdiction of the "wrong" and the "remedy" prescribed. We have stated that equity must always be as astute in preventing fraud as corrupt minds are in conceiving it and that a court of conscience must keep the granted relief abreast of the current forms of iniquity. *Renn* v. *Renn,* 207 Ark. 147, 179 S.W. 2d 657. We have added that equitable relief should not be refused because of technical distinctions, where the evidence firmly establishes that fraudulent acts have been committed. *Vaughan* v. *Sutton,* 236 Ark. 310, 365 S.W. 2d 863. We have recognized that statutory provisions may constitutionally affect the method of exercising existing equity jurisdiction or regulate the chancery practice. *Patterson* v. *McKay,* supra; *Wilson* v. *Lucas,* 185 Ark. 183, 47 S.W. 2d 8.

To summarize, the action brought by appellees was based primarily upon allegations of fraud upon which they sought cancellation of certain instruments and contracts and restitution, and being peculiarly within the established

powers of equity, was one in which equity jurisdiction was properly assumed and exercised, even though the law court might have had concurrent jurisdiction and some of the relief sought as an incident to the action might have been of a purely legal nature. See *Cribbs* v. *Walker,* 74 Ark. 104, 85 S.W. 244; *Tandy* v. *Smith,* 173 Ark. 828, 293 S.W. 735; *Schley* v. *Dodge,* 192 Ark. 365, 91 S.W. 2d 280; 12 C.J.S. 943, 1022, Cancellation of Instruments, §§ 2, 50. There was no error on this score.

Appellants next contend that appellee Gary E. Jones was not entitled to recover under the Arkansas Securities Act. This argument is based upon provisions of Ark. Stat. Ann. § 67-1256 (f). That subsection bars any person who has made or engaged in the performance of any contract in violation of the act, with knowledge of the facts by which its making or performance was in violation, from basing any suit on such contract. Appellants argue that this appellee was a vice-president of Titan and a salesman for them who made most of the sales in Arkansas and received commissions for the sales, that he contacted prospective purchasers, furnished them with copies of a prospectus and other instruments, invited them to meetings where the interests were discussed and generally participated actively in the sale of the interests involved in this action.

Among the findings of fact made by the chancellor was that sales of interests were made to Gary E. and Janie J. Jones on August 9, November 1 and 23, and December 17, 1971 and January 21, 1972, but that, even though Gary E. Jones received commissions for sales to purchasers in Arkansas, the record was unclear as to whether those commissions or his activities were directly or materially involved in any of the sales to the parties to the action. It should be noted that appellee Gary E. Jones was made a party to the action by a cross-complaint filed by appellants, to which he responded with a counterclaim based on virtually the same allegations as were made by other appellees in the complaint in the action.

Appellee Shipley, a purchaser of some of the interests involved, first heard of Titan Oil & Gas Co. Inc. in June or Ju-

ly, 1971, from Gary Jones, a friend and fellow employee at the Arkansas Department of Health. Gary Jones only said that he had heard about some wells in Louisiana and mentioned the name of his father, Gomer Jones. Shipley decided to invest after he had thoroughly read a prospectus and letter from an accounting firm in Monroe, Louisiana, given him by Gary Jones. Sometime in September or October, he received a map which was either presented at a meeting held then, or given him by Gary Jones. Gary Jones invited him to the meeting. Shipley was told by Gary Jones that he was representing Titan and receiving commissions from it. Shipley said that there was nothing false, fraudulent or misleading in the prospectus, or in the accounting information, except that he understood from what appellant Murphy later said that the statement was based on actuality, rather than assumptions, even though the statement itself stated that it was based upon certain assumptions. He knew of nothing that Gary Jones said that was false, fraudulent or misleading.

James P. Jones was also a State Health Department employee. He was told of Titan and given a prospectus by Gomer Jones. He went to the meeting in September or October upon invitation of Gary Jones. Both Gary and Gomer Jones were present at the meeting, but James P. Jones did not see them participate otherwise. James Jones later received a prospectus on a Henry Mahoney well, in which he participated, from Gary Jones. He also was invited to Gary's home where he met and discussed oil investments with appellant Beck. He then learned that Gary represented Titan.

Gomer Jones testified that he became sales representative and a vice-president of Titan on July 1, 1971, before his son Gary became a sales representative. He contacted Gary about the matter on the same day he contacted James P. Jones. Appellant Harvey also testified that Gary Jones was elected as vice-president subsequent to Gomer's election in July. He said that all sales made in Arkansas were made by Gary Jones, Gomer Jones or Arlen Craig, Jr. Harvey said that the meeting with investors in the fall of 1971 was held at the request of "Mr. Jones", but it is apparent that the reference was to Gomer Jones.

Gary Jones said that he and his wife made an investment in a well known as Gertrude Wright No. 1 on August 9, 1971, after having read some material relating to it shown to him by his father. He said after this well proved to be a producer, his father asked him if he would be interested in being a sales representative. He said that he had never participated in, or received notice of any stockholders' meetings, or received any dividends from Titan and that he had never before been involved in any oil ventures or "security deals".

There is absolutely no evidence that Gary Jones made any representations to any of the appellees or that he had any knowledge whatever of "...the facts by reason of which [any contract made] was in violation..." of the statute. Furthermore, he did not sue on a contract. He sued to cancel contracts made and to recover the consideration paid by him. It would be difficult to say that Gary Jones "made or engaged in the performance" of the contracts on which he was the purchaser in violation of the provisions of the act. To say the least, we could not say that there was a preponderance of evidence showing that Gary Jones was barred from recovery under the act.

Appellants next contend that there was not sufficient evidence to establish common law fraud or deceit on their part. This point for reversal seems totally dependent upon appellants' argument that the chancery court had no jurisdiction of the statutory action. There is no argument that the evidence was insufficient to establish a cause of action under the Arkansas Securities Act. It is quite clear that the chancellor held that appellees had established a cause of action under the act and that the court's decree is based substantially upon that holding with particular emphasis on omissions of appellants to state material facts in order to prevent statements made from being misleading and the failure of appellants to show by a preponderance of the evidence that they did not know, or in the exercise of reasonable care could not have known, of the untruth or omission. Since we have held that the trial court did have jurisdiction of the action on statutory grounds, we find it unnecessary to determine where the preponderance of the evidence as to common law fraud and deceit lies. No useful purpose would be served by a

review of the evidence as to the liability of appellants under the act, and it would only serve to extend this already lengthy opinion. It is sufficient to say that we could not say that the chancellor's holding or the statutory cause of action was erroneous or clearly against the preponderance of the evidence.

Finally, appellants argue that they were entitled to contribution from both Gary Jones and Gomer Jones under Ark. Stat. Ann. § 67-1256(b) (Repl. 1966). The chancellor dismissed appellants' cross-complaint against Gary E. Jones but rendered judgment in their favor against Gomer Jones as to $3,150 of the collective judgment together with pro rata costs and attorney's fees. The trial court found that, by a preponderance of the evidence, Gomer Jones was a participant in the initial sale of interests to appellees Shipley, James P. Jones and Gary E. Jones with respect to the well known as Gertrude Wright No. 1. Otherwise, it was found that as to further involvement of either Gomer or Gary E. Jones, the record was clear that they received commissions for sales, but was "unclear that those commissions or their activities were directly or materially involved in any of the sales to the parties to this action".

The section of the act upon which appellants rely makes every officer of a seller and every employee or agent of a seller who materially aids in the sale jointly and severally liable with the seller, unless the officer, employee or agent sustains the burden of proving that he did not know, or in the exercise of ordinary care, could not have known, of the existence of facts by reason of which the liability is alleged to exist. It also provides for contribution as in cases of contract among those liable.

There is little need to discuss the evidence as to the participation of Gary Jones in the sale to James P. Jones. Gomer Jones contacted both James and Gary with reference to the sale of interests on the same day. As a result, Gary himself invested in Gertrude Wright No. 1 and when it was reported that this well was a producer he became enthusiastic. Other purchases made by James were made after he attended a meeting at which appellants Harvey, Murphy (president)

and Beck (vice-president) spoke and presented material, and on another occasion after Gary Jones had merely brought him a prospectus. James Jones said that neither Gomer nor Gary participated in the meeting even though Gary had invited him. He also had a private conversation with Beck just after the meeting, but before he invested in the John Owens well on that occasion.

Shipley found nothing misleading about material Gary Jones furnished. Gary did nothing more than invite Shipley to the meeting addressed by Murphy, Beck and Harvey. The question whether Gary Jones materially aided in these sales was one of fact, the resolution of which depended to some extent on the inferences drawn from the testimony. We are unable to say that the chancellor's finding on this question was clearly against the preponderance of the evidence.

We quite readily agree with the chancellor that Gomer Jones was a material participant in the sales of interests in the Gertrude Wright No. 1 well. We likewise cannot say that denial of further relief against him was erroneous. Appellants had the burden of proving by a preponderance of the evidence that his further participation materially aided in the sales. The chancellor's saying that the record was unclear, means to us that, in his opinion, there was not a clear preponderance, in which case appellants failed to meet their burden. *Neil* v. *Deming*, 21 S.W. 1066. "Preponderance of the evidence" means evidence of greater convincing force and implies an overbalancing in weight. *Smith* v. *Magnet Cove Barium Corp.*, 212 Ark. 491, 206 S.W. 2d 442. Where the evidence tends equally to sustain two inconsistent propositions, the party having the burden of proof cannot prevail. *Standard Pipe Line Co.* v. *Burnett*, 188 Ark. 491, 66 S.W. 2d 637, cert. den. 292 U.S. 649, 545 S. Ct. 857, 78 L. Ed. 1499; *Biddle* v. *Jacobs*, 116 Ark. 82, 172 S.W. 258; *St. Louis I.M. & S. Railway Co.* v. *Henderson*, 57 Ark. 402, 21 S.W. 878. See A.M.I. Civil, 2d Ed., 202.

In arriving at his conclusion, the chancellor necessarily had to decide to some extent what inferences were proper to be drawn from the evidence, and to weigh the evidence in the light of his evaluation of the credibility of the witnesses.

There were no really disinterested witnesses on this point. There is no indication in Shipley's testimony that Gomer Jones actively participated in any sales to him after the first investment in Gertrude Wright No. 1. James P. Jones knew that Gomer Jones was being paid commissions on his purchases, but gave no indication that Gomer had actively participated in the sales after his original purchase. Gomer Jones stated that he was never consulted by Titan officers about anything except sales, but he admitted he had encouraged the meetings in Arkansas in which they participated. He also testified that he knew nothing about the oil business and that he never saw any meeting at which minutes were taken. He introduced the appellants who were officers of Titan at meetings appellees attended. There is no indication that he did more than this at a meeting, except for inviting persons present to ask questions of Harvey, Beck and Murphy. Gomer Jones said that he invested his commissions in the various operations in which Titan was selling interests.

The weight to be given evidence depends upon its effect in inducing belief. *Romines* v. *Brumfield,* 199 Ark. 1066, 136 S.W. 2d 1023. Where evidence is in conflict, that which preponderates is the evidence entitled to greater weight in respect to credibility. *Missouri Pacific Railroad Co.* v. *Hancock,* 195 Ark. 414, 113 S.W. 2d 489. There is a preponderance of the evidence only when there is a preponderance of all reasonable inferences that might be drawn to prove the principal facts sought to be established, sufficient to outweigh all other contrary inferences. *Smith* v. *Magnet Cove Barium Corp.,* supra.

Even though we try chancery cases de novo on appeal, we will affirm the chancellor's decision and will not disturb his findings of fact, unless they are clearly against the preponderance of the evidence. *Campbell* v. *Richardson,* 250 Ark. 1130, 468 S.W. 2d 248; *Bollen* v. *McCarty,* 252 Ark. 442, 479 S.W. 2d 568. Where the testimony is in sharp conflict, or is evenly balanced, and the state of the record is such that we are in doubt as to where the preponderance of the evidence lies, we will be governed by the chancellor's findings if he has not erroneously applied the law. *Willis* v. *Denson,* 228 Ark. 145, 306 S.W. 2d 106; *Brunson* v. *Reinberger & Collier,* 134 Ark.

211, 203 S.W. 269. On the record here, when we consider those factors bearing on the chancellor's decision, we are unable to say that he erred in weighing the evidence.

Since appellant has not demonstrated error, the decree is in all respects affirmed.

Supplemental Opinion on Rehearing
delivered January 20, 1975

JOHN A. FOGLEMAN, Justice. In their petition for rehearing, appellants have correctly pointed out that in our opinion of December 2, 1974, we overlooked their contention that Gary E. Jones and Gomer Jones should be held liable under Ark. Stat. Ann. § 67-1256 (b) as officers of Titan Oil & Gas, Inc., the seller. Even though this point was only casually stated in appellants' brief, it was argued in their reply brief. It was clearly overlooked by the trial court, even though, when the pleadings are construed in favor of the pleader, the question was in issue. Sec. 67-1256 (b) clearly makes an officer of a seller liable jointly and severally with and to the same ex-

tent as the seller unless he was a non-seller and sustains the burden of proving that he did not know and in the exercise of reasonable care could not have known of the existence of the facts by reason of which the liability was alleged to exist. It provides for contribution "as in cases of contract among the several person so liable".

As we read the statute, an officer who materially aids in a sale would be liable regardless of his knowledge or lack of knowledge. Consequently a discussion of this liability on the part of Gary E. Jones and Gomer Jones is material to our affirmance of the chancellor's finding on this liability only and we adhere to our original opinion insofar as this question is concerned. On the other hand, the chancery court did not consider or decide the question of the liability of an officer who is a non-seller.

The general rule in equity cases is that, with all the record fully developed, we should finally decide a case here instead of remanding it to the chancery court, particularly when we can plainly see what the rights and the equities of the parties are. *Narisi* v. *Narisi,* 233 Ark. 525, 345 S.W. 2d 620; *Pickett* v. *Ferguson,* 45 Ark. 177, 55 Am. St. Rep. 545. We can say that this is the case with reference to the liability of Gary E. Jones. We note that under Ark. Stat. Ann. § 67-1256 (f) Gary E. Jones would have been barred from recovering if he had knowledge of the facts by which the making or performance of the contract with him was in violation of the Arkansas Securities Act. In our original opinion we stated that there was no evidence that Gary E. Jones had any knowledge whatever of the facts by reason of which any contract made was in violation of the statute and that we could not say that there was a preponderance of the evidence showing that Gary Jones was barred from recovery.

The testimony shows that Gary E. Jones had heard about these wells in Louisiana and that he had accepted, at face value, a prospectus and a letter from Donald & Kuhn, accountants in Monroe, Louisiana. The appellee-plaintiffs did not contend that these were misleading. There was also testimony that Gary E. Jones attended the meetings that other purchasers attended but otherwise did not participate

in the meetings. Gary E. Jones received the prospectuses from his father Gomer, who asked him to read them. It was only after the first well was a producer that his father asked him if he would be interested in being a seller's representative. He made investments just as the other purchasers did. He testified that he never received notice or participated in any shareholders' meetings. He said that he had never been involved in any oil ventures or securities dealings prior to these. According to appellant Harvey, Gary E. Jones was not elected vice president until sometime in the fall of 1971, "around October". At this time, Shipley and James P. Jones had already purchased interests in at least one well. We feel that Gary E. Jones sustained the burden of proving that he did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability was alleged to exist.

The situation is quite different as to Gomer Jones. We cannot say that we can plainly see what the rights and the equities of the parties are as to him or the decree which should have been rendered on the cross-complaint against him. It is true that the chancellor held that there should be contribution on his part as to $3,150 of the collective judgment against Titan and its other officers, together with pro rata costs and attorneys' fees. This holding was obviously based on the sales in which Gomer Jones materially aided.

Contribution is an equitable doctrine and relief is granted only when the equities are equal. See *Taylor* v. *Joiner,* 180 Ark. 869, 24 S.W. 2d 326; *U. S. Fidelity and Guaranty Co.* v. *Aetna Casualty & Surety Co.*, 418 F. 2d 953 (8th Cir. 1969). See also *Risor* v. *Brown,* 244 Ark. 663, 426 S.W. 2d 810. It is abundantly clear that the chancery court left this issue undecided and that questions of fact were involved. Since this is so, we exercise our discretion to remand this case to the trial court for a determination of this issue on the cross-complaint against Gomer Jones.

In all other respects we adhere to our original opinion.

Bonnie Black WALKER and Janet Elaine WALKER *v.* Betty Walker YARBROUGH, Administratrix of the Estate of A. C. (Jack) Walker, Deceased

74-141 516 S.W. 2d 390

Opinion delivered December 2, 1974

Dan McCraw, Ike Allen Laws Jr., P.A. and *W. H. Schulze,* for appellants.

Williams & Gardner, for appellee.

J. FRED JONES, Justice. A. C. (Jack) Walker died on November 12, 1969, and Betty Walker Yarbrough was appointed administratrix of his estate in compliance with her petition alleging that she was the only daughter and sole surviving heir of Mr. Walker. The appellant, as Bonnie Black Walker, filed a petition in the probate court alleging that she was the widow of Mr. Walker and that her minor child, Janet Elaine, was a daughter and heir of Mr. Walker and as such was entitled to a one-half interest in his estate after the expenses of administration, and her own dower interest were set aside. The appellant prayed that her dower interest in the

property of Mr. Walker be set aside and awarded to her and that their daughter, Janet Elaine, be awarded her one-half interest in the remainder of Mr. Walker's estate. Bonnie's petition was based on an alleged common-law marriage. The probate judge found that Bonnie failed to establish a valid common-law marriage with Mr Walker. He dismissed her petition and decreed that Betty Walker Yarbrough was the sole surviving heir of Mr. Walker and was entitled to his estate.

On appeal to this court Bonnie and Janet Elaine rely on two points for reversal: First, they contend that the chancellor erred in finding that A. C. (Jack) Walker and Bonnie Black Walker were not common-law husband and wife and, second, they contend that there was substantial evidence Janet Elaine was the daughter of A. C. (Jack) Walker and that he recognized her as such. We do not reach appellants' second point because we are of the opinion the chancellor was correct in finding that A. C. (Jack) Walker and Bonnie Black Walker were not common-law husband and wife.

Bonnie's petition, insofar as the child is concerned, is based on Ark. Stat. Ann. § 61-141 (b) (Repl. 1971) which reads as follows:

> "If a man have a child or children by a woman, and afterward shall intermarry with her, and shall recognize such child or children to be his, such child or children shall be deemed and considered as legitimate."

It is conceded by all parties concerned that Mr. Walker and Bonnie were never married in a civil or religious ceremonial marriage and apparently the parties recognize that before Bonnie or her child, Janet Elaine, would be entitled to share in Mr. Walker's estate, it would be necessary to prove that Mr. Walker had intermarried with Bonnie.

The evidence is to the effect that Mr. Walker was approximately 65 and Bonnie was approximately 34 years of age when they met in Hot Springs in 1958 or 1959. Mr.

Walker owned farmland with a house thereon near Russellville and also maintained a house trailer at different locations in Hot Springs. Bonnie owned her home in Hot Springs and she and Mr. Walker entered into an illicit relationship and periodic illegal cohabitation in Hot Springs and on his farm near Russellville, and the relationship continued intermittently until about 1967.

The child Janet Elaine was born to Bonnie on August 28, 1963. There is considerable conflicting evidence directed to the question of whether Mr. Walker was the father of the child and to his acknowledgment that he was the father of the child as well as to his acts and intentions concerning her welfare. We find it unnecessary to discuss this evidence because this case turns on the question of whether Mr. Walker and Bonnie ever married. Common-law marriages, of course, are not permitted in Arkansas and the question narrows down to whether or not a marriage was contracted between the parties outside the state of Arkansas which would be recognized in this state under Ark. Stat. Ann. § 55-110 (Repl. 1971) which reads as follows:

> "All marriages contracted without this State, which would be valid by the laws of the State or country in which the same were consummated, and the parties then actually resided, shall be valid in all the courts in this State."

The evidence on this point is to the effect that in 1966 Mr. Walker took Bonnie and her daughter on a trip to California where they spent four or five days with relatives in that state and returned to Arkansas through the state of Colorado where they also spent five or six days visiting with Bonnie's relatives in that state. The evidence is also to the effect that Mr. Bob Chandler had lived with Mr. Walker in his home near Russellville and they had become quite good friends. In 1966 Mr. Chandler was in the automobile business at De Queen, Arkansas, and Mr. Walker visited with him on different occasions. Chandler testified that Mr. Walker brought Bonnie and the child to De Queen in 1966. He said he knew that Bonnie and Walker were not married

and he mentioned that fact to Mr. Walker. He said Mr. Walker first told him that he and Bonnie had married in Old Mexico, but that he then inquired about the marriage laws in Oklahoma as well as other states and he directed Mr. Walker to consult an attorney in De Queen.

The evidence is to the effect that prior to making the trip to California, Mr. Walker and Bonnie Mae Hawthorn[1] made application in Sevier County for a marriage license and license was issued on May 9, 1966. Bonnie said Mr. Walker carried the marriage license with them on their trip to California and surrendered the license unused upon their return to Arkansas.

The appellant argues that she and Mr. Walker succeeded in contracting a common-law marriage, primarily in the state of Colorado which recognizes common-law marriages, and that the marriage so contracted should be recognized in Arkansas. We are of the opinion that the evidence falls far short of proving the consummation of a marriage contract entered into in the state of Colorado or any other state.

The evidence in this case is as consistent with concerted effort and intention to avoid a marriage contract as it is in ent ring into and consummating one. According to Bonnie Mae's own testimony, she and Mr. Walker simply entered into an illicit relationship at Hot Springs, Arkansas, in about 1959 and continued that relationship at intervals for about ten years. She said that in 1967 she refused to go to Russellville with Walker and excerpts from her testimony are as follows:

> "Q. At that time you refused to come to Russellville with him did you not?
>
> A. I had been working on my house at Alpine. Yes, sir, I did. I told him he could just take me back to Alpine and he could go his way which was up at Russellville to

[1]Bonnie's maiden name was "Black," she had married a Mr. Hawthorn and upon divorce from him she reassumed her maiden name.

Betty or to Mrs. Edna Walker and Myra. And then in uh - September of '67 I went to work. I went to work at the Ouachita Hospital which that means I was not staying up at Russellville. I was staying then in Hot Springs but Jack was still in and out with me at my house on Alpine, 116 ½.

* * *

Maybe a week or two weeks he'd be gone. And then he would be back. But as far as living with him, I considered myself living with him even if he was in and out because that was his way of doing things."

Bonnie said she and the child went on a trip to California and back through Colorado with Mr. Walker. She said she had been with him to El Paso, Texas, and Old Mexico. She said they first visited Walker's niece, Imajean Carney, in California. She said they occupied the same room and bed in a guesthouse at Mrs. Carney's home and told Mrs. Carney they were married. On this point Bonnie testified as follows:

"Q. Now did you represent — did you tell Mr. and Mrs. Carney that you were married?

A. Yes, sir.

Q. How were you introduced when you were in California?

A. Well, I don't really remember how Jack put it, but he was always saying I was his nurse, and his wife, and just everything. And I was. Even a painter, a plumber, I don't know what else. I've even helped him mow the grass.

Q. Did Mrs. Carney introduce you and Mr. Walker to any of her friends out there?

A. Her friends?

Q. Yes.

A. Oh, she had a neighbor, but I couldn't remember the neighbor's name that came over that lived close to her. She did but I couldn't.

Q. Do you know how she introduced you?

A. I don't remember her words, no, sir."

Bonnie also said they spent one night in a motel in California and also visited a nudist colony.

"Q. Will you tell us, please, what was said at the nudist colony concerning your marriage?

A. Well, Jack — he asked Jack if that was his wife and he said yes. And Jack had to sign the register. He signed it Bonnie Black, Janet and Jack Walker. Maybe he said A. C. Walker. I don't know. We got the little card, Bonnie and Jack Walker, I believe. Three day visit or something like that."

Bonnie said they also visited with Russell Cannon in California. She said they occupied the same bedroom in the Cannon home and told Cannon they were married.

"Q. Did you all stay in the same room at Russell Cannon's house?

A. Right.

Q. Did you all represent to Russell Cannon that you were married?

A. Yes.

Q. Did Russell Cannon introduce you as man and wife?

A. I can't recall. We were at his shop almost every day but I don't know if anybody come in.

Q. And you all had Janet with you at the time?

A. Janet was with me.

Q. Then after you left Russell Cannon's house where did you go?

A. Oh, we went to uh — my aunt's, Cheyenne Wells. We stopped somewhere overnight. I don't just remember, in Arizona I believe. But I don't know where it was, but we did stop, make one stop between California and my aunt's. And my aunt was in the hospital and we went to my cousin's in Arapaho, Colorado, and she lives sort of out in the country, and she had a place in town which town is a little wide spot in the road. And Jack and I and Janet stayed at her house in town. And they were out on the farm.

Q. This is Mrs. Irwin, is that correct?

A. Right, Mary Francis.

Q. Did you and Jack tell Mr. and Mrs. Irwin that you were married?

A. Yes, sir.

Q. Did you all live together at her house in town?

A. Yes, sir.

Q. With Janet?

A. With Janet.

Q. And you stayed there I believe almost a week, is that right?

A. Well could be. I don't remember just how many days.

Q. Did your cousin introduce you as husband and wife to her friends there in Arapaho?

A. Yes, sir.

Q. And Mrs. Walker, you and Jack Walker actually never went through a marriage ceremony, did you?

A. We never said I do in front of Justice of the Peace or minister but other than that we went through blood tests and all of that. Got the license and everything.

Q. All right, now I believe that one time you all went to Mexico *for the purpose of getting married,* is that correct?

A. Right.

Q. Would you tell us what happened on that time?

A. Oh, we went to Mrs. Douglas's in El Paso and she went with us over into Mexico with the —

Q. Did you do anything toward completing the marriage?

A. Well we had our blood tested again in El Paso, Texas and I was with Jack except I wasn't with him. Mrs. Douglas — I went over with him but I never did — Jack never did want me around him when he was talking about business with anyone and he went in several places, and what they talked about, I just couldn't say. I presume I know what they went in there for to talk about but I wasn't with him.

Q. In any event you went across the river into Mexico but you did not complete the marriage there as far as the legal formalities?

A. No, sir." (Emphasis added).

On cross-examination Bonnie testified in part as follows:

"Q. When do you say you and Jack entered into a common-law marriage?

A. Well I would say when we first started living together and having sexual intercourse.

Q. In Arkansas, Hot Springs and Russellville?

A. Right.

Q. All right, and that's when you are telling the court it occurred?

A. Well if I understand your question right."

On cross-examination Bonnie testified that the trip to El Paso, when they visited Mrs. Douglas, was in December, 1966, *after their trip to California.*

Mr. Russell Cannon testified in part as follows:

"Q. You've heard Mrs. Black's testimony that she and Jack and Janet visited in your home in California?

A. Yes, sir.

Q. Sometime in the summer of 1966?

A. Yes, sir.

Q. Do you recall that visit?

A. Yes, sir.

Q. Mr. Cannon, do you recall anyone introducing Jack and Bonnie as husband and wife?

A. No, sir.

Q. Do you remember him referring to her as his wife?

A. No, sir.

Q. Do you remember anyone saying anything about her being his wife in his presence?

A. No, sir.

Q. Did you introduce them to any of your friends?

A. Did I introduce them to any of my friends?

Q. Yes.

A. No, sir, I don't think so.

Q. Do you remember how long they were there?

A. Probably four or five days, six days.

Q. What were the sleeping arrangements while they were there?

A. Well Bonnie and this baby slept in my wife's bedroom, and I slept with my uncle, and my wife slept in the daybed.

Q. You mean you slept with Jack Walker?

A. Yeah.

Q. He your uncle?

A. Yeah.

Q. This was the sleeping arrangements when you were in California?

A. Yes, sir.

Q. Was that the only time they were at your house?

A. Yes, sir.

* * *

Q. Did you ever talk with him about his relationship with Bonnie Black and Janet? Other than —

A. Other than just asking who she was and he said she was his nurse. He couldn't live alone. Had sugar diabetes and he'd pass out."

Mrs. Irwin testified on interrogatories that she and Bonnie are first cousins; that Bonnie and Walker spent three or four days in her home in Colorado in 1966. She said Bonnie told her they were married but that Mr. Walker did not. She said they occupied the same bedroom while there and that she introduced them to Guy Cuttler as husband and wife.

Several deeds and mortgages executed by Walker as well as Bonnie were introduced into evidence and they were separately signed by Walker as well as Bonnie as single and unmarried persons. Bonnie retained her name as "Black" on her Social Security identification. The child's birth certificate recited her name as "Black," and this was never changed.

The appellant cites *Darling* v. *Dent*, 82 Ark. 76, 100 S.W. 747, and *Stilley v. Stilley*, 219 Ark. 813, 244 S.W.2d 958, as precedent for recognizing out of state common-law marriages as legal marriages in Arkansas. These cases are readily distinguishable from the case at bar. In *Darling* there was uncontroverted testimony that Mr. Darling and Mrs. Williams went to Texas with the intent of obtaining a divorce for Mrs. Williams and getting married. Mr. Williams died and Mrs. Williams described an actual marriage ceremony in Texas followed by continuous cohabitation as husband and wife for about eight months in Texas, followed by about eleven years in Arkansas until Darling's death.

In *Stilley, supra,* the parties were ceremoniously married in Arkansas and went to Kansas where their five children were born. Mrs. Stilley obtained a divorce in Kansas and was awarded the custody of the children and child support. She returned to Arkansas and by amended complaint in chancery court alleged that she was under age at the time of the marriage and prayed that the marriage be canceled as absolutely void and of no effect. We held, in effect, that Mrs. Stilley had ratified the Arkansas marriage, even if it were void, by living with Mr. Stilley as husband and wife for nine years in Kansas (a common-law marriage state) and bearing

five children and obtaining a divorce in which the decree recited that they were married.

The appellant also relies on the Colorado case of *Taylor* v. *Taylor*, 10 Colo. App. 303, 50 P. 1049, as setting out the requirements for a valid common-law marriage in that state. The *Taylor* case was also relied on in the Nebraska case of *In Re Binger's Estate*, 63 N.W.2d 784. The pertinent facts as well as the statutory law in that case were almost on all fours with those in the case at bar. In *Binger's Estate* an invalid marriage was performed in Missouri and a Colorado common-law marriage was relied on and in issue. In that case the Nebraska Court said:

> "[P]laintiff argued that after her legal impediment had been removed, there was a common-law marriage which we should recognize by virtue of the law and decisions of Colorado, concededly a common-law state.
>
> That contention is predicated upon section 42-117, R.R.S.1943, which provides: 'All marriages contracted without this state, which would be valid by the laws of the country in which the same were contracted, shall be valid in all courts and places in this state.' The question is then whether or not under the circumstances of this case there was any valid common-law marriage in Colorado, which this state should recognize. We conclude that there was not.
>
> Plaintiff claims that there was a common-law marriage in Colorado because upon three pleasure trips respectively, one in October 1947, one in June 1950, and one in September 1951, she and decedent twice attended conventions and once visited relatives in Colorado for 3 or 4 days each trip. On such occasions they either registered at a named motel as husband and wife, or stayed with relatives, where they slept in the same bed, cohabited, and were introduced to or by friends and relatives as husband and wife, after which they returned to their home in Weeping Water. No claim is made that they ever actually resided or had a domicile in Colorado or in any other state except Nebraska. There is no evidence

> that any of such trips to Colorado were made for the purpose of changing their domicile or residence to that jurisdiction or contracting a common-law marriage while they were in that state, or that while there any agreement was ever made by them to become husband and wife, or that they ever thought that such was necessary to give their marriage any validity."

In *Binger's Estate, supra,* the Nebraska Court cites and comments on several decisions from other states and in reference to the Colorado cases, said:

> "Plaintiff relies upon the above cases, but they are all distinguishable. The parties therein all lived in and were bona fide residents of Colorado where as such they, in good faith, intending to be married, continuously cohabited, and held themselves out as husband and wife in that state for long periods of time. Here the parties, who were at all times bona fide residents of this state where common-law marriage is invalid, simply took short pleasure trips across the state line without ever intending to contract or contracting a common-law marriage in Colorado as required by its laws."

We approve the language and adopt the reasoning expressed by the Washington Supreme Court as quoted by the Nebraska Court in *Binger's Estate* as follows:

> "In State ex rel. Smith v. Superior Court, 23 Wash.2d 357, 161 P.2d 188, 192, the court said: 'We concur in the view of the trial court that where parties cohabit illicitly in the state of their residence and who happen to temporarily sojourn — only a few days in the case at bar — in a state where common law marriage is recognized, even if during those few days they hold themselves out as man and wife, those parties cannot by that conduct alone become legally man ard wife.
>
> 'Parties who live for years in illicit relationship in a state in which they were domiciled will not find themselves married to each other if they happen to sojourn for a short time and hold themselves out as man and wife in a

state where common law marriage is recognized.' "

There is no evidence in the record that Bonnie and Walker ever contracted a marriage without this state, within the meaning of Ark. Stat. Ann. § 55-110, *supra.*

The judgment is affirmed.

BYRD, J., concurs.

R. H. HORTON et al *v.* City of PARAGOULD, Arkansas et al

74-162 516 S.W. 2d 370

Opinion delivered December 2, 1974

Rhine & Rhine, for appellants.

Cathey, Brown, Goodwin & Hamilton, for appellees.

J. FRED JONES, Justice. This is an appeal from a circuit court order overruling a demurrer and dismissing parts of a cross-complaint or counterclaim.

The appellee-plaintiffs as Mayor and city councilmen of the City of Paragould, together with appellee-plaintiffs Harris and Smith as newly elected water and sewer commissioners, filed suit in circuit court against the appellant-defendants as individuals and as water and sewer commissioners, and as members of a class of property owners in Water and Sewer Improvement District No. 3 of the City of Paragould.

The ten page complaint traced the legislative and ordained history of Improvement District No. 3 and alleged that under the provisions of the state law and municipal ordinances, Improvement District No. 3 had fulfilled the purpose of its creation and that by operation of law the ownership of the water and sewer system and its facilities had reverted to the citizens of Paragould, to be operated under the supervision and control of the governing body of the City of Paragould. The complaint then alleged that the defendant-commissioners had refused to recognize Harris and Smith as newly elected members of the commission; that they had neglected and refused to account to the City of Paragould, through its Mayor and city council, as to any of the official acts of the commission pertaining to the finances and operation of the water and sewer system of the city; had failed to keep accurate records of business transactions and had in fact usurped the offices of Harris and Smith, and had refused to permit the city council to inspect or copy water and sewer records.

The amended complaint then prayed for a declaratory judgment determining the ownership and right to manage and control the water and sewer system of the City of Paragould, and for an order directing the defendant-appellants Keeton and Gardner to cease the usurpation of the offices rightly belonging to Harris and Smith; for a mandatory injunction requiring the defendants to make available to the plaintiffs and the citizens of Paragould, access to the records of the water and sewer commission, and requiring them to comply with ordinances of the City of Paragould, and to render an accounting to the City of Paragould for the receipts and disbursements of funds passing through their hands as such commissioners, and to make certain reports to the city council.

The appellant-defendants filed a general demurrer to the complaint alleging that it did not state facts sufficient to constitute a cause of action and praying that the complaint be dismissed. The appellants then filed a 50 page brief in support of their demurrer and it is included in the record on this appeal. The appellee-plaintiffs made request for admissions and in response thereto, the appellant-defendants refused to admit or deny any of the requests made by the plaintiff-appellees until after their general demurrer was acted on by the trial court.

The appellant-defendants then filed an answer and cross-complaint in which they, in effect, denied each material allegation in the complaint. The defendant-appellants alleged in subsections (a) and (b) of Section VIII of what they termed a "Taxpayer's Cross-Complaint Against the Plaintiffs" that the city council had passed an ordinance in which a provision provided that the operation of the water works and sewer system and collection of revenues therefrom, should be under the control of the water and sewer system "heretofore established and presently functioning in the City." They then alleged that the board, so referred to in the ordinance, was the same board as the named defendants; that the plaintiffs were estopped to challenge the authority of said board because of their contractual obligations set out in the ordinance, and that the Acts and ordinances relied on by the appellee-plaintiffs were unconstitutional and void.

In subsections (c) through (k) the cross-complaint then alleged various acts amounting to misfeasance and nonfeasance in office by the Mayor and city council in connection with many collateral and unrelated matters and in connection with many collateral and unrelated matters and in connection with the employment of special counsel rather than using the services of the city attorney in procuring the passage of unconstitutional legislation and prosecuting frivolous lawsuits, some of which were against the directors of Improvement District No. 3. The appellants also alleged in these subsections that the Mayor was receiving salary in excess of constitutional limit, and they prayed personal judgments for reimbursement and for injunctive relief.

As a separate item in response to appellees' motion to

strike the above subsections of the cross-complaint, the appellant alleged conflicts of interest between the appellees and their special counsel and moved for a show cause order against the attorneys for violation of the canons of professional ethics.

The order appealed from in this case recites as follows:

"On this 23rd day of April, 1974, court being in session, there came on to be heard the defendants' demurrer, the plaintiffs' motion to strike defendants' demurrer, defendants' motion to dismiss request for admissions, plaintiffs' motion to strike portions of defendants' counterclaim cross-complaint, and defendants' motion to show cause why Canons of Professional Ethics are not being violated, plaintiffs appearing by and through their attorneys, Cathey, Brown, Goodwin and Hamilton, and defendants appearing by their attorneys, Rhine and Rhine. The court, having reviewed pleadings, the motions with exhibits attached thereto, having heard statements of counsel and being fully advised in the premises, does find and order that:

1. Defendants' demurrer should be and hereby is overruled and denied.

2. Subparagraphs c, d, e, f, g, h, i, j and k of paragraph VIII of the defendants' answer and counterclaim should be and they hereby are dismissed without prejudice to the rights of the defendants or any of them to file suit in a separate case concerning the allegations contained therein in a court of competent jurisdiction.

3. The defendants' motion to show cause why Canons of Professional Ethics are not being violated should be and it hereby is dismissed as not being within the competent jurisdiction of this court in this proceeding.

4. The defendants should be and they hereby are granted twenty days from this date within which to file further responsive pleading or further proceeding in this matter.

5. To the actions and orders of this court defendants do except and object, which exceptions and objections are hereby noted of record, and the defendants did note their intention to appeal the court's ruling to the Supreme Court of the State of Arkansas.

IT IS SO ORDERED."

Upon appeal to this court the appellants set out the points they rely on for reversal as follows:

"The lower court erred when it overruled appellants' demurrer to the complaint filed by the appellees which complaint prayed for a declaratory judgment and information in the nature of quo warranto and other relief in an attempt to enforce City of Paragould Ordinance 904, an ordinance to create a municipal water and sewer commission to take over the ownership, operation, and control of the water facilities of the City of Paragould now owned and controlled by Water Improvement District No. 3 of Paragould, Arkansas, with the authority to 'sell any property, real or personal, not necessary to be used in the operation of the facility within its supervision.'

(A) The City Council of Paragould, Arkansas, had no legislative powers expressly conferred or fairly implied to pass Ordinance 904 and Ordinance 904 is a void ordinance.

(B) Section VII of Ordinance 904 violates the Constitution of the State of Arkansas and the Fifth Amendment of the Constitution of the United States.

(C) Ordinance 904 is in direct conflict with Special Act 487 of 1923 which is still in full force and effect.

The lower court erred when it dismissed the defendants' (appellants') 'cross-complaint' and referred to the 'cross-complaint' as a 'counterclaim.'

The lower court erred when it dismissed without hear-

> ing defendants' motion 'to show cause why the canons of professional ethics are not being violated by the appellees' attorney.' "

We are unable to consider the points relied on by the appellants because this is an appeal from an interlocutory order and not from a final order or judgment disposing of the issues.

As early as 1915 in the case of *Davis* v. *Receivers St. L. & S. F. Rd. Co.*, 117 Ark. 393, 174 S.W. 1196, the defendant demurred to a complaint and the court sustained the demurrer. In the case at bar, as was recited in *Davis,* "no judgment was rendered dismissing the complaint of the plaintiffs and not even a judgment for cost was rendered." In *Davis* we held that when the trial court sustained the demurrer, the plaintiff had his election to amend his complaint, or, to rest on his complaint and permit final judgment to be rendered dismissing his complaint and then appeal. In so holding, we said:

> "It is well settled in this State that no appeal lies where there is no final judgment. The order of the court sustaining the demurrer was not a final judgment but was interlocutory, merely."

See also the more recent case of *Spruill* v. *Hamilton,* 207 Ark. 468, 181 S.W. 2d 35, and cases cited therein.

The appellants simply argue the merits of the cause under their contention that the trial court erred when it overruled their demurrer to the complaint, and in their reply brief they argue that this court should sustain their demurrer and they state, in part, as follows:

> "The appellees contend that the order of the lower court was not a final order and not appealable. * * * [I]n this case, the order entered by the lower Court did dismiss appellants' demurrer, and also dismissed the appellants' Cross-Complaint. Certainly this lower court order was final as to the Cross-Complaint, and to force these appellants into a trial without a final adjudication on

the 'Cross-Complaint Question,' and if after the alleged cause of action is heard in the lower court, then the question of the Dismissal of the Cross-Complaint is again submitted to this Court, and this Court finds that the Cross-Complaint should not have been dismissed, a great injustice would be forced on these appellants."

The appellants' argument in this connection has been answered contrary to their contention in at least three decisions of this court. In *Security Mtg. Co.* v. *Bell,* 175 Ark. 128, 298 S.W. 865, the appellee-defendant filed separate demurrers to Sections 2 and 3 in the first paragraph of Section 4 of the complaint. The trial court sustained the demurrer to Section 3 and the first paragraph of Section 4, but overruled it as to Section 2. The appellant refused to plead further and the complaint was dismissed as to Section 3 and the first paragraph of Section 4 from which order the plaintiff appealed. We held in that case that an objection and exception (at that time required) to the ruling of the court sustaining a demurrer to the third section and fourth paragraph of the complaint fully saved the point on review and adjudication of the whole action, and in that case we quoted from *Davie* v. *Davie,* 52 Ark. 224, at p. 227, 12 S.W. 558, and said:

" 'The object of the limitation is to present the whole cause here for determination in a single appeal and thus prevent the unnecessary expense and delay of repeated appeals.'

As the appeal must be dismissed for being prematurely taken, we refrain from passing upon the issues determined upon demurrer until the whole case is brought before us on appeal properly taken and prosecuted."

In *Renner* v. *Progressive Life Ins. Co.,* 191 Ark. 836, 88 S.W. 2d 57 (1935), the trial court entered an order sustaining a demurrer to part of a complaint and granting a motion to dismiss as to other portions of the complaint. In that case we said:

"The effect of the foregoing order was to dismiss

> appellant's complaint in part only, and to retain a substantial part thereof for trial. In *Security Mortgage Company* v. *Bell,* 175 Ark. 128, 298 S.W. 865, reading from the second headnote, we stated the applicable rule as follows: 'An appeal from an order dismissing a cause as to certain paragraphs, but leaving the paragraph which presented a triable issue, *held* prematurely taken, since the issues should have been tried and objections to the demurrer urged on the final appeal from the whole action.'
>
> Appellant's cause being dismissed in part only this appeal is prematurely prosecuted, and must be dismissed."

In the very recent case of *Ind. Ins. Consultants* v. *1st State Bk.*, 253 Ark. 779, 489 S.W. 2d 757, the trial court granted a motion for summary judgment and in so doing dismissed an intervention. After notice of appeal was filed, the trial court corrected its order to show only a partial dismissal of the intervention pertaining to the $21,000 item in issue, and the appellant contended that the trial court lacked jurisdiction to correct its order after the filing of notice of appeal. We found no merit to the contention and in that case we said:

> "We do not reach the merits of the other points argued by appellant for lack of a final order. In *Renner* v. *Progressive Life Insurance Co.*, 191 Ark. 836, 88 S.W. 2d 57 (1935) and *Security Mortgage Co.* v. *Bell,* 175 Ark. 128, 298 S.W. 865 (1927), we pointed out that an order dismissing a complaint in part and leaving a part which presented a triable issue was not an appealable order."
>
> The appeal in this case is dismissed without prejudice.
>
> FOGLEMAN, J., concurs in part and dissents in part.

JOHN A. FOGLEMAN, Justice, concurring in part, dissenting in part. For the most part, I would affirm the circuit court's order, but I do not entirely agree with the approach taken to the problem by the majority. I do agree that the overruling of appellants' demurrer is not properly before us

because no final judgment has been entered. I also agree that appellants' charges of violation of the "Canons of Professional Ethics" (I assume they are referring to the Code of Professional Responsibility) are not properly before us and that they were not properly before the trial court. See *Davis* v. *Merritt,* 252 Ark. 659, 480 S.W. 2d 924.

I further agree with the trial court and appellees that the portions of appellants' pleading stricken by the circuit judge were to be viewed as counterclaims, as well as cross-complaints. Appellants complain that the trial court erroneously treated their pleading as a counterclaim instead of a cross-complaint. I agree with the trial court, however, that, insofar as relief against the appellants is concerned, the pleading was properly viewed, at least in part, as an attempt to state counterclaims. Otherwise, the striking of the pleading as a cross-complaint would be clearly proper. A cross-complaint is allowed only against persons other than the plaintiff in an action when a defendant has a cause of action against a co-defendant or a person not a party to the action which affects the subject matter of the action. Ark. Stat. Ann. § 27-1134 (Repl. 1962). Any cause of action asserted by the defendants against the plaintiffs was a counter-claim. Ark. Stat. Ann. § 27-1123 (Repl. 1962); *Smiley* v. *Smiley,* 247 Ark. 933, 448 S.W. 2d 642. If a proper counterclaim was pleaded by appellants, then it was possible to bring in new parties (i.e. the city clerk and city treasurer) in addition to the appellees-defendants. Ark. Stat. Ann. § 27-1124 (Repl. 1962); *Flanigan* v. *O. R. Burden Construction Corp.,* 238 Ark. 43, 377 S.W. 2d 870.

Unlike my brethren of the majority, I consider that part of the trial court's order striking portions of appellants' "answer and cross-complaint" to be appealable and the propriety of the court's action a question properly before us. It is essential to a clear statement of my position that I review the record in the case in the light of the provisions of Ark. Stat. § 27-2101 (Supp. 1973) set out in the second paragraph. The pertinent portions of the statute are:

> The Supreme Court shall have appellate jurisdiction over the final orders, judgments and determinations of

all inferior courts of the State, in the following cases and no other:

Second: In an order affecting a substantial right made in such action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken, or discontinues the action; and when such order grants or refuses a new trial, or when such order strikes out an answer, or any part of an answer, or any pleading in an action.

Where an order finally determines a distinct and severable branch of a cause, it has always been held to be appealable, even though the suit is not ended. *Davie* v. *Davie,* 52 Ark. 244, 12 S.W. 558. It has heretofore been recognized that a decree or order dismissing a cross-action (apparently either cross-complaint or counter-claim from a technical point of view) is appealable at least in some circumstances not involving the sustaining of a demurrer. *Fox* v. *Pinson,* 177 Ark. 381, 6 S.W. 2d 518; *Flanigan* v. *Drainage Dist. No. 17,* 176 Ark. 31, 2 S.W. 2d 70; *Purser* v. *Corpus Christi National Bank,* 256 Ark. 452, 508 S.W. 2d 549; *Reynolds* v. *Bakem Credit Union,* 255 Ark. 322, 500 S.W. 2d 549. We have also held that a judgment dismissing and striking an answer was final and appealable, even though final judgment awaited a jury verdict some eight months later, and that the question relating to the pleading being stricken could not be raised on appeal from the final judgment. *Dunklin* v. *Watkins,* 202 Ark. 602, 151 S.W. 2d 978. In a decision very pertinent to one of the issues here we considered a chancery court order permitting the Attorney General of Arkansas to appear and defend a suit by a taxpayer against the Commissioner of Revenues for the recovery of income tax paid under protest. We held that order to be appealable and reversed the trial court. *Parker* v. *Murry,* 221 Ark. 554, 254 S.W. 2d 468.

The order here, I submit, is one striking various counterclaims and parts of appellants' answer. By statute a counterclaim is necessarily a part of defendants' answer. Ark. Stat. Ann. § 27-1121 (Repl. 1962).

The City of Paragould instituted this action in which its

mayor and city council were plaintiffs. Additional plaintiffs were Jeffery Harris and C. P. Smith, who claim to be duly elected and qualified members of the Water and Sewer Commission of the City of Paragould pursuant to its ordinance 904. Horton and others, who had been elected directors and commissioners in charge of the water and sewer facilities in the city pursuant to an act of the Legislature which plaintiffs contended had been repealed, were made defendants. Appellants Gary McClure and H. P. Taylor were made defendants as property owners within the city limits of Paragould and property owners within the boundary lines of old Water Improvement District No. 3, and who, appellees alleged, had in the past undertaken to act in behalf of the property owners of said Water Improvement District No. 3 in determining legal matters. The allegations of the complaint, however, made them representative parties to the action as members of a class consisting of the property owners within the boundary lines of Water Improvement District No. 3, for the purpose of binding these property owners by the determination of the issues in the lawsuit. Appellees also alleged that the defendants had asserted that there is a special and pecuniary interest on the part of property owners in the original Water Improvement District No. 3, to the exclusion of participation of all electors of the city in the affairs of the water and sewer department. Basically appellees sought a declaratory judgment holding that the ownership, control and management of the water and sewer systems of the City of Paragould is currently and has been, since the adoption of Act 653 of the General Assembly of 1967, in the mayor and city council of the City of Paragould with the legal authority on the part of any of the defendants being limited to such powers as they may have given by ordinance or resolution validly adopted by the council of the city pursuant to law.

The defendants, appellants here, joined in a pleading against the named plaintiffs and against Laveta Smith, treasurer of the City of Paragould and Emma Jean Cole, city clerk. In this pleading appellants alleged that the legislative acts upon which the plaintiffs relied were unconstitutional and void in any application to the control, management, operation and ownership of the water facility property and the vested rights of the defendant Water Improvement

District No. 3 of Paragould. Appellants' "cross-complaint" was asserted by them as taxpayers against the mayor, city councilmen, treasurer and city clerk of the City of Paragould. In it they alleged:

A. That the action taken by the city was in violation of a bond ordinance passed in 1963 in order to receive a federal grant to be used in sewer improvement work by extensions, betterments and improvements to alleviate hazards to life, health and safety of the inhabitants of the city and that this ordinance pledged and required that the operation of the system and the collection of revenues be continued under the control of the waterworks and sewer commission theretofore established and functioning;

B. That acts relied upon by the city were unconstitutional, void and constituted a constructive fraud on the real property owners in Water Improvement District No. 3, in that they repealed an earlier act and thereby destroyed certain contractual and accrued rights of the property owners in Water Improvement District No. 3 and in the sewer facilities of the City of Paragould, and further more, that the passage of Ordinance 904 was a direct violation of these contractual and accrued rights, so that the city should be permanently enjoined from attempting to divest control of the water facility from the board of directors of Water Improvement District No. 3;

C. That appellees should be permanently enjoined from prosecuting lawsuits such as this and required to refund to the city treasurer all attorneys' fees and expenses paid from the city treasury for prosecution of certain lawsuits;

D. That the mayor and individual council members should be required to refund into the city treasury all attorney's fees, court cost and expenses paid from the city treasury in defending a suit brought by McClure and Taylor as property owners in

Paragould Water Improvement District No. 3 and in drafting an act to repeal the statutes upon which McClure and Taylor had relied;

E. That personal judgment should be entered against appellees as individuals and in favor of the City of Paragould for all monies expended in processing lawsuits relative to the subject matter, including attorneys' fees paid to special counsel;

F. That special counsel should not be allowed to proceed in the case because a member of the firm had accused a member or members of the city council of bribery in connection with a rezoning petition in which his firm was interested;

G. That the employment of special counsel to prosecute this action was in violation of ordinance 924 of the city prescribing the duties of the city attorney of Paragould and that the mayor and councilmen should be required to refund city money paid to special counsel and to dismiss special counsel and that they should be enjoined from employing any special counsel to file suits of this nature interfering with the operation of the water facility of this city;

H. That the mayor and city council of the City of Paragould should be enjoined from requiring the surplus funds of the Light Plant Commission be turned over to the city and that the city should be required to refund $35,000 and any other funds in the city treasury belonging to the Light Plant commission to that Commission;

I. That, upon their cross-complaint McClure and Taylor, as representatives of taxpayers in the city as a class, should recover amounts paid to the mayor over and above the $5,000 constitutional salary limit;

J. That the city treasurer and city clerk be enjoined

from issuing warrants for expenses for special attorneys' fees and expenses incident to this suit and for any money to be paid to the mayor over and above an annual salary of $5,000; and

K. That the case be transferred to equity.

Appellees did not demur but moved to strike all those portions of the appellants' counterclaim and cross-complaint seeking relief by way of class action and all those portions of defendants' counterclaim and cross-complaint which seek an injunction to keep the plaintiffs from being represented by special counsel and all those portions relative to the Light Plant Commission of the city. Thereafter, the answer and cross-complaint were amended in particulars not material to the question now before us. The trial court dismissed all portions of appellees' counterclaim and cross-complaint except the portions relating to the contentions (A) that the action of the city was in violation of the bond ordinance for sewer improvements and (B) that certain acts upon which the plaintiffs relied and ordinance 904 of the city were void and unconstitutional as a violation of the contractual and accrued rights of property owners in Water Improvement District No. 3.

Thus we are not dealing with a demurrer to an answer but with a motion to strike. Furthermore, we must determine to what extent the pleading filed is a counterclaim and to what extent it was (as appellants contend it is) a cross-complaint. In this connection it should be remembered that a counterclaim *must* be asserted against the plaintiffs in the action. Appellants' claims stricken except for (G) and (J) above were efforts to obtain personal judgments against the persons named as plaintiffs in the action. These then were not counterclaims because they did not state causes of action against the plaintiffs (appellants). This is true because appellants sued, not as individuals, but in the official capacities alleged in the complaint, and not as private individuals. When a cross-complaint contains matter foreign to the subject matter put in issue in the complaint, new parties not having an interest affecting the original suit may not be brought in. *Home Insurance Co.* v. *Moro, Inc.*, 253 Ark. 304, 485

S.W. 2d 736; *Meyers Store Co.* v. *Armstrong,* 187 Ark. 636, 61 S.W. 2d 440; *Naler* v. *Ballew,* 81 Ark. 328, 99 S.W. 72; *Pindall* v. *Trevor & Colgate,* 30 Ark. 249.

Clearly the individuals, who, for the time being, represented the City of Paragould were "new parties", as were the officials (city clerk and city treasurer) named as cross-defendants by appellants in their pleading. It seems to me that it was not proper to bring these parties into the case; the pleading constituted a cross-complaint to this extent and was properly stricken as to items (C), (D), (E) and (I). The relief sought clearly does not affect the subject matter of the action and is not a claim against the plaintiffs.[1] Item (F) simply states no cause of action or claim for relief.

As to items (H) and (I), and that portion of item (J) directed toward the mayor's salary, we are governed by our holdings in *Tucker* v. *Pulaski Federal Savings & Loan Ass'n,* 252 Ark. 849, 481 S.W. 2d 725 that the counterclaim statute cannot be used as a vehicle for bringing a class action. It was also proper that the court dismiss the cross-complaint features of the pleading in the exercise of sound judicial discretion in that the issues would become so complicated and confusing that a judgment that would not prejudice rights of parties would be difficult to reach. *Flanagan* v. *O. R. Burden Construction Corp.,* 238 Ark. 43, 377 S.W. 2d 870.

As to item (G) and item (J), insofar as it related to special counsel's fees, I feel that the trial court erred. Insofar as appellants are concerned they were required to assert as many grounds of affirmative defense or counterclaim as they had. Ark. Stat. Ann. § 27-1121 (Repl. 1962). *Hughes* v. *Holden,* 229 Ark. 15, 316 S.W. 2d 710; *Shrieves* v. *Yarbrough,* 220 Ark. 256, 247 S.W. 2d 193; *Adams* v. *Henderson,* 197 Ark. 907, 125 S.W. 2d 472. Appellants had the right to challenge the authority of appellees' attorneys to represent them in the suit. *McKenzie* v. *Burris,* 255 Ark. 330, 500 S.W. 2d 357. See also, *Nunez* v. *O.K. Processors, Inc.,* 238 Ark. 429, 382 S.W. 2d 384.

It is probably immaterial to this question that McClure

[1]This part of the order may not be appealable. *Worth Insurance Company* v. *Patching,* 241 Ark. 620, 410 S.W. 2d 125.

and Taylor assert these claims, along with the other appellants, in a representative capacity; however, insofar as this phase of the case is concerned, they could properly assert a counterclaim for property owners in Water Improvement District No. 3. They did not make themselves the champion of that group. Appellees did. I submit that if the decree was to bind this class, its representatives were required to assert any ground of affirmative defense or counter-claim the class might have.

I would affirm the action of the trial court except as to that part of appellants' pleading relating to the employment of special counsel.

Richard S. McCONAHAY *v.* STATE of Arkansas

CR 74-99 516 S.W. 2d 887

Opinion delivered December 2, 1974
[Rehearing denied January 20, 1975.]

F. James Jefferson, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Gary Isbell,* Asst. Atty. Gen. and *Arthur John Anderson Jr.,* Dep. Atty. Gen., for appellee.

FRANK HOLT, Justice. A jury first determined appellant guilty of grand larceny. Then pursuant to the habitual offender act, Ark. Stat. Ann. § 43-2328 (Supp. 1973), documents evidencing four previous convictions were introduced and appellant's punishment was assessed by the jury at 31½ years, the maximum, in the Department of Correction. Appellant asserts for reversal that the court erred in allowing the jury to consider as evidence of prior convictions two documents which do not reflect whether the appellant was represented by or had validly waived counsel. The state with commendable candor concedes this is error.

Appellant's court appointed and present counsel objected to the introduction of these two deficient documents. However, they were admitted into evidence on the basis that they reflected appellant had received a jury trial. Therefore, it presumably would appear that appellant was represented by counsel. It is well settled that "presuming waiver of counsel from a silent record is impermissible." *Burgett* v. *Texas,* 389 U.S. 109 (1967). The introduction of a previous conviction document, where that record concerning representation is "silent," is prejudicial error. *Roach* v. *State,* 255 Ark. 773, 503 S.W. 2d 467 (1973); *Richards* v. *State,* 254 Ark. 760, 498 S.W. 2d 1 (1973); *Wilburn* v. *State,* 253 Ark. 608, 487 S.W. 2d 600 (1972); and *Burgett* v. *Texas, supra.*

Appellee urges that a practical and appropriate procedure now would be to remand the cause for an evidentiary hearing by the trial court similar to that in *Jackson* v.

Denno, 378 U.S. 368 (1964), to determine if appellant was represented by or validly waived counsel during the trials of his two out of state convictions. By Ark. Stat. Ann. § 43-2105 (Supp. 1973), following *Denno,* a confession of a defendant is not admissible into evidence for a jury's consideration until the court has first held an in chambers hearing and there determined by a preponderance of the evidence that the confession was free and voluntary. When determined as being admissible our statute requires that thereupon "[I]ssues of fact shall be tried by a jury. . . . " In *Kagebein* v. *State,* 254 Ark. 904, 496 S.W. 2d 435 (1973), we recognized that *Denno* and our statute are for the purpose of preventing a jury from hearing an involuntary confession. There we said "[I]t is not intended to restrict evidence a jury may hear after a court determination of voluntariness has been made. The defendant still has the constitutional right to have his case heard on the merits by a jury, including the weight and credibility the jury might give to the voluntariness of the confession."

The state says, however, in the case at bar, that upon a remand it is willing to shoulder the heavy burden of proof in a *Denno* hearing to convince the trial court beyond a reasonable doubt that the appellant was represented by or validly waived counsel at the time of his previous convictions. If the state meets that burden of proof with respect to the admissibility of the deficient documents, then the state asserts appellant's sentence should stand and would comport with appellant's constitutional rights. If, however, the burden of proof is not met, then the state would have the election to retry the appellant or accept the minimal enhancement of his sentence based upon the two documents to which no objection was made. We cannot agree with this suggested procedure.

Ark. Stat. Ann. § 43-2330.1 (Supp. 1973), our habitual criminal statute, reads in pertinent part:

> The following trial procedure *shall be adhered to* in cases involving habitual criminals:
>
> (1) The jury shall first hear all the evidence pertaining to the current charge against the defendant and shall retire to reach its verdict as to this charge,

> based only upon such evidence; *** [which was done in the case at bar]
>
> (2) If the defendant is found guilty, the same jury shall sit again and hear evidence of defendant's prior conviction(s). Provided, that the defendant shall have the right to deny the existence of any prior conviction(s), and to offer evidence in support thereof. (Emphasis ours.)

Certainly, it is for the trial court to determine the preliminary issue as to admissibility of the evidence. *Cantrell v. State*, 117 Ark. 233, 174 S.W. 521 (1915). The court should not now be asked to do indirectly what it could or should not do directly at the initial trial; i.e., determine the truthfulness or veracity of the admittedly infirm documents without that issue being determined by the jury. Cf. *Cantrell* v. *State, supra.* That is an issue which our legislature clearly intended for the jury's determination once the trial court finds it admissible. Citations are not necessary to the effect that we have consistently held that a statute, which is penal in nature, as here, must be strictly construed.

Appellant's counsel had a right to rely upon our previous decisions interpreting this statute and the procedure followed. *Wilburn, supra.* When the prior convictions were introduced, counsel properly objected and pointed out the constitutional infirmity. In *Denno* the defendant testified before the jury as to his version of his confession. According to *Wilburn,* it was unnecessary for appellant to testify or introduce any evidence, neither of which he did, since the documents were, as admitted, constitutionally defective. The burden was upon the state to offer proper documents or evidence before the jury to correct the defects. Our state and federal constitutions guarantee appellant the right to confront and cross-examine adversary witnesses. The jury, by this highly penal statute should be allowed, if requested, to weigh the credibility of these witnesses on a most vital and crucial fact issue.

In the case at bar, in accordance with our well established procedure when an infirm document of a previous convic-

tion is admitted as evidence, we reduce appellant's sentence. *Roach* v. *State*, *supra*, *Richards* v. *State*, *supra*, and *Wilburn* v. *State*, *supra*. Here we reduce appellant's sentence to a total of four years (one year minimum for grand larceny [Ark. Stat. Ann. § 41-3907 (Repl. 1964)], plus three years for the two unquestioned previous convictions) to remove any possibility of prejudicial effect to the appellant resulting from the two defective documents concerning previous convictions. If the state, through the attorney general, desires to accept this reduction within seventeen calendar days, the judgment is affirmed as modified. Otherwise, the judgment is reversed and remanded.

Affirmed upon acceptance of modification.

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

CARLETON HARRIS, Chief Justice, dissenting. I agree with the procedure suggested by the State as far as this particular litigation presently before the court is concerned. In *Wilburn* v. *State*, 253 Ark. 608, 487 S.W. 2d 600, this court, upon the authority of the United States Supreme Court cases cited in *Wilburn*, reversed the judgment because the evidence offered concerning one of appellant's three prior convictions did not reflect that Wilburn was represented by counsel in the earlier conviction, or that he had waived counsel, and we remanded the case for another trial "unless the attorney general within 17 days elects to accept a modification of the punishment so as to sentence Wilburn to the minimum time of three years plus one additional year as penalty for the second offense, or a total of four years in the state penitentiary."

I am in agreement with the State's proposal that this cause should be remanded for further proceedings to be conducted before the trial judge in order to determine whether the prior convictions were, as a matter of law, constitutionally infirm. Evidence should be presented before the court relative to whether appellant was represented on those occasions by counsel, or if he waived the right to counsel. If the additional evidence affirmatively reflects either of these facts, then, of course, the documents which were presented before the jury

were properly admissible, and the original sentence should stand. On the other hand, if the evidence does not reflect either of these two facts, the State would then elect under the option set forth in *Wilburn* and either accept the minimal enhancement sentence of four years, or retry appellant with the possibility of obtaining, upon conviction, an enhancement sentence of from four to 21 years. I cannot see how McConahay can be prejudiced under this procedure, for unless the evidence, beyond a reasonable doubt, reflects that McConahay was represented by counsel, or waived the right to counsel, the judgment stands reversed. On the other hand, if the evidence reflects beyond a reasonable doubt that McConahay was represented by counsel, or waived that right, he still has suffered no prejudice, for the jury has *already* passed upon his prior convictions (the same jury that passed on the current grand larceny charge), and our statute has thus been complied with. I recognize that McConahay did not take the stand to testify relative to these prior convictions — but he certainly had the opportunity to testify and to deny that he had been convicted. Thus far, I agree with fellow Justice Fogleman, and we are in accord with regard to disposition of this case.

However, as far as future cases are concerned, I would suggest the following procedure:

The jury shall first hear all the evidence relating to the current charge against a defendant and shall retire to reach its verdict as to this particular charge, based only upon the evidence of the current offense (this is the requirement of the statute). If the jury finds the defendant guilty, the court, before permitting any evidence to be presented to the jury by the prosecuting attorney relative to prior convictions under the habitual criminal act, should conduct an in chambers hearing, and pass upon the validity or admissibility of the evidence to be offered to the jury concerning prior convictions. Should the court find a constitutional defect (the defendant was not represented by counsel or did not waive the right to counsel in the earlier convictions), the court would not permit such evidence to be introduced before the jury. If, on the other hand, the evidence convinces the trial court beyond a reasonable doubt that the defendant was represented by counsel, or waived the right to counsel at the

trials which resulted in prior convictions, this evidence would then be admitted before the jury, and that body (the same jury which found him guilty on the current charge), would pass upon whether he had been convicted of the prior offenses, and would then fix his punishment, considering both the current and previous convictions. The requirement of the statute that "the same jury shall sit again and hear evidence of defendant's prior conviction(s)" would thus be observed.

This procedure would guard against inadmissible testimony concerning prior convictions being offered in evidence, preventing reversals in cases involving habitual offenders, and at the same time, in every respect, safeguarding the rights of a defendant.[1] It follows that I disagree with the views expressed in the majority opinion, and accordingly, respectfully dissent.[2]

JOHN A. FOGLEMAN, Justice, dissenting. I dissent from the condition placed upon the affirmance. I would remand the judgment without modification. I definitely disagree with certain statements in the majority opinion. I further dissent from the rejection of the procedure on remand suggested by the Attorney General. I do not agree that representation by counsel, or lack of it, or waiver, has even a remote or minute bearing on the "truthfulness or veracity" of a record of conviction. Nor can I agree that records of convictions which are silent with respect to representation by counsel, or the waiver of the right thereto, are, in any sense of the word "infirm documents". The fact that it is necessary that a foundation be laid for their introduction does not make them infirm.

[1]Lest I be accused of legislating, let it be pointed out that the General Assembly of 1971, through Act 470, enacted legislation reading as follows:

> "SECTION 1. The Supreme Court of the state of Arkansas shall have the power to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings in criminal cases and proceedings to punish for criminal contempt of court in all the inferior courts of law in this state."

Under this legislation, it is my view that a rule should be promulgated embracing the procedure set out in this opinion. For that matter, there is nothing suggested that conflicts with the statute, the only purpose being to prevent inadmissible testimony from being offered.

[2]I would even go along with the majority opinion insofar as disposition of this case is concerned, if the opinion provided that future cases should be handled in the manner set out in this dissent.

Neither do I agree that somehow appellant would, as implied by the majority, be deprived of the right to confront and cross-examine witnesses by the state's suggestion. The relevance of the statement in that regard escapes me.

I do not agree that appellant's counsel had the right to rely on our previous decisions in not contesting the *existence* of the previous convictions, as the statute permits. We had no such decisions and appellant had every opportunity to contest the *existence* of these convictions, if he chose to do so, after they were admitted. I am sure that the majority does not really intend to say, though it does imply, that trials should be reduced to sporting matches in which one party or the other may "hide behind a log" of error and by reason thereof be afforded a second chance to do that which he could have done, without prejudice, in the first instance, had he chosen to do so.

I cannot help feeling that an erroneous premise has led the majority into its unwarranted rejection of the procedure proposed by the state. That premise is the statement, or to say the least, the plain implication, that the question of representation or waiver of counsel in a previous conviction is necessarily for jury determination, at least at the option of a defendant in the position of appellant.

I feel that elaboration upon the state's proposed procedure is essential to its being understood and demonstrative of its propriety.

Where we have found this error in previous cases, beginning with *Wilburn,* we have permitted the state to have the option of having the judgment affirmed but modified to provide for the minimum sentence which the jury might have imposed if the objectionable evidence had been excluded or to have it reversed and the case remanded for a new trial. We did this on the basis that, if the modification be accepted, there was no possible prejudice to the appellant.

The state suggests that the *Wilburn* procedure is not necessarily exclusive and that there is an alternate procedure which we can and should follow in these cases. The Attorney General urges that we remand this case to the trial court for an evidentiary hearing of the type prescribed in *Jackson* v.

Denno, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed. 2d 908, 1 A.L.R. 2d 1205 (1964) where the question of the admissibility of a confession was involved, except that the state here would have the burden of showing, beyond a reasonable doubt, that McConahay was represented by counsel at his trial on the questioned convictions, or that he had knowingly and intelligently waived his right to such representation. If the state meets that heavy burden, he suggests, the constitutional error was harmless and the sentence should stand. If not, then the trial court could give the state the option of agreeing to a reduction of sentence under the *Wilburn* rule, or a new trial. I find this suggestion to be practical, without prejudice to any right of appellant and constitutionally in harmony with *Jackson* v. *Denno*, supra.

Our statute on habitual offenders is Ark. Stat. Ann. § 2330.1 (Supp. 1973). In pertinent part, it reads:

> The following trial procedure shall be adhered to in cases involving habitual criminals:
>
> *****
>
> (2) If the defendant is found guilty, the same jury shall sit again and hear evidence of defendant's prior conviction(s). Provided, that the defendant *shall have the right to deny the existence of any prior conviction(s), and to offer evidence in support thereof.* (Emphasis ours.)

The statute only gave the defendant the right to deny the existence of any prior conviction. Clearly appellant had that right in this case but chose not to avail himself of it. There is no right on the part of a defendant to have the jury determine the weight or credibility of evidence of a previous conviction on the basis of representation by counsel or lack thereof or to consider the question of admissibility of evidence of a previous conviction. Where records of prior convictions are offered, either for enhancement of punishment or for impeachment of a witness, the question whether the party or witness was afforded the right to counsel, or waived it, goes to the question of admissibility of the evidence of the conviction. This is made clear in the leading case, *Burgett* v. *Texas*, 389 U.S. 109, 88 S.Ct. 258, 19 L. Ed. 2d 319 (1967). We have treated the matter in the same light. See *Wilburn* v. *State*, 253 Ark. 608, 487 S.W. 2d 600; *Richards* v. *State*, 254 Ark. 760, 498

S.W. 2d 1; *Roach* v. *State,* 255 Ark. 773, 503 S.W. 2d 467.

The determination whether evidence is admissible is for the trial judge, even though he may have to decide a preliminary question of fact relating to the foundation for its admission. 75 Am. Jur. 2d 407, Trial § 345; 88 C.J.S. 407, Trial § 207. This is true, even though it is not error for the trial court, when in doubt about a matter essential to admission, to submit the question to the jury. 75 Am. Jur. 2d 407, Trial § 345; 88 C.J.S. 407, Trial § 207. See IX Wigmore on Evidence (3rd Ed.) 501, § 2550; McCormick on Evidence (2d Ed.) 121, § 53; *Cantrell* v. *State,* 117 Ark. 233, 174 S.W. 521; *Pine Bluff Co.* v. *Bobbett,* 174 Ark. 41, 294 S.W. 1002; *Wimberly* v. *State,* 90 Ark. 514, 119 S.W. 668; *Clements* v. *State,* 199 Ark. 69, 133 S.W. 2d 844.

It was clearly recognized in *Burgett,* that the error in admitting evidence such as is involved here might be harmless. There the United States Supreme Court said:

> The admission of a prior criminal conviction which is constitutionally infirm under the standards of *Gideon* v. *Wainwright* is inherently prejudicial and we are unable to say that the instructions to disregard it made the constitutional error "harmless beyond a reasonable doubt" within the meaning of *Chapman* v. *California,* 386 U.S. 18, 17 L. Ed. 2d 705, 87 S. Ct. 824.

Other courts have recognized that this is the case. See e.g. *Donahay* v. *State,* 255 S. 2d 598 (1971); *Gilday* v. *Scafati,* 428 F. 2d 1027 (1 Cir. 1970); *United States* v. *Penta,* 475 F. 2d 92 (1 Cir. 1973); *Gilday* v. *Commonwealth,* 355 Mass. 799, 247 N.E. 2d 396 (1969); *Subilosky* v. *Commonwealth,* 358 Mass. 390, 265 N.E. 2d 80 (1970); *White* v. *State,* 11 Md. App. 423, 274 A 2d 671 (1971); *Tucker* v. *United States,* 299 F. Supp. 1376 (D.C., Cal., 1969), 431 F. 2d 1292 (9 Cir. 1970), *United States* v. *Tucker,* 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed 2d 592 (1972). In *Loper* v. *Beto,* 405 US 473, 92 S. Ct. 1014 (1972) this possibility was definitely recognized. The prevailing plurality of four, added this footnote to their opinion per Stewart, J.:

> In the circumstances of this case there is little room for a finding of harmless error, if, as appears on the record now before us, Loper was unrepresented by

> counsel and did not waive counsel at the time of the earlier convictions. Cf. *Subilosky* v. *Moore*, 443 F. 2d 334; *Tucker* v. *United States*, 431 F. 2d 1292; *Gilday* v. *Scafati*, 428 F. 2d 1027.

Furthermore, Mr. Justice White, in a concurring opinion essential to the decision, made these pertinent statements:

> ***** and as our past cases now stand, I agree with Mr. Justice Stewart that the Court of Appeals' reasons for affirming the District Court were erroneous. This judgment, however, does not necessarily mean that Loper's conviction must be set aside. There remain issues unresolved by the Court of Appeals, as to whether the challenged prior convictions were legally infirm; was Loper represented by counsel at the time of the earlier convictions; if not, did he waive counsel? These matters are best considered in the first instance by the Court of Appeals. The same is true with respect to the legal significance of the lack of proof with respect to the validity of one or more of the prior convictions used for impeachment purposes at Loper's trial. In this connection, I do not understand our prior decisions to hold that there is no room in cases such as this for a finding of harmless error; and if this case is ultimately to turn on whether there was harmless error or not, I would prefer to have the initial judgment of the lower court.

The Supreme Court of California *In Re Dabney,* 76 Cal. Reptr. 636, 452 P. 2d 924 (1969) discussed the matter, viz.

> We do not believe that the Supreme Court's description of the error as inherently prejudicial means that it can never be found "harmless beyond a reasonable doubt" within the meaning of *Chapman*, for the court apparently applied the *Chapman* test in *Burgett*. It did not state that because the error was inherently prejudicial it could never be deemed harmless, but instead stated that the error was inherently prejudicial and that "we are unable to say that the instructions to disregard it made the constitutional error 'harmless beyond a reasonable doubt' * * *." It did not foreclose the possibility that on another record presenting different facts it could conclude that such error was harmless.

> By describing the error as inherently prejudicial, the court may have meant only that such error is always to some extent harmful by reason of its essential character and is therefore different from error in the admission of other unconstitutionally obtained evidence that is not always harmful, such as, for example, innocent responses to an interrogation not preceded by required Miranda warnings. (*Miranda* v. *Arizona* (1966) 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed 2d 694.) In this sense of "inherently," used as descriptive of the essential character of the error, commenting on a defendant's failure to testify is also inherently prejudicial. (See *Griffin* v. *California* (1965) 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed 2d 106.) Such error, however, may be found harmless under *Chapman*. Accordingly, we adhere to our holding * * * that the introduction into evidence of an unconstitutional prior conviction is not prejudicial per se and therefore does not necessarily effect reversible error. Both the court's language in *Burgett* and the background provided by *Spencer* make clear, however, that only the most compelling showing can justify finding such error harmless beyond a reasonable doubt.

If appellant was actually represented by counsel, or had waived his right to counsel, in the cases resulting in the conviction of which he complains, he has not been prejudiced and the error is harmless. Of course, we cannot, upon the present record say that this is so. But this does not mean that appellant is entitled to a new trial without a determination whether the evidence was prejudicial or harmless. If remand for that purpose is innovative, so much the better, so long as substantial individual rights are not prejudiced. Retrials are a burden upon the whole judicial system, as well as upon witnesses, officers, and all others connected with them. Where they can be avoided without prejudice to individual rights of parties, they should. The procedure suggested by the state would be a positive step in this direction. The trial court has the means of determining the facts. If it should be found that the convictions admitted were, beyond a reasonable doubt, not constitutionally inadmissible, even though they appeared so to be, why should appellant have a new trial?

The state's suggestion is not as innovative as it might appear. In *Johnson* v. *State,* 9 Md. App. 166, 263 A.2d 232 (1970) the Maryland Court of Special Appeals recognized that the U.S. Supreme Court in *Burgett* applied the harmless error test of *Chapman* v. *State of California,* 386 U.S. 18, 87 S.Ct. 824, 17 L.E. 2d 705 and was unable to say that the error was harmless. That court said:

> *** In short there was nothing before the trial court upon which it could properly determine that the prior convictions were valid and thus admissible. We think the purposes of justice will be advanced by permitting further proceedings in the case. As we find***that the other contentions of appellant do not constitute grounds for reversal, we remand the case, without affirming, reversing or modifying the judgment, with direction to the lower court to conduct forthwith an evidentiary hearing on the issue of the validity of the prior convictions, at which the procedure hereinbefore set out shall be followed. Rule 1071. On the evidence adduced at such hearing, the lower court shall determine as to each prior conviction admitted in evidence at the trial on the merits, whether or not it was constitutionally valid. Upon such determination the record will be transmitted to this court.

The U.S. Court of Appeals for the Second Circuit, in *United States* v. *DuShane,* 435 F. 2d 187 (1970), also treated the matter, saying:

> Accordingly, on this record, the evidence of the Oklahoma conviction was improperly introduced. However, it may be that the Government can produce live witnesses whose testimony, after cross-examination, as to what transpired in Oklahoma in 1959 could be a proper basis for a finding of waiver. ***** Therefore, we remand for a further evidentiary hearing on the issue of waiver. After such hearing and the careful consideration that the issue requires, if the trial judge concludes that the Government has not carried its burden of proving waiver, the judgment of conviction should be set aside. If he finds waiver, the judgment of conviction will remain, but appellant will again be able to pursue appellate

remedies, if he so wishes, on the fuller record.

See also, *People* v. *Moore,* 391 Mich. 426, 216 N.W. 2d 770 (1974), relating to post conviction relief.

In *Jackson* v. *Denno,* 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed. 2d 908, 1 A.L.R. 2d 1205, when the question was one of admissibility of evidence, the court said:

> *** But if at the conclusion of such an evidentiary hearing in the state court on the coercion issue, it is determined that Jackson's confession was voluntarily given, admissible in evidence, and properly to be considered by the jury, we see no constitutional necessity at that point for proceeding with a new trial, for Jackson has already been tried by a jury with the confession placed before it and has been found guilty. True, the jury in the first trial was permitted to deal with the issue of voluntariness and we do not know whether the conviction rested upon the confession; but if it did, there is no constitutional prejudice to Jackson from the New York procedure if the confession is now properly found to be voluntary and therefore admissible. If the jury relied upon it, it was entitled to do so. Of course, if the state court, at an evidentiary hearing, redetermines the facts and decides that Jackson's confession was involuntary, there must be a new trial on guilt or innocence without the confession's being admitted in evidence.

Of course, where error of constitutional proportions is involved, it is prejudicial, unless it be judicially determined beyond a reasonable doubt that the error was harmless. We should remand this case to the trial court to conduct a hearing to determine whether the error in admitting the convictions objected to was harmless beyond a reasonable doubt. If it so finds, then appellant would be free to pursue a further appeal. If not, then the court should grant appellant a new trial unless the state should agree to a reduction of sentence as prescribed in *Wilburn* v. *State,* supra, and its progeny.

I am authorized to state that Mr. Justice Brown joins in this dissent.

Arthur RATZLAFF et al *v.* FRANZ FOODS of Arkansas, a Subsidiary of TYSON'S FOODS, an Arkansas Corporation

74-172 to 178 516 S.W. 2d 385

Opinion delivered December 9, 1974

Putman, Davis & Bassett, by: *Tilden P. Wright III,* and *John O. Maberry,* for appellants.

Crouch, Blair, Cypert & Waters, for appellees.

CARLETON HARRIS, Chief Justice. This is the third appeal in this litigation. See *Ratzlaff, et al* v. *Franz Foods of Arkansas,* 250 Ark. 1003, 468 S.W. 2d 239, and *Ratzlaff, et al* v. *Franz Foods of Arkansas,* 255 Ark. 373, 500 S.W. 2d 379. The pertinent facts are set out in the first *Ratzlaff* case, and it is not necessary that those facts be here reiterated. It is suf-

ficient to say that appellants contend that appellee has discharged certain noxious wastes into the sewer system of the City of Green Forest, allegedly polluting Dry Creek, a stream running through appellant's properties, and they allege damages. In the first case, the trial court sustained a demurrer to the complaint and we reversed and remanded, our holding being largely predicated on the fact that the complaint asserted that appellee had violated a contractual duty with the City. We also pointed out, however, that in *Carmichael* v. *City of Texarkana,* 116 F. 845, 54 C.C.A. 179, it was recognized that a user of the City's sewage facilities could, under some circumstances, be liable. In the second *Ratzlaff* case, the appeal was dismissed because we held that it constituted a "piecemeal appeal". Following the remand of that case, four additional plaintiffs joined the original plaintiffs in the suit against Franz Foods and except for slight variations of property descriptions and the amount of damages sought, the complaints and amended complaints are substantially identical to those of original appellants. There are three allegations, the first being the existence of an oral or written contract between appellant and the City of Green Forest, by which contract Franz was restricted from depositing certain production waste matters into the City Sewer System. It was next asserted that Franz was directly depositing such matter into Dry Creek, causing the pollution of said stream to the damage of appellants, and finally it was asserted that Franz had violated the City ordinance which specifically provided that certain deposits of waste products should not be deposited into the sewer system of the City. As to the last contention, the court granted a summary judgment, holding, as a matter of law, that this allegation did not state a cause of action;[1] subsequently, the evidence being stipulated, the court granted a directed verdict and dismissed the complaint. Thereafter, this appeal was perfected, but only one point is here relied upon, *viz.*, "The existence of Ordinance No. 272 of the City of Green Forest, Arkansas, and the violation of such ordinance by the appellee states a cause of action against the appellee."

[1]The ruling was apparently based on the ground that an individual user of the City Sewage System cannot be liable for alleged damage once he discharges an effluent into the municipal sewage system.

Ordinance No. 272 is an exhibit to the complaint.

As to the ordinance, the complaint, *inter alia,* asserts violations of Article III, Section 3 (b), (d), Section 4 (b), (c), (f), (h), (i) (3), (i) (4), and (j) of said ordinance. We agree with appellee that violations of Section 4 and its subdivisions do not assert a cause of action since that section provides that no substances, wastes, etc., shall be discharged into the sewer system "if it appears likely in the opinion of the Water Superintendent or Sewer Superintendent such wastes can harm either sewers, sewage treatment process or equipment, have an adverse effect on the receiving stream, or can otherwise endanger life, limb, public property, or constitute a nuisance." There is no allegation in the complaints or amended complaints that the superintendent has made any finding that waste deposited by Franz can harm the system, and without such an allegation, a cause of action cannot be predicated on this section.

Violations mentioned in Section 3, however, are not dependent upon the opinion of the Sewer Superintendent. Pertinent provisions in that section read as follows:

> "Section 3. No person shall discharge or cause to be discharged any of the following described waters or wastes to any public sewers: . . .
>
> (b) Any waters or wastes containing toxic or poisonous solids, liquids or gases in sufficient quantity, either singly or by interaction with other wastes to injure or interfere with any sewage treatment process [to] constitute a hazard to humans or animals, create a public nuisance or create any hazard in the receiving waters of the sewage treatment plant, including, but not limited to, cyanides in excess of two (2) mg/1 as CN in the wastes as discharged to the public sewer. . . .
>
> (d) Solid or viscose substances in quantities or of such size capable of causing obstruction to the flow in sewers or other interference with the proper operation of the sewage works such as, but not limited to, ashes,

cinders, sand, mud, straw, egg shells, shavings, metal, glass, rags, feather, tar, plastics, wood, unground garbage, whole blood, pauch manure, hair and fleshings, entrails, paper dishes, cups, milk containers, etc., either whole or ground by garbage grinders."

Appellee argues, however, that Article VI of the Ordinance covers this section. Article VI reads:

"Section 1. Any person found to be violating any provision of this ordinance shall be served by the Water Superintendent or the Sewer Superintendent with written notice stating the nature of the violation and providing a reasonable time limit for the satisfactory correction thereof. The offender shall, within the period of time stated in such notice, permanently cease all violations.

Section 2. Any person who shall continue any violation beyond the time limit provided for in Article VI, Section 1, shall be guilty of a misdemeanor, and on conviction thereof may be fined in an amount not exceeding One Hundred Dollars ($100.00) for each violation. Each day in which any such violation shall continue shall be deemed a separate offense.

Section 3. Any person violating any of the provisions of this ordinance shall become liable to the City for any expense, loss, or damage occasioned the City by reason of such violation."

It is contended that since there are no allegations that the Sewer Superintendent has served a notice on appellee, as provided in Section 1, the complaint fails to state a cause of action.

Appellee, in its brief, says with reference to Section 3 and the pertinent subsections:

"This leaves only the allegations relative to violation of Sub-Sections 3 (b), and (d) to be dealt with. Article VI

of the ordinance specifically and unequivocally provides that the deposit of any of the prohibited substances in the sewage system is not unlawful unless and until the water superintendent or the sewer superintendent finds that the ordinance is being violated, and serves written notice on the violator providing a reasonable time for the satisfactory correction of the deficiency. Section 2 of Article VI further specifically provides that there is no violation of law unless the person notified continues to deposit the substances in the sewage system after the period of time stated in the notice. There is not even any allegation that these requirements of the ordinance have been fulfilled; thus, the complaint also totally fails to state a cause of action relative to the alleged violations of Article III of the ordinance."

We do not agree that Article VI provides that the deposit of prohibited substances into the sewage system is not unlawful until the Superintendent finds that the ordinance is being violated. In fact, Article VI deals entirely with enforcement for a violation and sets forth the criminal penalty in event an offender shall continue to violate the ordinance after being advised by the Sewer Superintendent with written notice stating the nature of the violation and providing a reasonable time for the correction thereof. Civil litigation is not dependent upon criminal prosecution and of course there is frequently civil litigation between parties where one has allegedly violated criminal provisions, but has not been prosecuted. It is true that there is no allegation in the complaint to the effect that the Superintendent has served a notice of a violation upon appellee but this does not necessarily mean that no violation has occurred. At any rate, there is nothing in Article VI which provides that even though one deposits prohibited (by the ordinance) substances into the sewage system, such act is not unlawful until notice has been served by the Superintendent.

To return to the case of *Carmichael* v. *City of Texarkana, supra,* the case was originally filed in the District Court at Texarkana, wherein complainants sought the abatement of a nuisance alleged to have been created by the discharge of sewage from the sewer system of the City on premises of com-

plainants, and further sought to recover damages caused to complainants thereby. Both the City of Texarkana and certain individuals were named as defendants. The individual defendants demurred and such demurrer was sustained in a decree rendered in May, 1899. The suit remained pending against the City. Subsequently, in 1901, the pleading against the City was dismissed. This case is styled *Carmichael* v. *City of Texarkana,* 94 F. 561 (W.D. Ark.). The decree was thereafter appealed to the United States Court of Appeals (Eighth Circuit) and was affirmed, that court finding that, as to the City, there was no evidence of negligent construction or maintenance of the sewer system. As to the individuals, the court held that inhabitants of a city who call upon such city to construct a sewer which the city has the authority to construct and control, and such inhabitants who use the improvement *in the way prescribed by law,* are not liable jointly with the city for damages which result to third parties. In the trial court opinion, which was left intact by the Court of Appeals, District Judge Rogers stated:

> "It does not appear from the complaint that the connections made by the individual defendants with the defendant city's sewer system were made in violation of any city ordinance or statute of the state, nor will it be assumed in the absence of allegations to that effect."

The question here presented is not exactly the same as that in *Carmichael,* but the principle is controlling, i.e., we have here the allegation that Section 3 of the City ordinance was violated by appellee depositing certain substances into the sewer system contrary to the ordinance.

We hold that a cause of action was stated and the court erred in granting a summary judgment to appellee. The judgment is therefore reversed and the cause remanded to the Carroll County Circuit Court (Eastern District) with directions to proceed in a manner not inconsistent with this opinion.

ALLSTATE INSURANCE COMPANY *v.* EQUITY MUTUAL INSURANCE COMPANY

74-195 516 S.W. 2d 389

Opinion delivered December 9, 1974

Wright, Lindsey & Jennings, for appellant.

Laser, Sharp, Haley, Young & Boswell, P.A., for appellee.

GEORGE ROSE SMITH, Justice. In November, 1972, the plaintiff's decedent, Carrie Lovett, was fatally injured by an uninsured motorist as she was walking across a street in Little Rock. Mrs. Lovett was covered by $10,000 uninsured-motorist clauses in each of two automobile insurance policies: One, a policy issued to Mrs. Lovett by the appellee Equity Mutual upon Mrs. Lovett's own car and, two, a policy issued by the appellant Allstate upon Mrs. Lovett's husband's car. Both policies provided coverage for the named insured and for his or her spouse. Liability being admitted, the only remaining question in the case is whether Equity Mutual is liable for the entire $10,000, as Allstate contends, or the two insurance companies are liable for $5,000 each, as the trial court held. We affirm.

As far as this case is concerned, the two policies are identical. Both contain excess insurance coverage, but counsel for the rival companies agree that excess coverage is not involved here. What is involved is a pro rata provision that is common to both policies and reads as follows:

> Except as provided in the foregoing [excess coverage] paragraph, if the insured has other similar insurance available to him and applicable to the accident, the damages shall be deemed not to exceed the higher of the applicable limits of liability of this insurance and such other insurance, and the company shall not be liable for a greater proportion of any loss to which this coverage applies than the limit of liability hereunder bears to the sum of the applicable limits of this insurance and such other insurance.

Allstate argues that Equity Mutual is the primary insurer because Equity Mutual issued the policy upon Mrs. Lovett's own car. We need not determine whether that argument would have merit if Mrs. Lovett's car had been involved in the fatal accident, for that is not the fact. At the time of her death Mrs. Lovett was a pedestrian. The pro rata clause contains no language peculiarly applicable to that situation. Instead, the controlling provision limits liability "if the insured has other similar insurance available to him and applicable to the accident." Both policies had that provision; so we do not see why either company should bear the entire loss. That conclusion, upon similar facts, was reached in *Box* v. *Doe*, 221 So. 2d 666 (La. App., 1969), cert. den., 254 La. 457, 223 So. 2d 868 (1969). To come to any other conclusion we should have to read into the policies something that is not there.

Affirmed.

James ALEXANDER *v.* STATE of Arkansas

CR 74-92 516 S.W. 2d 368

Opinion delivered December 9, 1974

Stallcup, Bartels & Boling, Court-appointed atty., for appellant.

Jim Guy Tucker, Atty. Gen., by: *Gary Isbell,* for appellee.

LYLE BROWN, Justice. Appellant James Alexander was convicted of the sale of a controlled substance (LSD) and sentenced to ten years. He advances five points for reversal which will be enumerated and discussed under separate headings.

Point I. *The court erred in denying appellant's motion for the State to furnish him an independent chemist to make an analysis of the contraband.*

Appellant takes the position that he was without funds to hire a chemist to make an independent analysis of the LSD and that he had a constitutional right to have such assistance at the expense of the State. We are cited no precedent to justify such demand. It clearly is not mandated or authorized by statute. A corollary to appellant's request is found in our case of *Hale* v. *State,* 246 Ark. 989, 440 S.W. 2d 550 (1969). Hale contended that the trial court erred in refusing to provide him funds with which to employ a private psychiatrist. In holding Hale's contention without merit we pointed out there was no law to support the proposition. To the same effect see *Grissom* v. *State,* 254 Ark. 81, 491 S.W. 2d 595 (1973). We point out that a qualified chemist employed by the State Board of Health made the analysis. Her qualifications are not questioned and she is in no way controlled by persons charged with the duty of prosecuting criminal cases.

Point II. *The delay between the alleged commission of the offense and the filing of charges was constitutionally detrimental to appellant.*

The offense was alleged to have occurred on February 28, 1973, and charges were not filed until July 12, 1973. Our general statute of limitations on filing of felony charges such as the one at hand is three years from the commission of the offense. Ark. Stat. Ann. § 43-1602 (Repl. 1964). A similar

contention was made in *Beckwith* v. *State*, 238 Ark. 196, 379 S.W. 2d 19 (1964). We there said it was realized that time wears out proof of innocence as well as proof of guilt; nevertheless, the public policy on limitations for filing charges is expressed in the statute. We there said that the record failed to show that the acts of the prosecutor were so arbitrary, unreasonable and unlawful as to deprive Beckwith of due process of law. The same question arose in the case of *United States* v. *Marion*, 404 U.S. 307 (1971). In that case there was a delay of 38 months between the commission of the offense and the returning of an indictment. The Court said the due process clause of the fifth amendment would require dismissal if it were shown at the trial that the pre-indictment delay "caused substantial prejudice to appellees' rights to a fair trial and that the delay was an intentional device to obtain tactical advantage over the accused". Then the court went on to make a point which is apropos to the case at bar:

> Appellees rely solely on the real possibility of prejudice inherent in any extended delay; that memories will dim, witnesses become inaccessible, and evidence be lost. In light of the applicable statute of limitations, however, these possibilities are not in themselves enough to demonstrate that appellees cannot receive a fair trial and to therefore justify the dismissal of the indictment. Events of the trial may demonstrate actual prejudice, but at the present time appellees' due process claims are speculative and premature.

In the case at bar it was clearly evident that no harm came to the appellant's defense as a result of the delay.

Point III. *The trial court erred in permitting appellant's wife to be cross-examined about other offenses allegedly committed by appellant.*

Appellant says "the State attempted to place before the jury other offenses by asking the appellant's wife if marijuana and other narcotics were not present in their house trailer many times and if she had not purchased or bought capsules for her husband to put dope in". Evidence was produced by the State to the effect that narcotics were in fact in the house

trailer and that the wife had obtained empty capsules to be filled with LSD. It was certainly permissible to cross-examine the witness as to felonious offenses of which she may have had knowledge or in which she may have participated. The subject matter went to her credibility as a witness. In *Clark* v. *State*, 246 Ark. 1151, 442 S.W. 2d 225 (1969), appellant's wife was questioned on cross-examination about the number of times she had testified in court. In affirming the case we pointed out that wide latitude is allowed on cross-examination to elicit facts impeaching the credibility of a witness. "The scope of this examination is largely within the discretion of the trial court."

Point IV. *The court erred in permitting the cross-examination of appellant about arrests on other crimes.*

Appellant asserts as error under this point the fact that he was asked on cross-examination, "is that the first time you have been arrested?" Appellant takes the question out of context and also misquotes it. The prosecuting attorney inquired: "Now when were you arrested on *these drug charges?*" The dispute between the prosecutor and the witness concerned the exact date upon which appellant was arrested on the charges for which appellant was being tried. Appellant contended that he was not arrested until October 16. Upon objection being made, the prosecutor made it clear that he was trying to ascertain the exact date of the arrest of appellant on "this charge". The trial court instructed the jury that evidence of any other arrest was not admissible. The point is without merit.

Point V. *The court erred in permitting continued cross-examination of appellant concerning other crimes after appellant denied the crimes.*

We have examined the testimony upon which the point is based. Appellant was asked on cross-examination if, on January 23 past, he sold two ounces of marijuana to W. D. Blount; if he received thirty dollars for the marijuana; if on the same day he sold two ounces of marijuana to Ken McKee; if he dealt in drugs with Ernie Epley or with Norman Hunter; if he did in fact "push drugs" for Pat Beaverson; if he

sold mescaline out of Mobile Home No. 16; if he sold some LSD on February 28 past; if he sold drugs on March 1, 1973, to David Kem; if he bought empty capsules at the Indian Mall Pharmacy to be used for packing mescaline; if he sold cocaine from the trailer; and if he kept drugs in the mobile home in a drawer in the kitchen. All of the questions brought negative answers. The prosecutor did not argue with the witness about his answers. We are unable to say the trial court abused its discretion in permitting the questions to be propounded.

Affirmed.

GENERAL MOTORS CORPORATION AND SCUDDER CHEVROLET, INC. *v.* Thomas Allen TATE, Administrator of the Estate of Marcelyn C. TATE, Deceased and Thomas Allen TATE, Individually

74-133 516 S.W. 2d 602

Opinion delivered December 9, 1974

Barber, McCaskill, Amsler & Jones, for appellant.

Hall, Tucker & Lovell, for appellee.

JOHN A. FOGLEMAN, Justice. On this appeal the granting of a new trial after a successful defense of a wrongful death action is brought into question. Review here is complicated by our inability to ascertain the ground or grounds upon which the motion was granted. Ordinarily, the trial court has a wide latitude of discretion in granting or refusing a new trial. *Security Insurance Co.* v. *Owen,* 255 Ark. 526, 501 S.W. 2d 229; *Ellsworth Brothers Truck Lines* v. *Mayes,* 246 Ark. 441, 438 S.W. 2d 724. We do not reverse such an order in the absence of an abuse of that discretion that is manifest or clearly shown. *Security Insurance Co.* v. *Owen,* supra; *Bittle* v. *Smith,* 254 Ark. 123, 491 S.W. 2d 815. Furthermore, the showing of abuse of discretion must be much stronger where, as here, the appeal comes from an order granting a new trial than when a denial is involved. *Security Insurance Co.* v. *Owen,* supra. We have said that when an order granting a new trial is expressed in general terms without a specification of grounds, it must be affirmed if it can be supported on any ground alleged in the motion. *Missouri Pacific Railroad Co.* v. *Clark,* 246 Ark. 824, 440 S.W. 2d 198. *Hall* v. *W. E. Cox & Sons,* 202 Ark. 909, 154 S.W. 2d 19. The motion specified six grounds. The order granting the new trial simply recited that "it is the opinion of this court that justice would best be served by the granting of a new trial. . . " Although we are committed to a review of all grounds of a motion for new trial in such a case to ascertain whether it can be sustained on any grounds, appellee argues that the granting of the motion could be justified on any one of three grounds. No reliance is placed upon any of the other grounds. Those three are:

I. The trial court erred in refusing a jury instruction requested by appellee which would have permitted him to

recover for breach of warranty.

II. The trial court erred in refusing to give a jury instruction requested by appellee which would have permitted him to recover upon the basis of strict liability.

III. The verdict was not sustained by substantial evidence.

We are confident that appellee would present any other ground upon which he felt that the order could possibly be sustained. Consequently we will review only those grounds which appellee feels are justification for granting this motion. As we do, we must also consider that it is an abuse of discretion to set aside a jury verdict without reasonable cause. *Ellsworth Brothers Truck Lines* v. *Mayes,* supra.

Thomas Allen Tate brought this action against appellant General Motors Corporation and Scudder Chevrolet, Inc. in his capacity as personal representative of his deceased wife, Marcelyn C. Tate in his own right. He sought damages for wrongful death on behalf of the estate and next of kin and for his own personal injuries. He alleged causes of action against General Motors based upon strict liability, breach of warranty and negligence. His complaint against Scudder Chevrolet, Inc., the automobile dealer,was based upon breach of warranty and negligence.

Before their marriage, Tate's wife purchased a 1966 Model Chevrolet Caprice from Chalmers Precise, Jr. about December 18, 1969. Title was placed in Tate and his wife after their marriage. Precise had purchased the automobile, manufactured by General Motors, from Scudder Chevrolet, Inc. on December 13, 1965. Marcelyn C. Tate was fatally injured and Thomas A. Tate injured, on June 2, 1972, when the vehicle, being driven by Tate, went out of control and crashed into a highway sign on Interstate Highway 30 in Saline County. Appellee alleged that the injuries were attributable to an unusual and uncontrolled acceleration of the automobile resulting from a rotation of the vehicle's engine caused by failure of defective engine mounts. Appellant pleaded the statute of limitations and alleged that Tate's own negligence was the proximate cause of the injuries.

At the conclusion of the evidence on behalf of appellee, the dealer's motion for a directed verdict was granted. The grounds for the motion were that there was no evidence of negligence on its part and that the cause of action on breach of warranty was barred by the statute of limitations. Appellant's motion upon the same grounds was denied. Appellant's motion for a directed verdict at the conclusion of all the evidence was likewise denied.

The case went to the jury upon the question of negligence only, the circuit judge having refused to submit the issues of breach of warranty and strict liability by refusing instructions requested by appellee on those issues. A unanimous verdict for appellant was returned. After a hearing on appellee's timely motion for new trial, the circuit judge took the motion under advisement. Later, he advised the parties of his opinion by letter. Thereafter, he denied appellant's motion for a specification of the grounds for granting the motion and entered an order setting aside the jury verdict and granting a new trial upon the vague and general grounds hereinabove set out. By way of clarification the court entered an order stating that the granting of the new trial did not apply to Scudder, but that the directed verdict in its favor should stand. Appellant's motion for a specification of the grounds upon which the motion for new trial was granted was denied.

Turning now to the three potential bases for the circuit judge's action, we will discuss them in order.

I.

Appellant has contended throughout that any cause of action appellee might have had was barred by the statute of limitations. On the other hand, appellee contends that the cause of action was not barred and that the statute of limitations did not begin to run until the breach was discovered. The parties agree that appellee's allegations and proof constituted the assertion of a cause of action for breach of an implied warranty. They also agree that this cause of action accrues when the breach occurs and the breach occurs when tender of delivery is made. See Ark. Stat. Ann. § 85-2-

725 (Add. 1961). The tender of delivery, insofar as appellant is concerned, was on the date of the sale by the dealer, Scudder Chevrolet Co., to Precise, i.e., December 13, 1965. This action was brought on December 21, 1972. It is evident that more than five years intervened. The action was clearly barred by the failure to bring the action within four years after the cause of action accrued as required by Ark. Stat. Ann. § 85-2-725, unless the action fell within the exception stated in Ark. Stat. Ann. § 85-2-725 (2). That subsection states that a breach of warranty occurs when tender of delivery is made except when a "warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance, the cause of action accrues when the breach is or should have been discovered." It does not seem logical that the Code intended that an *implied* warranty be explicitly extended to future performance. The words "explicit" and "implied" are contradictory. "Explicit" has been defined as meaning express, not implied. Webster's Third New International Dictionary; Webster's New International Dictionary, Second Edition; The Random House Dictionary of the English Language, Unabridged Edition. The exception relied upon by appellee is immediately preceded by the statement that the cause of action accrues when the breach occurs, regardless of lack of knowledge of the breach. It could not have been intended that an implied warranty be an exception, where injury results from a defect in goods, to the general rule. See White - Summers, Handbook on Uniform Commercial Code 341, § 11-8; Anderson Uniform Commercial Code, 2d Ed. 563, § 2-725:24. Other jurisdictions have rejected the contention made by appellee. *Ohio - Val Decker Packing Co.* v. *Corn Products Sales Co.* (6 Cir. 1969) 411 F. 2d 850; *Everhart* v. *Rich's, Inc.*, 128 Ga. App. 319, 196 S.E. 2d 475 (1973); *Constable* v. *Colonie Truck Co.*, 37 A.D. 2d 1011; 325 N.Y.S. 2d 601 (1971); *Moody* v. *Sears, Roebuck & Co.* 344 F. Supp. 844 (D.C., Ga. 1971). See also, *Mendel* v. *Pittsburgh Plate Glass Co.*, 291 N.Y.S. 2d 94 (1967). This conclusion is also consistent with pre-code law in Arkansas. *Peterson* v. *Brown*, 216 Ark. 709, 227 S.W. 2d 142. We do not see how the statute can be construed to bring this action within the exception to the applicable four year statute of limitations, so appellee's cause of action was clearly barred. In spite of the circuit judge's concern about his failure

to submit the cause of action on breach of warranty to the jury, expressed when he took the motion for new trial under advisement, a new trial was not granted against the automobile dealer. It seems to us that the same evidence and the same warranty applied to both the dealer and the manufacturer. Be that as it may, the failure to give the requested instruction could not have afforded a basis for granting a new trial.

II

Appellee contends that Act 111 of 1973 [Ark. Stat. Ann. § 85-2-318.2 (Supp. 1973)] providing for strict liability was applicable to this case in spite of the fact that the cause of action accrued and the action was commenced prior to the effective date of the act. We had steadfastly refused to adopt the doctrine of strict liability in cases such as this by judicial action. Appellee contends that the legislative act providing for strict liability was intended to have retrospective effect as shown by a clause stating that it is remedial in nature. Furthermore, says appellee, the act did not create new rights but merely gave an additional remedy. We are unable to accept this argument. Strict liability is a new theory of recovery in a case of this sort. It is a liability imposed by statute. It confers upon a plaintiff the right to recover damages upon a theory and under circumstances where a cause of action did not formerly exist. See Frumer & Friedman, Products Liability, 3-237, § 16A [1]; Restatement of Torts, 2d Ed., § 402A Comment m, Prosser, The Assault upon the Citadel (Strict Liability to the Consumer) 69 Yale Law Journal 1099, 1134 (1960); Annot, Products Liability, 13 A.L.R. 3d 1057, 1074 (1967); *Greenman* v. *Yuba Power Products, Inc.,* 27 Cal. Rptr. 697, 377 P. 2d 897, 901 (1963). Before the adoption of the act, appellee could have only recovered by proving negligence or a breach of warranty. After the passage of the act, for one in appellee's position, neither negligence nor breach of warranty would be an essential ingredient of the cause of action on strict liability. Thus a new cause of action exists and a new liability is imposed. Any doubt about the legislative intent in this regard may be resolved by resort to the title of the act which reads, "An Act to Impose Liability for Injury and Damages Done in Certain Circumstances by Defective Products, and for Other Pur-

poses." The mere statement that the act is remedial does not overcome the presumption against retrospective effect.

III

Appellee's action for negligence was based upon an allegation that the motor vehicle he was driving and in which his wife was a passenger at the time of their injuries was equipped with engine mounts that were defectively designed in such a way that upon failure of an engine mount the engine was allowed to rotate or move within the engine compartment, thereby causing the engine to speed up, or preventing it from slowing down, because of interference with the throttle linkage system. In this respect, we must review the testimony of Tate as to how the accident of June 2, 1972 occurred. It is substantially as follows:

> On the Sunday in question he and his wife had planned to go to Hot Springs and sell the car, which then had been driven approximately 66,000 miles and for which he had previously received from appellant a recall notice for correction of a possible safety hazard which would exist if separation of an engine mount should occur on the vehicle. The Tates had had no problem or difficulty with the automobile. It was in excellent condition. They proceeded normally along the highway until they reached the point where the highway branches, with the Interstate highway going to Malvern and another fork otherwise designated going to Hot Springs. Tate was driving at approximately 70 miles per hour, his customary speed on the Interstate highway. He took his foot off the accelerator in order to decrease the speed of the vehicle so that he could make a turn to the right to the Hot Springs highway. He removed his foot completely from the accelerator and the speed of the vehicle decreased normally, as he would expect, for one or two seconds. It then seemed as if the vehicle went into passing gear, jerking forward. The speed of the car then accelerated and Tate tried to put his foot on the brake. He heard a roaring noise as if he had the accelerator pressed all the way down with his foot on the brake. He believed that he put both feet on the brake trying to stop

the vehicle. The steering wheel locked, as if one had turned the key on a later model car to the "off" position, so that Tate could not turn it. Tate saw a roadside sign looming up in front of him but did not remember hitting it. The vehicle struck the sign, was severely damaged, Marcelyn Tate was killed and Tate suffered severe injuries. He said that the automobile was equipped with factory air conditioning.

There is no doubt that the left motor mount had failed by fatigue prior to the impact of the automobile with the sign post. The question was whether the fatigue failure of the left motor mount could have been the proximate cause of the accident and damages. All of the witnesses on this point were experts. Two of them were called by appellee and two by appellant. All agreed that a failure of this motor mount could, under certain conditions, permit the engine on this model of Chevrolet to rotate in such a manner as to interfere with the throttle linkage. There are certain factors, however, that clearly show that this could not have happened in this instance. Ellis McCorkle, one of appellee's experts, testified that when the engine is accelerated, its torque tends to lift it from the left mount putting it in tension and putting the right mount into compression. He said that the motor could move out of position so that the accelerator linkage is affected and jammed into full acceleration by pulling the carburetor into full open position and that, if you took your foot off the pedal, it is still in the jammed position, even though the motor would be racing. He theorized that the engine in the Tate vehicle had rotated and locked the accelerator into a high speed position so that if Tate took his foot off the accelerator pedal it didn't affect the application of the gas to the motor and the motor continued to race. This, of course, is not consistent with Tate's testimony that when he removed his foot from the throttle, the speed of the vehicle decelerated.

Joe Harris, the other expert called by appellee, was of the opinion that motor mount failure was the cause of the accident, or at least triggered the events which culminated in the accident. He said that apparently when the driver of the Chevrolet asked the car to slow down, it did partly, but not

totally. He said that something caused the engine to continue to deliver power while the brakes were applied and the only thing that anybody could find on this car that might have been the cause of it was the defective motor mounts. He could not recall whether the car had air conditioning or not, but admitted that an air conditioning unit could introduce some restraint to the engine motion which might limit it somewhat, but he did not think that it was a prime consideration and did not take into consideration whether or not the vehicle had air conditioning when he was making his examination of it. He said that a forward movement of the engine would cause an increased acceleration by pulling the carburetor away from the accelerator, and he thought such was likely in this case, but thought there had been a twisting motion at one point in time. He said that the only time one had any problem with a separated motor mount is in low gear, on a sharp left turn or when driving down the road at 70 miles an hour and hitting a little bump. He recalled a bit of a left turn before the point of the accident (but Tate did not). He said that the road was not perfectly level.

Richard Maiers, an engineer who was employed by General Motors Corporation, testified as an expert. He said that the engine mount phenomenon associated with Chevrolet vehicles is one in which the engine will want to lift off the mount, if the left engine mount should, by reason of fatigue, impact or any other cause, become separated into two individual parts, which had happened at some time. He stated that engine lift could only occur under particular circumstances when the transmission is in first gear but under no circumstances could you have engine lift in anything except when the automobile was in the low gear. In first gear, by accelerating from a stop with the throttle all the way to the floor, the shift of first gear will occur at about 48 miles per hour. Engine lift could be maintained only up until the vehicle reached a speed of 40 miles per hour at which time the engine would fall back due to its own weight onto the left engine mount. One of the secondary effects of the separation of the left engine mount when there was significant engine rotation to the right could result in holding the throttle rod in the position the driver put it in under the proper conditions. However, he said that this will not cause increased accelera-

tion. The effect, according to him, is merely to hold the throttle in the position it is already in by pushing hard enough on its side. He said that this occurs in low gear only. This, he said, had no effect on the steering system of the vehicle. This witness testified that the air conditioner compressor support bracket on this automobile limited the amount of engine movement in the automobile. The amount of engine lift or displacement permitted by the air conditioner is not sufficient to cause any of the secondary effects such as would affect the throttle or brakes and, with the air conditioning unit, the Tate vehicle could not have had an acceleration problem at any speed due to a separated engine mount, according to this witness.

Henry H. Hicks, Jr., a teacher in the mechanical engineering department of the University of Arkansas also testified that the stuck throttle phenomenon could not be possible on the Tate vehicle with the air conditioner in place.

No one attempted to contradict this testimony. Of course, one of the witnesses was an employee of appellant and the other employed for the purposes of this trial. Their testimony went to the matter of physical impossibility of the accident happening as Tate related being the result of the defective left motor mount. If this were not the case, surely the experts who testified for appellee could have shown that it was not.

There was really no reason why the testimony of these witnesses should be totally discarded. In a long line of cases we have said that when the testimony of one employed by a defendant in an action is not substantially contradicted by any testimony, fact or circumstance, and does not seem unreasonable or improbable, the jury cannot arbitrarily or capriciously disregard his testimony, and we have reversed judgments where this was done, and, where the case was fully developed, have dismissed the action. See *St. Louis, San Francisco Ry. Co.* v. *Williams,* 180 Ark. 413, 21 S.W. 2d 611; *St. Louis, San Francisco Ry.* v. *Cole,* 181 Ark. 780, 27 S.W. 2d 992; *Missouri Pacific Railroad Co.* v. *Hancock,* 195 Ark. 414, 113 S.W. 2d 489; *East Texas Motor Freight Lines, Inc. et al* v. *Dennis et al,* 214 Ark. 87, 215 S.W. 2d 145. In such a case we have held

that where there is not sufficient evidence upon which to predicate a finding of negligence without arbitrarily disregarding testimony of such witnesses in favor of a theory equally hypothetical, a judgment against a defendant should be reversed and dismissed. *St. Louis, San Francisco Ry. Co.* v. *Pace,* 193 Ark. 484, 101 S.W. 2d 447; *Missouri Pacific Railroad Co.* v. *Ross,* 194 Ark. 877, 109 S.W. 2d 1246. Where it is impossible for a jury to have harmonized discrepancies in testimony without eliminating impossibilities and have substantial evidence upon which to predicate a verdict, this court will reverse a judgment on such a verdict. *Missouri Pacific Railroad Co.* v. *Hancock,* supra; See also *Ellsworth Brothers Truck Lines* v. *Mayes,* 246 Ark. 441, 438 S.W. 2d 724.

Since the testimony of Harris and Hicks was unaffected by conflicting inferences which might be drawn from it, and was not improbable, extraordinary or surprising in nature, there was no reason for denying the jury's finding of verity dictated by it. *Knighton* v. *International Paper Co.,* 246 Ark. 523, 438 S.W. 2d 721. There is a presumption that the trial court will not set aside a verdict that is not against the preponderance of the evidence when there is substantial conflict in the evidence, but that presumption does not apply in the absence of such a conflict. It is clear to us that the air conditioning unit was in place on the Tate vehicle and that the motor could not have rotated sufficiently to have interfered with the throttle linkage. It is clear that the decrease in speed of the vehicle when Tate took his foot off the accelerator is a clear indication that the rotation of the motor did not interfere with the throttle linkage.

It is also significant that McCorkle's testimony is not consistent with Tate's version of the accident. Under these circumstances we have concluded that it was not possible that this accident could have resulted from the failure of the left motor mount of the Tate vehicle. Thus there was no substantial evidence upon which the jury could have based a verdict against appellant. Since there was no substantial conflict in the evidence on these critical points the trial court could not have properly granted a new trial because the verdict was against the preponderance of the evidence.

In our consideration of this case, we have reviewed other such cases wherein the trial court has granted a motion for new trial without specifying the grounds for its decision. These cases always present perplexing problems in appellate review, not only to the appellate court in exploring every possible facet of the case to determine whether there has been an abuse of the trial court's discretion, but to attorneys on both sides who have to brief the case. We have, in this case, assumed, properly we think, that the attorneys for appellee would, beyond doubt, present any ground upon which the action could be sustained. Even this approach is far from satisfactory, and only tends to add to the evergrowing burden of this court. Consequently, we are promulgating a rule governing the granting of motions for new trial in the future, which will tend to eliminate this problem and thereby improve the administration of justice. It is generally conceded that, in the interest of good practice and the proper dispatch of judicial business, courts should specify in orders granting new trials, with particularity the grounds on which the order is made. 58 Am. Jur. 2d 437, New Trial § 214; 66 C.J.S. 533, §210 (3) (a). The Appellate Court of Indiana met the problem headon when it was first confronted with it. See *Rife* v. *Karns*, 133 Ind. App. 226, 181 N.E. 2d 239. See also *Pensacola Chrysler-Plymouth, Inc.* v. *Costa*, 195 S. 2d 250 (Fla. 1967); *Morton* v. *Staples*, 141 S. 2d 806 (Fla. App. 1962); *Simmons* v. *Koeteewaw*, 5 Wash. App. 572, 489 P. 2d 364 (1971); *Mulka* v. *Keyes*, 41 Wash. 427, 249 P. 2d 972 (1952); *Brooks* v. *De La Cruz*, 12 Ariz. App. 591, 473 P. 2d 793 (1970); *Heaton* v. *Waters*, 8 Ariz. App. 256, 455 P. 2d 458 (1968); Rule 59, Federal Rules of Civil Procedure.

The rule we are promulgating by per curiam order is based to some extent upon the action of other courts.

Since we have found no ground which could have supported the granting of a new trial, we reverse the order and dismiss the action.

Willis E. SELF *v.*
John DYE and Linda DYE

74-197 516 S.W. 2d 397

Opinion delivered December 9, 1974

Eugene Coffelt, for appellant.

Little, Lawrence & McCollum, by: *James G. Mixon,* for appellees.

JOHN A. FOGLEMAN, Justice. This appeal involves questions pertaining to the trial of an action to recover for damage to the automobile of John and Linda Dye in a collision with the motor vehicle of Willis E. Self. The collision occurred in the city limits of Rogers at the intersection of U.S. Highway 71 and Oak Street. Although no pleadings are abstracted, it is clear from appellant's statement of the case, adopted by appellees, that both parties alleged that the other driver was negligent and that his negligence was the proximate cause of the damage. Traffic at the intersection was controlled by traffic lights.

Appellant states the following points for reversal:

1. That there was no substantial evidence to support the verdict rendered by the trial court in this action.

2. That the trial court erred in admitting or considering the police report of the officer who investigated this accident.

3. That the trial court abused its discretion in limiting cross-examination of witnesses.

We find no merit in any of these points and affirm the judgment, which was rendered by the circuit judge sitting as a jury.

I

Appellant argues that the testimony of Linda Dye (the driver of the Dye automobile) shows that she did not even see the vehicle driven by Self on Highway 71 until the two vehicles collided, and that her testimony about the collision was not corroborated, because one witness offered for that purpose was a police officer who remembered nothing significant and the other was not credible. Appellant asserts that, since it is clear that Mrs. Dye was not keeping a proper lookout and was driving with an infant in her lap, she was negligent as a matter of law, and that the damages should have been reduced under the Comparative Negligence Statute (Ark. Stat. Ann. § 27-1764 [Repl. 1962]).

We think appellant mistakes both the scope of our review and the issue before the trial court. The question here is whether there was *any* substantial evidence to support the judgment. The issue before the trial court was whether one, or the other, or both, of the drivers were guilty of negligence which constituted the proximate cause of appellees' damage.

It is not necessary that we consider any testimony other than that of Linda Dye on this point. On this critical issue she testified as follows:

> She was driving the Chevrolet automobile owned by her and her husband in a westerly direction on Oak Street, en route to a babysitter's home, where she would leave her three-year-old daughter and then go to her place of employment. At the intersection, she stopped at a stoplight. After she waited almost the full time the light remained red for Oak Street traffic, it turned green, she pulled into the intersection and her car was struck by Self's vehicle, which she had not previously seen. She travelled 10 or 12 feet and had gotten her vehicle into the "inside lane" on Highway 71 before it was struck. Highway 71 is a four-lane highway. When the Self vehicle struck her, it was in the first lane, or the right hand lane on Self's side of the highway. After the collision, Self asked her what had happened, who had run the red light, and who had hit whom. Self said that he was day dreaming and really did not know what had happened.

This testimony was clearly substantial evidence of Self's negligence and was sufficient basis for the trial court's apparent finding that it constituted the sole proximate cause of the collision.

II

Denny Roles, a Rogers police officer, investigated the collision when it happened. He prepared an accident report which was kept in the files of the Rogers Police Department. Before he was called as a witness by appellees, he reviewed this report at the request of their attorney. He testified that it was his practice to take a statement from each driver involved in a collision. He recorded those statements on his report. It is clear from the record that Roles did not have any independent recollection of the statements of the drivers and his memory was not refreshed by reading his report. He could only be sure of the statement made to him by Self because he had recorded it in his report. Appellant objected to "what he has got in that statement". Roles testified, after the objection was overruled, that Self had stated that he didn't know what had happened.

The importance of this point cannot be overlooked because the trial judge resolved the conflict between the testimony of the two drivers by the officer's report of what the parties stated at the time of the investigation. The report itself was never actually introduced, but a critical portion of its content was read into evidence. We cannot sustain the admission of this evidence on the basis of the class of evidence called "recollection refreshed" on the record before us. Reliance upon a written recital made by the witness when he had a clear recollection of the facts recited is classified as a "past recollection recorded". See McCormick, (2d Ed.) p. 14, § 9; p. 712, § 299; 4 Jones on Evidence (6th Ed.) 251, 266, § 27:1, 27:9.

Evidence is admissible under this classification if the witness had first-hand knowledge of the facts recorded, if the written record is an original made at or near the time of the event recorded and while the witness had a clear and accurate memory of it, but lacks a present recollection of it, and

if the witness can vouch for the accuracy of the written memorandum. McCormick (2d Ed.), p. 712, Chapter 30; 4 Jones on Evidence (6th Ed.) 254, 267, 27:3, 27:9. Many years ago, we applied this rule in *Woodruff* v. *State,* 61 Ark. 157, 32 S.W. 102. It was lucidly stated by Mr. Justice Battle in *Phoenix Insurance Co.* v. *Public Parks Amusement Co.,* 63 Ark. 187, 37 S.W. 959. The proper foundation was laid for the officer's reciting the statement made by Self as recorded on the report made at the time.

III

During the cross examination of Linda Dye, she was asked if she had examined the Self vehicle and if she knew which part of the vehicle was struck. She responded to both questions in the negative. The court sustained appellees' objection to the further inquiry, "You don't know that his extreme right front ---." We certainly recognize that the cross-examiner should be accorded wide latitude in attempting to elicit facts which would tend to contradict or impeach testimony given on direct examination. We also recognize that undue limitation on examination constitutes an abuse of the trial court's discretion. Still, the cross-examiner may be restricted in posing argumentative questions or addressing a question to a witness that erroneously assumes that a material fact has been proved or that the witness has testified to such facts on direct examination. 58 Am. Jur. 366, Witness § 666; 98 C.J.S. 211, 215, Witnesses, § 411, 413; 98 C.J.S. 36, Witnesses, § 3286 (5); McCormick on Evidence p. 11, § 7; 4 Jones on Evidence 166, § 2521. The right to ask leading questions does not license the examiner to testify, in effect, by making statements of fact. *Woodruff Electric Cooperative Corp.* v. *T. J. Daniel,* 251 Ark. 468, 472 S.W. 2d 919. We find no abuse of discretion on this ruling.

Later, on cross-examination of the police officer the record discloses the following:

By Mr. Coffelt:

Q. He stated that he didn't know what happened?

A. Yes sir.

Q. Is that statement unusual when a man is driving down the highway when the light is green and somebody runs into them?

Mr. Mixon: Object. Offering an opinion.

The Court: Objection sustained. That's the ultimate decision for the court to make.

Mr. Coffelt: Save our exceptions.

Again we find no abuse of discretion. This question is also argumentative and assumes that appellant's version of the disputed facts as to the color of the traffic light was true. It called for a conclusion or opinion of the witness, or the drawing of an inference by him. Whether an affirmative answer to the question would have cast doubt on the officer's credibility or would have added weight to the statement of Self as recorded by the witness is certainly a matter subject to argument. To say the least, the court's action was well within the latitude of its discretion.

The judgment is affirmed.

Willie L. ROBERTSON and REO MOVING & STORAGE Company *v.* Marilyn Jean BARNETT, Administratrix of the Estate of Carl Dewayne BARNETT, deceased

74-152 516 S.W. 2d 592

Opinion delivered December 9, 1974
[Rehearing denied January 13, 1975.]

Mays & Landers and *Bridges, Young, Matthews & Davis,* for appellants.

Richard E. Griffin and *Robert J. Johnson,* for appellee.

CONLEY BYRD, Justice. This is an appeal from a $300,000 default judgment entered in a personal injury action in favor of appellee Marilyn Jean Barnett, Administratrix of the Estate of Carl Dewayne Barnett, deceased, and against appellant Reo Moving & Storage Company of Illinois and its driver Appellant Willie L. Robertson. Appellants rely upon the following points for reversal:

"POINT I. The trial court erred in finding that the appellants should not be permitted to plead to the complaint notwithstanding that time for pleading had expired.

POINT II. The trial court erred in entering judgment against appellants because a co-defendant, Clarence Poole, had filed an answer which inured to the benefit of appellants.

POINT III. Appellants should have been permitted to remove the case to Federal Court.

POINT IV. The court erred in admitting evidence as to damages for loss of parental guidance.

POINT V. The judgment is excessive.

POINT I. Appellants admittedly received proper service of the summons and complaint sometime around October 24, 1973. Appellant Reo Moving & Storage Company (hereinafter referred to as "Reo") promptly turned its summons and complaint over to its insurance broker Lindquist Burns Insurance Agency. William Leonard of the Lindquist Burns Insurance Agency mailed the summons and complaint to R. E. Potter, Ltd., through whom "Reo's" liability coverage with U.S.F.&G. had been obtained. R. E. Potter, Ltd., is apparently a general agent for U.S.F.&G. Potter told U.S.F&G.'s claim department that he had delivered the summons and complaint to U.S.F.&G.'s adjuster Mr. Ward Chase. Ward Chase denies that Potter delivered the summons and complaint. At any rate "Reo" had thirty days within which to answer the complaint, but due to the neglect or default of its insurance agents, no answer or response to the complaint was made until December 19, 1973. Appellants in both the trial court and here contend that their failure to answer within time was caused by "excusable neglect, unavoidable casualty and other just cause" within the meaning of Ark. Stat. Ann. § 29-401 (Repl. 1962). That statute provides:

"Judgment by default shall be rendered by the Court in

> any case where an appearance or pleading, either general or special, has not been filed within the time allowed by this Act; provided, that the Court may for good cause allow further time for filing an appearance or pleading, if application for granting further time is made before expiration of the period within which the appearance or pleading should have been filed; and that nothing in this Act shall impair the discretion of the Court to set aside any default judgment upon showing of excusable neglect, unavoidable casualty or other just cause."

Appellants quote from decisions of this court prior to Acts 1955, No. 49, and from decisions of other courts construing similar statutes to the effect that the delay in responding to the complaint came about through "excusable neglect, unavoidable casualty or other just cause." The history of the lax procedure before Acts 1955, No. 49, and the effect and purpose of the change brought about by Acts 1955, No. 49, can be found in *Walden* v. *Metzler,* 227 Ark. 782, 301 S.W. 2d 439 (1957), and *Pyle* v. *Amsler, Judge,* 227 Ark. 785, 301 S.W. 2d 441 (1957). The effect of the 1957 Amendment, Acts 1957, No. 53, which provided: ". . . that nothing in this Act shall impair the discretion of the Court to set aside any default judgment upon showing of excusable neglect, unavoidable casualty or other just cause," has been considered in *Interstate Fire Insurance Co.* v. *Tolbert,* 233 Ark. 249, 343 S.W. 2d 784 (1961); *Moore, Adm'x* v. *Robertson,* 242 Ark. 413, 413 S.W. 2d 872 (1967); and *Ryder Truck Rental* v. *Wren Oil Dist. Co.,* 253 Ark. 827, 489 S.W. 2d 236 (1973). We can see little difference between the neglect of the agents and employees involved in *Interstate Fire Insurance Co.* v. *Tolbert, supra,* and in *Ryder Truck Rental* v. *Wren Oil Dist. Co., supra,* and the agents to whom "Reo" entrusted its affairs. Consequently, we must hold that the trial court did not err in finding that appellants' conduct did not amount to "excusable neglect, unavoidable casualty or other just cause."

POINT II. Appellants contend that an answer filed by a third defendant, Clarence Poole inured to their benefit and that because thereof the trial court erred in entering the default against them. We find no merit in this contention

because the issue is raised for the first time on appeal. Furthermore, there were separate allegations of negligence against Poole that did not arise out of any relationship of indemnity, master and servant, or principal and agent such as was involved in *Arkansas Electric Co.* v. *Cone-Huddleston*, 249 Ark. 230, 458 S.W. 2d 728 (1970).

POINT III. Appellants contend that since they did not know about the voluntary non-suit against Poole until they received the precedent for judgment, the trial court erred in not setting aside the default judgment so that they could remove the case to Federal Court on diversity of citizenship. We find no merit in this contention, because as pointed out in *Chicago, R.I. & P.R. Co.* v. *Stude*, 346 U.S. 574, 74 S. Ct. 290, 98 L. Ed. 317 (1953), a state court's procedural provisions cannot and do not control the privilege of removal granted by federal statute.

POINT IV. Appellants objected to any evidence for loss of parental guidance of the five children left by the decedent on the ground that there was no allegation in the complaint on that issue.

The allegation in appellee's complaint on that issue was as follows:

> ". . . that his wife, Marilyn Jean Barnett and five minor children suffered and sustained severe pecuniary injuries, suffered severe mental anguish and the wife suffered loss of consortium as a result of the death of her husband."

Appellee recognizes that under our prior cases, *Helena Hardwood Lumber Co.* v. *Maynard*, 99 Ark. 377, 138 S.W. 469 (1911), that before one could recover for loss of parental care and guidance the matter must have been specifically pleaded. However, to avoid that requirement, appellee points to AMI 2215 and our per curiam order of April 19, 1965, to the effect that an AMI instruction should be used where applicable unless the trial court finds that it does not accurately state the law.

Our per curiam order of April 19, 1965, was neither an attempt nor was intended to affect or to change pleading requirements. We note also that, appellee's interpretation has not been given to the per curiam order by the members of the drafting committee of AMI — see article by Henry Woods in 20 Ark. L. Rev. 73, 80, wherein it is specifically recognized that before the instruction on loss of parental guidance can be given it must be specifically pleaded.

In both *Starks* v. *North Little Rock Policemen's Pension and Relief Fund*, 256 Ark. 515, 510 S.W. 2d 305 (1974), and *Kohlenberger, Inc.* v. *Tyson's Foods, Inc.*, 256 Ark. 584, 510 S.W. 2d 555 (1974), we pointed out that because a default judgment is in the nature of a forfeiture, a judgment by default must strictly conform to and be supported by the allegations of the complaint. Of course, when appellee's pleading is tested by that rule, we find that the issue of loss of parental guidance was not sufficiently pleaded to permit the introduction of proof in connection therewith.

However, the error of the trial court in admitting the evidence does not necessarily require an outright reversal of the whole judgment. At the conclusion of the evidence the record shows that in arriving at the total amount of the judgment the trial judge, before whom the case was tried without a jury, determined that he would allow $100,000 for loss of contributions, funeral bills and the value of the pickup truck that was destroyed; $50,000 to the widow for loss of consortium and mental anguish; and $30,000 for each of the five children. Of course, the error in admitting the evidence as to loss of parental guidance involved only the $30,000 item for each of the five children and if this element be stricken from the judgment by remittitur then the balance of the judgment can stand.

POINT V. Appellants here argue that the award of $200,000 for mental anguish is not supported by the record. We need not determine this issue since under Point IV, *supra,* appellee must enter a remittitur for $150,000 or the case will be remanded for a new trial. We do not consider the $50,000 award to the wife for mental anguish and loss of consortium as excessive on the record before us.

If within 17 days the appellees enter a remittitur for $150,000 — (*i.e.* $30,000 for each of the five children) the judgment will be affirmed. Otherwise the judgment will be reversed for a new trial.

Affirmed on condition of remittitur.

James H. DEVAZIER and Debra Dawn DEVAZIER
v. WHIT DAVIS LUMBER COMPANY and
F & S CONSTRUCTION COMPANY

74-205 516 S.W. 2d 610

Opinion delivered December 9, 1974

McMath, Leatherman & Woods, by: *Phillip H. McMath* and *Mart Vehik,* for appellants.

Smith, Williams, Friday, Eldredge & Clark, by: *Overton S. Anderson* and *Joseph E. Kilpatrick,* for appellees and cross-appellants; *Laser, Sharp, Haley, Young & Boswell* and *Rice & Batton,* for appellees.

FRANK HOLT, Justice. Appellants James DeVazier and his thirteen year old daughter, Debra, brought this action to recover damages for personal injuries suffered by Debra as a result of a large stack of sheetrock falling upon her legs. The father sought "out of pocket" expenses and Debra sought damages for pain, suffering and permanent injury. The jury found each appellee and appellant Debra 25% responsible for the alleged injuries. The jury awarded Debra's father $3,200 for the expenses he had incurred and no damages to Debra. The trial court's denial of appellants' motion for a new trial "solely on the issue of damages sustained by her [Debra] as a result of the negligent injury which the jury has found that she has sustained by reasons of the" negligence of the appellees is the basis for this appeal.

The relief which appellants seek is not permissible. We have consistently refused to affirm a judgment on the issue of liability and allow a partial new trial or one limited only to the issue of damages. *Clark* v. *Ark. Democrat Co.,* 242 Ark. 497, 413 S.W.2d 629 (1967); *Manzo* v. *Boulet,* 220 Ark. 106, 246 S.W.2d 126 (1952); and *Krummen Motor Bus & Taxi Co.* v. *Mechanics' Lbr. Co.,* 175 Ark. 750, 300 S.W. 389 (1927). See also 58 Am. Jur. 2d, New Trial, § 27. The rationale is that a verdict, the foundation of the judgment at law, is an entity which cannot be divided by the trial court. Therefore, the trial court was correct in denying appellants' motion for a new trial.

Although we deem it unnecessary to discuss appellants' other contentions for reversal, suffice it to say we have examined them and find no merit.

By cross-appeal, F & S Construction Company asserts that the trial court erred in refusing its motion for a directed verdict on the basis that, as a matter of law, Debra was a licensee as to it. We cannot agree. Appellee William Carpenter, a real estate agent since 1967, sells houses. In doing so, he shows a prospective buyer building plans as well as houses which are being built by F & S Construction Company pursuant to a "turn-key" contract between Carpenter and F & S. Carpenter has keys to these pre-sold houses and does not have to secure permission from F & S to show them during construction. Carpenter was showing Debra's mother, a prospective purchaser, houses at her request. Debra was accompanying them. When they were inspecting one of the houses, which was under construction and pre-sold, a quantity of sheetrock stacked against a wall fell on Debra breaking a leg and ankle. It is F & S' contention that Debra was on the premises occupied by it merely as a sightseer for her own purposes and F & S Construction Company did not stand to benefit from her presence in the house.

Prosser, Law of Torts, § 61 (4th Ed. 1971), states:

> The leading case of *Indermaur* v. *Dames* laid down the rule that as to those who enter premises upon business which concerns the occupier, and upon this invitation express or implied, the latter is under affirmative duty to protect them, not only against dangers of which he knows, but also against those which with reasonable care he might discover.

In Restatement (Second) of Torts § 332 (1965), comment b at p. 176, invitation is defined as ". . . . conduct which justifies others in believing that the possessor desires them to enter the land. **** Any words or conduct of the possessor which lead or encourage the visitor to believe that his entry is desired may be sufficient for the invitation." In the case at bar, F & S allowed Carpenter to have keys to houses which were under construction by it by contract with him and it was his practice to show the houses to customers when requested. Certainly, it must be said the jury could infer that showing the houses to prospective purchasers, as here, resulted in a financial benefit to both Carpenter and F & S. See *Alfrey*

Heading Co. v. *Nichols,* 139 Ark. 462, 215 S.W. 712 (1919).

Cross-appellant F & S next asserts there was no substantial evidence of negligence by it. Therefore, the court erred in denying its motion for a directed verdict. In determining this issue on appeal, our well settled rule is we consider only that evidence and all reasonable inferences deducible therefrom which are most favorable to the appellee. *Baldwin* v. *Wingfield,* 191 Ark. 129, 85 S.W.2d 689 (1935); and *National Credit Corp.* v. *Ritchey,* 254 Ark. 139, 491 S.W.2d 811 (1973). In the case at bar 80 panels of sheetrock were delivered to the house five days before the accident occurred. One panel is 4' x 12' x ½" and weighs between 60 and 80 pounds. Approximately 18 of these were stacked vertically in the unfinished bedroom where Debra was injured. An employee and part owner of F & S testified that he had seen the sheetrock three or four times between the delivery date and five days later when the accident occurred. Appellants adduced evidence that the sheetrock was leaning against the wall at a very slight angle or "straight up." The safe method of storing sheetrock, appellant's expert witness testified, is to lay it horizontally on the floor. We hold there was substantial evidence, when viewed most favorably to the appellee, to support the jury's finding that F & S was negligent.

By cross-appeal, Whit Davis Lumber Company asserts for reversal that the trial court erred in refusing to grant its motion for a directed verdict. We agree with this contention. The lumber company, pursuant to an order by F & S, delivered the sheetrock to the house where the injury occurred. It was stacked in a vertical position as was their custom and practice. The sheetrock, as previously indicated, had been stacked in this position for about five days preceding the accident. During this time, a part owner of the construction company had observed and inspected it on three or four separate occasions. It appears that the sheetrock was delivered and stacked as ordered.

Restatement (Second) of Torts § 384 states the following rule:

One who on behalf of the possessor of land erects a

> structure or creates any other condition on the land is subject to the same liability, and enjoys the same freedom from liability, as though he were the possessor of the land, for physical harm caused to others upon and outside of the land by the dangerous character of the structure or other condition *while the work is in his charge.* (Emphasis ours.)

Comment g of § 384 points out that liability does not attach for harm caused after control of the condition is terminated. In *S.W. Bell Co.* v. *Travelers Ind.,* 252 Ark. 400, 479 S.W.2d 232 (1972), we reiterated the general rule:

> .... where there is a practical acceptance by a proprietor upon completion of its contractor's work thereupon the liability of the contractor as to third persons ceases and the responsibility 'for maintaining or using [it] in its defective condition [is] shifted to the proprietor.'

To the same effect is *Chesser* v. *King,* 244 Ark. 1211, 428 S.W.2d 633 (1968). In the circumstances we hold that F & S Construction Company, which ordered the sheetrock, was in complete possession and control of it at the time of the alleged injury inasmuch as there was, to say the least, a "practical acceptance" by the construction company. Therefore, any liability of the lumber company had ceased and had shifted to the construction company.

Affirmed on direct appeal. Affirmed on cross-appeal as to F & S Construction Company and reversed and dismissed on cross-appeal as to Whit Davis Lumber Company.

BYRD, J., not participating.

Sam WEEMS and Doyle OWEN *v.*
John ANDERSON, Special Judge of 17th Judicial Circuit, Prairie County, Arkansas

CR 74-114 516 S.W. 2d 895

Opinion delivered December 9, 1974
[Rehearing denied January 20, 1975.]

Reinberger, Eilbot, Smith & Staten, for petitioners.

Jim Guy Tucker, Atty. Gen., by: *O. H. Hargraves,* Dep. Atty. Gen., for respondent.

LeRoy Autrey, Special Justice. On August 20, 1973, Sammy A. Weems, the prosecuting attorney for the 17th Judicial District, reported to Circuit Judge W. M. Lee of that District that the investigation of an alleged crime of arson in the burning of the home of Doyle Owen in Prairie County had implicated the prosecuting attorney and requested that the Court convene a grand jury to investigate the matter. This report by Weems was made just before the commencement of a hearing before the Circuit Court at the conclusion of which Weems was disbarred but allowed to continue in the office of prosecuting attorney.

On December 20, 1973, the Court appointed William F. Sherman, a lawyer residing in Pulaski County, as special prosecutor to conduct an investigation of the alleged arson with authorization to issue subpoenas, to appear before grand juries, to prosecute any persons indicted, and to serve with the full powers of a prosecuting attorney in the State of Arkansas. On motion submitted by Special Prosecutor Sherman and over the objection of Prosecuting Attorney Weems, the Circuit Court on March 6, 1974, ordered that Thomas Woolsey be required to give testimony pertaining to the alleged arson of the Owen home on the condition that no testimony or other information compelled under the order

could be used against Woolsey in any criminal case pursuant to the provisions of Act 561 of 1973.

A special grand jury was empaneled by Circuit Judge Lee on March 13, 1973, and charged with the investigation of the alleged arson of the Owen home. Special Prosecutor Sherman appeared before the special grand jury and presented evidence including the testimony of Woolsey. The grand jury on March 15, 1974, issued an indictment charging Prosecuting Attorney Weems and Owen with arson and a second indictment charging Weems, Owen and Woolsey with conspiracy.

Weems first objected to the appointment of Sherman as special prosecutor on January 29, 1974, and Circuit Judge Lee on February 11, 1974, overruled the objection, basing the Court's authority to appoint a special prosecutor under the circumstances of the case presented on three concepts, namely: "(1) by inference under Statute 24-108, (2) by agreement or consent of the elected prosecutor, (3) by inherent authority of his office . . . ."

After the indictments issued by the grand jury, Circuit Judge Lee on his own motion disqualified himself in this matter, and Judge John L. Anderson was assigned by this Court as a special judge for the trial of these cases. Thereafter, Weems and Owen filed formal motions and objections to the appointment of Sherman as special prosecuting attorney and these motions were overruled. This petition for writ of prohibition followed.

In support of the petition for a writ of prohibition, Weems and Owen make the following contentions:

> (1) The circuit court does not possess any inherent authority to appoint a special prosecuting attorney to serve in place of a prosecuting attorney, a constitutional officer of the State.
>
> (2) Section 24-108, *Arkansas Statutes*, enacted in 1838, does not provide for the appointment of a special prosecuting attorney until there has been an indictment of the prosecuting attorney.

(3) Section 24-108, *Arkansas Statutes,* is unconstitutional because (a) the special prosecuting attorney is to be paid only if he obtains a conviction, (b) this statute violates the doctrine of separation of powers, and (c) a constitutional officer can only be removed by impeachment or joint address as provided for in Article XV of the Arkansas Constitution.

(4) Weems did not agree to the appointment of Sherman as special prosecuting attorney and, furthermore, could not contractually convey his office to another person.

(5) Section 24-117, *Arkansas Statutes,* providing that the court can appoint an attorney at law to prosecute for the State when the regular prosecuting attorney has neglected or failed for any reason to attend to the courts of the circuit, is wholly inapplicable to this situation.

(6) Even if the circuit court has authority to appoint a special prosecuting attorney, such attorney must be a resident of the district and Sherman is not a resident of the 17th Judicial District.

(7) A special prosecuting attorney cannot utilize the provisions of Act 561 of 1973 to grant immunity to a witness since this authority is granted only to the prosecuting attorney.

(8) Even if the Court has authority to appoint a special prosecuting attorney to handle the case against Prosecuting Attorney Weems, there is no authority for the appointment of a special prosecuting attorney to prosecute Owen, a private citizen.

Article 7 of the Arkansas Constitution entitled "Judicial Department" provides in Section 24 for the election of a prosecuting attorney for each judicial circuit. This Court held in *Smith* v. *Page,* 192 Ark. 342, 91 SW2d 281 (1936), that a prosecuting attorney is a constitutional state officer acting in a quasi judicial capacity. There is no constitutional, statutory or case law authority supporting the Petitioners' claim that

the prosecuting attorney is a member of the Executive Department of the State. In fact, Article 6, Section 1, of the Constitution as amended by Amendment 37, Section 1, specifically provides that the officers of the Executive Department are Governor, Lieutenant Governor, Secretary of State, Treasurer, Auditor, Attorney General and Commissioner of State Lands.

Article 15, Section 1, of the Arkansas Constitution provides that all State officers, judges and prosecuting attorneys shall be liable to impeachment and removal from office for high crimes and misdemeanors and gross misconduct in office, and that "an impeachment whether successful or not, shall be no bar to an indictment". In *Speer* v. *Wood,* 128 Ark. 183, 193 SW 785 (1917), this Court held that a prosecuting attorney who had been indicted could not, under the State Constitution, be suspended or removed from his office even though an amended statute included the prosecuting attorney with county and city officials who could be suspended by the Circuit Court upon indictment. However, the prosecuting attorney in that case was subsequently prosecuted on the grand jury indictment by a special prosecutor. *Speer* v. *State,* 130 Ark. 457, 198 SW 113 (1917).

Since prosecuting attorneys and other State officials may be indicted and tried for alleged criminal activities whether there is an impeachment or not, there must be some way within the framework of our State's legal system for the prosecuting attorney to be indicted and tried even when the alleged crime occurs within the same judicial district in which he is elected the prosecuting attorney. Section 24-108, *Arkansas Statutes,* provides that it is the duty of the Court to appoint an attorney to "conduct the prosecution" when there is an indictment of the prosecuting attorney, but this statute makes no provision for the appointment of an attorney to assist the grand jury in the investigation of the alleged crime or in the drafting of an indictment. Section 24-117, *Arkansas Statutes,* provides that if a prosecuting attorney shall neglect or fail to attend to the courts of the circuit and to prosecute as required by law, it is the duty of the court to appoint an attorney to "prosecute for the State during the term". A literal reading of the statutory provision expresses an intent that a

special prosecutor shall be appointed only when the prosecuting attorney both fails to attend court and to prosecute as required by law. Here again, the statutory provisions fall short of providing authority for the circuit court to appoint a special prosecuting attorney to assist the grand jury when the elected prosecuting attorney is allegedly involved in the commission of a crime.

The absence of specific statutory authority for the appointment of a special prosecuting attorney under the circumstances of this case does not mean that the court is without authority to do what justice, reason and common sense dictate must be done. In other jurisdictions where there was the same lack of statutory authority for the appointment of a special prosecuting attorney under circumstances such as those here presented, the courts have held that there is an inherent power in the courts to make such an appointment. We hold that the Arkansas Circuit Courts also have such inherent power.

In *State, ex rel, Thomas, Pros. Atty.* v. *Gessner, et al, Judges*, 123 Ohio St. 474, 478 (1931), the judges of Mahoning County, Ohio, without notice to the prosecuting attorney, empaneled a special grand jury to investigate the alleged criminal conduct of the prosecuting attorney and appointed three members of the Ohio Bar to serve as special prosecutors. The Ohio prosecuting attorney in his petition for writ of prohibition raised many of the same objections here raised by the prosecuting attorney. In response to these objections, the Ohio Supreme Court said:

> "It must be borne in mind that this proceeding is not one for the removal of the prosecuting attorney from office, or to appoint another prosecuting attorney in his place; neither is it an effort to appoint an assistant to the prosecuting attorney. The appointment of an assistant implies that such assistant would be under the direction of the prosecuting attorney himself. If there is any virtue in the proceedings which have resulted in the selection of counsel to aid and advise the grand jury, that virtue must be found in the selection of counsel who would be entirely independent of any influence on the part of the prosecuting attorney himself.

> "There being no definite specific statutory provision for a finding of the temporary disqualification of the prosecuting attorney, it only remains to inquire whether the court possesses inherent power in the premises.
>
> "It is not doubted that the court of common pleas has the power to call a grand jury into session and to instruct it. In the opinion of this court, there is no question of the right of the court to appoint counsel to aid and advise the grand jury concerning the matters presented to it, provided such counsel absent themselves from the jury room during the deliberations and the taking of the vote upon questions being determined by it."

For other authorities upholding the inherent authority of the court to appoint a special prosecutor when the State's attorney is under investigation, see *Williams* v. *State,* 188 Ind. 283, 123 NE 209 (1919), *State* v. *Jones,* 306 Mo. 437, 268 SW 83 (1924), 31 ALR 3rd 953, 986-988 (1970) and 65 *Yale Law Journal* 209, 216, 217.

In *Commonwealth* v. *McHale,* 97 Pa. 397, 406 (1881), the Supreme Court of Pennsylvania held that an act of 1866 enabling the court to appoint a special district attorney for the conduct of a case was not voided by the passage of a new constitution in 1874 making the district attorney a constitutional officer. In reversing the lower court which had quashed the indictments on the grounds that they were not signed by the district attorney, the Court said:

> It was urged, however, that the indictments were properly quashed because not signed by the district attorney. They were signed by Guy E. Farquhar, Esq., who was specially appointed by the court to try these cases, under the Act of 12th March 1866, Pamph. L. 85. The appointment appears to have been regularly made in accordance with the provisions of said act, and was eminently proper, as the district attorney was a candidate at the general election at which the alleged frauds were committed, and which frauds, it is stated, increased his vote. It would therefore have been a breach of professional and official propriety for him to have

acted as district attorney in these cases. But it is said the appointment was illegal because the Constitution adopted since the act of 1866 was passed, makes the district attorney a constitutional officer, and as such he cannot be stripped of his powers by the legislature. There is little force in this suggestion. *While the legislature may not abolish the office, it can control the officer. They can regulate the performance of his duties, and punish him for misconduct, as in the case of other officers. And where he neglects or refuses to act, or where, from the circumstances of a given case, it is improper and indelicate for him to act, it is competent for the legislature to afford a remedy. This is all that the Act of 1866 does, and we think its provisions are not obnoxious to any constitutional provision."* (Emphasis Supplied).

The adoption by the State of Arkansas of the Constitution of 1874 making the prosecuting attorney a constitutional officer did not void the provisions of Section 24-108, *Arkansas Statutes,* passed in 1838 which provides for the appointment of a special prosecutor to prosecute the prosecuting attorney. Section 24-117, *Arkansas Statutes,* which provides for the court appointment of a special prosecuting attorney under certain circumstances was passed by the 1875 legislature. In *Speer* v. *Wood,* Supra, this court noted that the act under discussion was passed by the Legislature of 1877, which assembled less than three years after the adoption of the 1874 Constitution and contained members of the Constitutional Convention. The Legislature of 1875, no doubt, also contained members of the Constitutional Convention and must have intended that making the prosecuting attorney a constitutional officer did not prevent the appointment of a special prosecutor when the prosecuting attorney fails to attend court and to prosecute according to law.

The Petitioners argue that Section 24-108, *Arkansas Statutes,* is unconstitutional because it provides that if the prosecuting attorney is convicted, the attorney conducting the prosecution "shall be entitled to receive the sum of Fifty Dollars ($50.00) out of the salary" of the prosecuting attorney. In support of this proposition, the Petitioners rely chiefly on the decision of the U. S. Supreme Court in *Ward* v. *Village of Monroeville, Ohio,* 409 US 57, 93 S. Ct. 80 (1972), in

which the court held that it was a denial of due process to subject a person's liberty or property to the judgment of a court, the judge of which could benefit from the payment of a fine by the defendant. The case here before the Court does not involve a judge, but a prosecuting attorney, and no authority has been cited from any jurisdiction supporting the contention that a prosecuting attorney may not be paid a fee from the fine imposed upon a defendant whom he has successfully prosecuted. However, this Court does not pass on the broad question of whether such an arrangement for the payment of the prosecuting attorney may or may not be violative of due process. While the amount here involved is so small as to be inconsequential when compared to the overall expense of prosecuting the prosecutor, we note that the fee portion of the statute is severable from the remainder; and should it later be held unconstitutional that portion of the statute can easily be severed without affecting the remainder. Consequently, if error, it would be harmless error.

The Petitioners' contention that the special prosecutor must be a resident of the judicial district in which he is appointed to serve is without merit. The two specific provisions for the appointment of a special prosecuting attorney are found in Sections 24-108 and 24-117, *Arkansas Statutes*. These sections only require that the special prosecutor be an attorney at law. When the Court, in the exercise of its inherent power under the circumstances presented by this case, appoints a special prosecuting attorney, there does not appear to be any reason why the Court should be limited to the appointment of an attorney who is a resident of the judicial district. It is likely that attorneys who are members of the same local bar as the prosecuting attorney may seek to avoid appointment as a special prosecuting attorney under the circumstances here presented, and the Court may, in the exercise of reasonable discretion, select an attorney from some other area of the State to so serve. Article 7, Section 24, of the Arkansas Constitution provides for the election of a prosecuting attorney by qualified electors of each circuit and quite logically provides that the person, learned in law, who is elected shall be a resident of the circuit from which he is elected. This constitutional provision clearly has no application to the appointment of a special prosecutor.

Also without merit is the Petitioners' contention that a special prosecutor may not act as prosecuting attorney under the provisions of Act 561 of 1973 in which the prosecuting attorney is authorized to request an order of the Court to require that a person testify upon being granted immunity. A special prosecutor does not displace the prosecuting attorney from his constitutional office, but in order for him to be effective in the investigation and prosecution of the matters for which he has been appointed, he must have the right to proceed in the same manner as the prosecuting attorney. Section 43-919, *Arkansas Statutes,* provides that "no person except the prosecuting attorney, and the witnesses under examination, are permitted to be present while the grand jury are examining a charge". In *Bennett* v. *State,* 62 Ark. 516, 36 SW 947 (1896), an attorney acting for the prosecuting attorney went into the grand jury room and examined witnesses. In finding no violation of the statute, we stressed the fact that the attorney acted in the prosecutor's stead. Other cases to the same effect are *Tiner* v. *State,* 109 Ark. 138, 158 SW 1087 (1913), and *Coon* v. *State,* 109 Ark. 346, 160 SW 226 (1913).

Doyle Owen was indicted with Weems on the charge of arson and with Weems and Woolsey on the charge of conspiracy. Obviously, Weems and any deputy prosecuting attorney appointed by him are disqualified in the prosecution of the case against Owen and the case against Woolsey. The inherent power of the Court to appoint a special prosecuting attorney to investigate a charge, to assist the grand jury and to prosecute the prosecuting attorney, surely includes the right to appoint a special prosecutor to investigate, assist the grand jury, and prosecute a person charged as a co-conspirator with the prosecuting attorney.

The petition for writ of prohibition is denied. For good cause shown, an immediate mandate is ordered.

HOLT, J., disqualified.

Joe TULL *v.* BENTON STATE BANK, Administrator

74-213 516 S.W. 2d 583

Opinion delivered December 16, 1974

John W. Barley, for appellant.

Fred E. Briner, for appellee.

GEORGE ROSE SMITH, Justice. The issue in this will contest is the validity of a will which obviously was extensively altered — in fact, almost completely rewritten — by the testatrix after its original execution and attestation. The probate judge sustained the validity of the instrument, on the ground that the testatrix intended for it to be her will. The appellant, the testatrix's brother, contested the will and now contends, correctly, that the altered instrument must be rejected, because it was not re-executed and re-attested in its altered form.

The instrument consists of two pages. The first page, on white paper, is very badly typed. It contains seven numbered paragraphs. The last six of those paragraphs make six different bequests or devises and constitute all the dispositive provisions in the will. Paragraph "Seventh" is the residuary clause, leaving the testatrix's real property and certain personal property "to my Sister, Rena Glass."

The second page, on blue paper, is neatly typed. It contains the final paragraph, which reads: "Fifth: I hereby appoint my sister, Rena Glass, executrix of this my last will and testament on this 25th day of July, 1964." After that come the signature of the testatrix, Myrtice Westbrook, the attestation clause, and the signatures of two attesting witnesses.

It is conclusively shown by the testimony, as well as by the will itself, that page one was retyped (presumably by the testatrix) and substituted for the original page one, which apparently was destroyed. In addition to the variances that we have mentioned — the differences in the color of the paper, in the typing, and in the paragraph numbers — page one refers to the testatrix's sister as Rena Glass, although she did not marry Mr. Glass until some 18 months after the date of the will, July 25, 1964. (On page two Rena's surname at the time, Andrews, was obviously erased, and the name "Glass" typed over the erasure.)

The trial judge based his decision upholding the will upon his finding that it was the testatrix herself who retyped and substituted the first page of the will. We have no quarrel with that finding of fact, but it does not serve to validate the altered will. Here the testatrix, in effect, revoked all the dispositive provisions in her original will and substituted those appearing on the rewritten first page of the instrument offered for probate. In those circumstances a re-execution and re-attestation of the will were essential to its validity. *Walpole* v. *Lewis,* 254 Ark. 89, 492 S.W. 2d 410 (1973); *Cook* v. *Jeffett,* 169 Ark. 62, 272 S.W. 873 (1925). Hence the altered instrument cannot be probated as the testatrix's will.

Reversed.

John R. DEGLER *v.* STATE of Arkansas

CR 74-109 517 S.W. 2d 515

Opinion delivered December 16, 1974
[As modified January 27, 1975.]

Gene Worsham, for appellant.

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

GEORGE ROSE SMITH, Justice. The appellant was charged with felony murder, in that he killed Curtis Turner during the perpetration of larceny. The jury returned a verdict of guilty and imposed a life sentence. Four points for reversal are argued.

First, it is contended that when this case was tried in the court below, a homicide committed in the perpetration of larceny no longer constituted a felony murder. Upon that premise it is arged that Degler could not lawfully be convicted of any offense greater than second-degree murder.

We cannot sustain that contention. This homicide occurred on June 12, 1973. Larceny was then included in the definition of felony murder. Ark. Stat. Ann. § 41-2205 (Repl. 1964). But larceny was not included in a similar definition contained in Act 438 of 1973. Ark. Stat. Ann. § 41-4702 (A) (Supp. 1973). Even though Act 438, absent an emergency clause, did not take effect until more than a month after the homicide now in question, the appellant insists that Act 438 was merely procedural and thus inapplicable to cases tried

after its effective date.

There are two answers to the appellant's argument. First, the purpose of Act 438 was to reinstate capital punishment for certain crimes only. Although the Act dropped larceny from the definition of *capital* offenses, the older definition appears to have been retained as a "life felony" by § 4 of Act 438. § 41-4704. Secondly, a change in the definition of murder is substantive rather than procedural. In fact, we can think of no provision in the criminal law that is more plainly substantive than the definition of the crime. Hence the older definition would be controlling in the trial of the case even if it had been repealed after the commission of the homicide. Ark. Stat. Ann. § 1-103 (Repl. 1956); *Clark* v. *State*, 246 Ark. 876, 440 S.W. 2d 205 (1969).

Secondly, it is contended that the trial court should have excluded Degler's confession and the State's allied proof that Degler later showed the officers where he had thrown the murder weapon and the stolen property. It is argued that the officers arrested Degler without probable cause and that therefore the confession and accompanying proof were inadmissible. *Davis* v. *Mississippi,* 394 U.S. 721 (1969); *Beck* v. *Ohio,* 379 U.S. 89 (1964). In the *Beck* case the court said that the validity of an arrest without a warrant, as here, depends upon whether the officers had probable cause to make it — "whether at that moment the facts and circumstances within their knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense."

Upon this point for reversal the appellant's recitation of the pertinent facts is so greatly abbreviated that we must discuss the proof in some detail. The homicide took place at what is referred to as the old State Dairy Farm house, in a rural part of Pulaski county. The house was casually frequented by a number of young people; "all the kids" that wanted to come there were welcome. (Degler was 22 at the time of the crime.) Two of the group had rented the house, but they were staying in Little Rock at the particular time in question.

On June 11, 1973, five young persons were at the house during the day. Charles Martin and Shirley Mooser were living there and had a key to the house. Degler, David Williamson, and Curtis Vanderpool were there during a substantial part of the day. Vanderpool left before the others did. Degler and Williamson, who had been drinking beer together for several hours, left at about 8:30 p.m., leaving Degler's distinctive yellow car still at the house. When Martin and Shirley also departed at about 9:00 p.m., they left the house unoccupied and locked. The decedent, Curtis Turner, had been at the house for about an hour on the preceding day, but he does not appear to have been there on the day in question.

Martin and Shirley returned at about 30 minutes after midnight. Curtis Turner's car was there, but Degler's yellow car was gone. Turner's dead body was lying on the front porch. Martin found that "a lot of stereo equipment and television and stuff" that had been there earlier was missing. Martin telephoned the sheriff's office to report the homicide. Two deputies — Harold Munn and another — came out to investigate. Munn also questioned several young people at the sheriff's office at three or four o'clock in the morning.

At about 9:30 that morning Officer Munn arrested Degler at his trailer home in North Little Rock. Munn, of course, had learned details of the homicide at the scene. He knew that Degler and Williamson were very good friends and traveled in each other's company. He had learned that one of them had a .22-caliber pistol. The police department had determined that a small-caliber weapon had been used in the killing. Munn knew that Degler's yellow car had been left on the premises before the homicide, and since the officer participated in the investigation at the house, it is reasonable to infer that he knew that the car was not there later on.

We are of the opinion that the trial court, drawing reasonable inferences from the testimony as a whole, was justified in finding that there was probable cause for the arrest. This case is quite unlike *Davis* v. *Mississippi, supra,* cited by the appellant. In *Davis* the police, acting upon information that a rape had been committed by a Negro youth, picked up from 40 to 50 such youths for questioning. In the

case at bar the information obtained by the officers implicated only Degler and Williamson. Those two young men had been at the Dairy Farm house during much of the day, had apparently been armed with a .22 pistol, had left Degler's car at the house when they departed together at about 8:30 p.m., and had evidently returned for it at some time before the homicide was discovered at 12:30 a.m. There is no indication in the record that the officers' investigation turned up facts tending to incriminate anyone other than Degler and Williamson. Moreover, this was not a case in which the officers could gather more data by obtaining a search warrant for the suspects' .22-caliber pistol, so that its test-fired bullets could be compared ballistically with those found in the victim's body. That procedure would not have been superior to an arrest in the officers' search for the truth, because the requirement of probable cause applies to an application for a search warrant as well as to an arrest. The officers acted reasonably upon the available facts; we are unwilling to say that the trial court was wrong in its conclusion that probable cause for the arrest existed.

Thirdly, the appellant contends that his confession should have been excluded as having been involuntarily made. In passing upon this contention we are required to review the evidence and make an independent determination of the ultimate issue of voluntariness. *Davis* v. *North Carolina,* 384 U.S. 737 (1966). We have recognized that duty ever since our decision in *Harris* v. *State,* 244 Ark. 314, 425 S.W. 2d 293 (1968), but we have not yet defined the standard to be followed in reaching our determination. See the concurring opinion in *Vault* v. *State,* 256 Ark. 343, 507 S.W. 2d 111 (1974). That omission necessarily makes it difficult for opposing counsel to argue the point on appeal. We now set the issue at rest by stating explicitly that in each case we will make an independent determination based upon the totality of the circumstances and that the trial judge's finding of voluntariness will not be set aside unless it is clearly against the preponderance of the evidence, which we take to be the same standard of review as the "clearly erroneous" rule followed by the federal courts. *United States* v. *U.S. Gypsum Co.,* 333 U.S. 364 (1948); *Maple Island Farm* v. *Bitterling,* 209 F. 2d 867 (8th Cir. 1954).

Degler was arrested at about 9:30 a.m., was warned of his rights, and signed a "waiver of rights", which recited the time as 9:40 a.m. At 10:10 Degler signed his first statement, in which he denied any part in the crime. It does not appear that his interrogation continued after his signing that statement.

The second suspect, Williamson, was arrested at about two o'clock. Williamson, after having been questioned, signed a statement (at a recited time of 2:10) in which he accused Degler of having fired the fatal shots. The officers then showed Williamson's statement to Degler, who read it and announced his desire to change his own statement. Degler then signed a statement (at a recited time of 3:35 p.m.) in which he said that he and Williamson had gone back to the house, had found nobody there, and had decided to take the stereo and t.v. set. Degler was carrying Williamson's gun. As Degler came out of the house "this man jumped up suddenly." Degler said that he was scared and fired three times. He then "took the player and t.v. to a spot along the road and ditched them." After signing the second statement Degler guided the officers to the place where the stolen property and murder weapon were recovered.

The record falls decidedly short of showing that the trial court's finding of voluntariness is clearly against the preponderance of the evidence. Although Degler was detained for some five and a half hours, he does not appear to have been subjected to interrogation during most of that time. Degler makes no assertion that he was mistreated. He does say, and the officers in effect admit, that he was told that he would feel better if he told the truth and got it off his chest. Degler stated, however, that the officers did not say how it would help him. Therre was certainly no offer of leniency. During the interrogation Degler was shown a Polaroid photograph of the victim's body, as it was found on the front porch, but there appears to be nothing particularly gruesome or inflammatory about the photograph (which is to be found in the record filed in Williamson's appeal from his conviction). It is also argued that the officers should not have shown Degler the statement that Williamson had made, but we do not see that Degler's constitutional rights were thereby

violated. In this connection the appellant cites *People* v. *Johnson,* 75 Cal. Rptr. 401, 450 P. 2d 865 (1969), but there the court found that the codefendant's statement had been unlawfully obtained, so that the fruit-of-the-poisonous-tree doctine was controlling. Here there is no similar proof that the codefendant's proof was unlawfully obtained. We find no error in the trial judge's admission of the confession into evidence.

Finally, the appellant, who had signed a confession on June 12, complains that the trial court refused to allow him to show by the testimony of cellmates in the Pulaski County jail that more than two months later Williamson, who was also in the jail cell, made threats against the appellant and his family in order to force the appellant to take the blame for the crime. We agree with the trial court's conclusion that threats made more than two months after the date of the confession had no bearing upon its voluntariness.

Affirmed.

Gayle Ramage NELSON & William Robert RAMAGE *v.* TEXARKANA HISTORICAL SOCIETY and MUSEUM et al

74-182 516 S.W. 2d 882

Opinion delivered December 16, 1974
[Rehearing denied January 20, 1975.]

Atchley, Russell, Waldrop & Hlavinka, by: *Stephen Cohen,* for appellants.

Autrey & Weisenberger, for appellees.

LYLE BROWN, Justice. This is a will contest case. The appellants are Gayle Ramage Nelson and William Robert Ramage, niece and nephew, and sole heirs at law of the testatrix, Maye Elizabeth Ramage Davis; the appellees are Texarkana Historical Society and Museum and State First National Bank of Texarkana, the special administrator. The probate court admitted to probate an instrument purporting to be the will of Maye Elizabeth Ramage Davis, a widow 78 years of age. The holographic instrument was not signed; the only place in the purported will where her name appeared was in the body thereof.

Appellants contend that decedent's name appearing in the body of the instrument was not written with the intent of authenticating or executing such instrument and therefore it was error to admit it to probate. Appellees contend (1) the signature in the body of the will satisfied the requirements for validity, and (2) the court correctly considered extrinsic evidence to show decedent's testamentary intent.

The instrument admitted to probate reads as follows:

Will December 18th 1973

I am in my sane mind today.

And I am leaving all my antiques in the living room, dining room and Victorian room and hall to Texarkana Museum in memory of my mother and father, W. R.

Ramage and brother Robert Ramage and Maye Elizabeth Ramage Davis. I leave my little Pet Petite to my friend Waneeta Corzine phone — 832-3001 — no answer ring 832-1666. I want three hundred dollars taken out of my savings account at Commercial bank for Petites upkeep.

I want the house sold and money to pay any outstanding debts and for the upkeep of Antiques for Museum. I want my kitchen stove, frigidaire and everything in kitchen for Samantha Washington — my maid. I want my XL 100 television to go to Elnora Edwards my maid. I want all my jewelry a fifteen hundred dollar diamond ring all my jewelry and furs to Ethel Gandy my cousin and clothes — Montgomery Alabama. Address 3393 Lebron St. Zip 36106.

Any money on savings pay my monthly bills.

Signed and Witnessed by (Signed) Nell Phillips

(Signed) Samantha Washington

Witness Nell Phillips, an antique dealer, testified as to her business dealings and many personal visits with the testatrix; that on December 18, 1973, the testatrix produced the will and asked Mrs. Phillips to witness it; and that she recognized the handwriting as that of the testatrix. Another antique dealer, Jack Cunningham, testified he saw the testatrix frequently; that he could identify the instrument as having been written in her handwriting; and that he discussed with testatrix the desirability of leaving her valuable collection of antiques to the museum. Cora Cook Thomas testified she and the testatrix had been good friends since high school days; that she could identify the will as being in testatrix's handwriting; that testatrix had discussed with the witness the subject of a will and she told testatrix to have two witnesses. Catheline Cunningham, another friend of many years standing, testified she was aware that testatrix intended to leave her antiques to the museum; and that the will was entirely in the handwriting of Maye Elizabeth Ramage Davis. Appellant Gayle Ramage Nelson, niece and close

neighbor of testatrix, testified that she had not been in the latter's home for several years, conceding that she and testatrix were not very close, in fact indicated there was some feeling of animosity.

Elnora Edwards, who is mentioned in the will, cooked breakfast for the testatrix during the last eighteen months of the latter's life; she said she was made aware that she would be remembered in the will; and that on the morning of December 20, testatrix said she had made her will and it was on top of the piano along with a list of pallbearers. Samantha Washington said she had worked for Mrs. Davis for some fifteen years. She said she witnessed the will on December 18; that Mrs. Phillips came in and witnessed it; and that testatrix told Ms. Washington to put the will on top of the piano.

Under the provisions of our probate code of 1949, the signature of a testator need not be written at the end of the will. "Where the entire body of the will and the signature thereto shall be written in the proper handwriting of the testator, such will may be established by the evidence of at least three credible disinterested witnesses to the handwriting and signature of the testator, notwithstanding there may be no attesting witnesses to such will." Ark. Stat. Ann. § 60-404 (Repl. 1971). *Smith* v. *MacDonald,* 252 Ark. 931, 481 S.W. 2d 741 (1972).

If the testator's name is written in or upon some part of the will other than at the end thereof, to be a valid signature it must be shown that the testator wrote his name where he did with the intention of authenticating or executing the instrument as his will. 2 Bowd-Parker: Page on Wills, § 20.9; *Estate of Kinney,* 16 Cal. 2d 50, 104 P. 2d, 782 (1940). Thus our problem is to determine whether the name Maye Elizabeth Ramage Davis was placed in the body of the will with the intent that it constitute a signature in addition to the intention of creating a memorial. In the second paragraph of the will we find the only mention of testatrix's name: "And I am leaving all my antiques . . . in memory of my mother and father, W. R. Ramage and brother Robert Ramage and Maye Elizabeth Ramage Davis."

Appellees rely heavily on our case of *Smith* v. *MacDonald*, supra. But the facts in that case are far different from the facts in the case at bar. The first line in that will describes the instrument as the "Will of Julian Leland Rutherford." The first paragraph recites: "I, Julian Leland Rutherford . . . do hereby make, publish and declare this to be my last will and testament." The last line of the instrument then recites: "Witness my hand and seal this 11 day of July, 1970."

We have abstracted at some length the testimony of the witnesses. The most that evidence shows is that the instrument was in the handwriting of the testatrix and that she considered it as her will. It would be sheer speculation to assume that those circumstances indicated that she intended her name in the body of the will to be her signature thereto.

Cited at length by appellees is the California case of *In re Bloch's Estate*, 248 P. 2d 21 (1952). In that case the single location of the name of the deceased was in the body of the will; in disposing of some bonds the testatrix there referred to "Bonds belonging to Helene I. Bloch." The court held that reference to constitute a signature. We discussed *Bloch* in our case of *Smith* v. *MacDonald*. We did not adopt the decision but merely referred to it as a "very interesting case". In fact we quoted with apparent approval from the dissenting opinion in that case of Justice Traynor:

> Regardless of where the name may appear in the instrument, there is always the possibility, of course, that it was intended as a signature. The mere existence of that possibility, however, is not enough to permit a reasonable inference that it was so intended. When the name is used to identify the decedent as the author of the alleged will as in Estate of Kinney, 16 Cal. 2d 50, 104 P. 2d 782 ("I Anna Leona Graves Kinney, do bequeath all my possessions to my four sisters") or to identify the instrument as decedent's will as in Estate of Brooks, 214 Cal. 138, 4 P. 2d 148 ("This is my will — Elizabeth Ryan Brooks"), and in addition the instrument appears to be a complete testamentary document, it may reasonably be inferred that the name was placed where it was with the intention of executing the instru-

> ment. In such cases the name is linked to the alleged testamentary act and the probabilities that it was intended as a signature are strong. In the present case, on the contrary, decedent's name appears only in the description of her property.

The legislature had a sound basis for requiring that a holographic will be signed by the testator, because that signature is the best and most reliable indication that the signer means for the instrument to be his will. We think, and so hold, that to adopt the majority rule in *Bloch* would amount to writing the word "signature" out of the statute.

Reversed and remanded.

FOGLEMAN, J., dissents.

JOHN A. FOGLEMAN, Justice, dissenting. The majority opinion seems to be hinged, at least in part, upon Justice Traynor's dissent in *In Re Bloch's Estate,* 39 Cal. 2d 570, 248 P. 2d 21 (1952). I respectfully submit that we did not cite this dissent with approval in *Smith* v. *MacDonald,* 252 Ark. 931, 481 S.W. 2d 741. We commented that Bloch was an interesting case, and that the dissenting opinion was of value in pointing out distinctions. We were discussing the California rule as set out in *In Re Manchester's Estate,* 174 Cal. 417, 163 P. 358 (1917), which we had been urged to adopt by the unsuccessful appellant. The *Manchester* rule was quoted as follows:

> The true rule, as we conceive it to be, is that, wherever placed, the fact that it was intended as an executing signature *must satisfactorily appear on the face of the document itself.* If it is at the end of the document, the universal custom of mankind forces the conclusion that it was appended as an execution, if nothing to the contrary appears. If placed elsewhere, it is for the court to say, *from an inspection of the whole document,* its language as well as its form, and the relative position of its parts, whether or not there is a positive and satisfactory inference *from the document itself* that the signature was so placed with the intent that it should there serve as a token of execu-

> tion. If such inference thus appears, the execution may be considered as proven by such signature. [Emphasis mine]

From the discussion of these cases in the opinion in *Smith* v. *MacDonald,* supra, it is clear that California does not permit extrinsic evidence to show surrounding circumstances as an aid to the court in determining whether a testator who wrote his name in the body of a will intended to do so as a signature.

The concluding language in *Smith* v. *MacDonald,* supra, clearly shows that we did not adopt either the majority or dissenting opinion in *Bloch* and that we rejected in toto the California rule we were being urged to adopt. That language is:

> Even if we should adopt and strictly apply the California rule announced in *Manchester* as urged by the appellants, the instrument signed by Rutherford would qualify as a holographic will subject to probate under the subsequent decisions of the California courts. *But in this case Mr. Rutherford delivered the sealed envelope to his attorney and told him that it contained his will. All other evidence clearly indicates that when Mr. Rutherford delivered the instrument to his attorney, he had fully carried out his announced intentions of disposing of his property by will* to the exclusion of the appellants. [Emphasis mine]

In Page on Wills, vol. 2, § 20.9, p. 294, is found the following:

> "There is a conflict of authority concerning the admissibility of evidence of testator's declarations and acts, together with surrounding circumstances, to determine whether his name which was written by him in the body of the will was intended as a signature. The weight of authority permits introduction of such evidence for the purpose of determining the intention with which testator wrote his name."

We conclude, therefore, that the trial court did not err in

> admitting the instrument to probate as the last will and testament of Julian Leland Rutherford, and that the judgment of the probate court should be affirmed.

This clearly put us in accord with the weight of authority, but it seems to me that the majority is now willing to adopt the California rule. I concede that under the California rule the Davis will should not have been admitted to probate, even though the *Bloch* majority would have required that it be. I submit also that the Bloch will would have been subject to probate if extrinsic evidence such as that presented here had been admitted. I would not recede from the rule obviously adopted by us in the rather recent case above cited and would examine this instrument in the light of the prevailing circumstances.

First, we must consider the findings and conclusions of the probate court. Those significant are:

> The Decedent left as her Last Will a written instrument dated the 18th day of December, 1973. The entire body of the Will and the signature thereto was in the proper handwriting of the Testatrix, and this was established by the testimony of four (4) credible disinterested witnesses to the handwriting and signature of the Testatrix and other evidence before the Court.
>
> * * * * * * * * * * * *
>
> (1) That the said handwritten instrument dated December 18, 1973, described above and heretofore filed herein be admitted to probate as the holographic Will of the Decedent, Maye Elizabeth Ramage Davis;
>
> (2) That the said holographic Will of the Decedent was executed in all respects according to law when the Decedent was competent to do so and acting without undue influence, fraud or restraint;

Unless appellees failed to meet their burden of proof or these findings are clearly against the preponderance of the evidence, we should affirm the judgment. What then were the

surrounding circumstances shown by the extrinsic evidence?

The entire instrument was written in the handwriting of Mrs. Davis. Its entire content is testamentary in nature. It is a complete testamentary document. It contains at the end the words "Signed and witnessed by", not the words "signed by and witnessed by". The testamentary provisions are all in the first person. Mrs. Davis was the only surviving child of the person named by her in the instrument as her father. Her brother was Robert Ramage and he was named by her as such in the document. She had a dog named Petite. She had a friend named Waneeta Corzine, an employee of a veterinarian, and this friend frequently bathed and brushed the dog for her. She had indicated her total dependence upon Ms. Corzine for this care of the pet. Under this instrument this friend would not only get the dog, but a fund for the maintenance of this pet. Mrs. Davis recorded in the written instrument the telephone numbers by which Ms. Corzine could be reached. When she was lonely, she called this friend to talk about dogs.

Mrs. Davis was very interested and knowledgeable about antiques and would not dispose of any she owned unless she had run out of money. On the day the instrument was dated, she told Nell Phillips that she had made her will and asked Mrs. Phillips to sign it as a witness. She related to Mrs. Phillips that she was ill and her state of health was getting worse and that she wanted to make the will before she died or went to the hospital. Mrs. Phillips, an antique dealer, had previously suggested that Mrs. Davis leave her property to the Texarkana Museum. Approximately three weeks prior to the date of the instrument, Mrs. Davis, by telephone, discussed making a will with Jack Cunningham, another antique dealer. He also suggested that she leave her property to the Texarkana Museum, rather than her church.

Cora Cook Thomas, a lawyer's daughter and longtime friend, had written her own will and had advised Mrs. Davis that it was in longhand. She also told Mrs. Davis what she should say in a will and to have two witnesses. On December 20, when Leola (Elnora) Edwards came to prepare breakfast, Mrs. Davis said she had made out her will and Mrs. Phillips

and Samantha Washington, another servant, had signed it. Both of these servants were legatees under the will. This instrument, a list of pallbearers, and a statement about the writing of an obituary were kept together in the place where Mrs. Davis specifically directed that the testamentary document be placed and left.

Mrs. Davis was estranged from appellants, her only heirs at law, and had specifically stated that she did not want to leave her property to them because they had not done anything for her. The admitted facts show there was considerable justification for this feeling. This was not an unnatural will, but a very natural one.

Evidence of surrounding circumstances will inevitably be circumstantial as to the ultimate facts in a case such as this. The testimony about the circumstances in this case are undisputed. They lead to the logical inference that Mrs. Davis did treat her name in the body of the instrument as her signature to her will. If she had not so intended, it is highly unlikely that she would have written her full name instead of using the simple pronoun "me" or the word "myself". Under all the circumstances, it seems to me that the trial court drew the only logical inference.

I would affirm the judgment.

Clara COLEMAN *v.* Cecil COLEMAN, Administrator

74-192 520 S.W. 2d 239

Opinion delivered December 16, 1974
[Rehearing denied March 17, 1975.]

Thomas D. Wynne Jr. and *Frank W. Wynne,* for appellant.

Navada C. Roberts, for appellee.

JOHN A. FOGLEMAN, Justice. The sole point for reversal of this will contest is stated thus:

> Anderson Coleman's second will is offered as a counterclaim, and therefore, the statute of limitation is not applicable.

The factual background and the issue on appeal are concisely stated by appellant. Appellee apparently concedes the correctness of this statement. It is as follows:

> Anderson Coleman died on April 12, 1967. During his lifetime, he married twice. His first marriage was to Donar Coleman. On the 24th day of January, 1956, Anderson Coleman executed a will whereby Donar Coleman was to be devised certain property at his death. Donar Coleman pre-deceased Anderson Coleman and sometime after her death, Anderson Coleman married Clara Coleman. On the 4th day of November, 1966, Anderson Coleman executed a will whereby Clara Coleman was to be devised certain property at his death.
>
> On April 10, 1972, Cecil Coleman, a son of Anderson Coleman, filed a Petition to Probate Will and Appointment of Personal Representative and proffered the first will of Anderson Coleman. This was one day short of the running of the five-year statute of limitation for fil-

ing of a will. Order for Appointment of Executor was made by this Court on April 11, 1972.

Clara Coleman, second wife of Anderson Coleman, was given Notice to Surviving Spouse on April 10, 1972. Clara Coleman then petitioned to set aside the first will and the Order appointing Cecil Coleman executor of the estate. Petition set out that a second will existed and revoked the first will filed by Cecil Coleman.

Cecil Coleman by Reply alleged that the statute of limitation had run against the will offered by Clara Coleman and should not be probated.

On May 16, 1972, Clara Coleman filed Petition for Probate of Will and Appointment of Personal Representative and proffered the will of Anderson Coleman dated November 4, 1966.

The court found that the second will of Anderson Coleman was not timely filed and that it was barred by the five-year statute of limitation. That the first will of Anderson Coleman was timely filed but when the second will was made the first will was revoked and that the estate of Anderson Coleman, deceased, would pass by descent and distribution.

It was therefore so ordered by the court.

Clara Coleman contends that this cause was not original with her and the second will proffered by her is the same as a counterclaim and that the statute of limitation does not run against the counterclaim.

A summarization of appellant's argument is that the subsequent will offered for probate by her was not barred by the five-year statute [Ark. Stat. Ann. § 62-2125 (Repl. 1971)] because it was not asserted in an effort to obtain affirmative relief, but as a counterclaim against the will offered by Cecil Coleman. She contends that a counterclaim is not barred if pleaded as a defense to a cause of action asserted against the pleader, provided the counterclaim was not barred by the

statute of limitations when that cause of action arose. A ready answer to this contention is that the counterclaim statutes [Ark. Stat. Ann. § 27-1121, 1123, 1124 (Repl. 1962)] have no application to a proceeding to probate or contest a will.

It is quite true that the Probate Code of 1949 provides that procedure shall be the same as that followed in courts of equity. Ark. Stat. Ann. § 62-2004 (e) (Repl. 1971). We have uniformly applied such procedures in probate proceedings since *Werbe* v. *Holt,* 217 Ark. 198, 229 S.W. 2d 225. See also, *Umberger* v. *Westmoreland,* 218 Ark. 632, 238 S.W. 2d 495; *Price* v. *Price,* 253 Ark. 1124, 491 S.W. 2d 793. It is true that this court has been authorized by Ark. Stat. Ann. § 62-2007 (Repl. 1971) to prescribe rules of procedure in probate courts but it has never seemed necessary to do so, because the procedures of chancery courts, presided over by the same judges as the probate courts, have seemed adequate. But, even in a court of equity, the counterclaim statute would not apply in this type of proceeding, so it does not apply here.

A counterclaim is defined as a claim by a defendant against a plaintiff. Ark. Stat. Ann. § 27-1123, defining a counterclaim, is a part of the Civil Code of Arkansas, adopted in 1869. There are two types of proceedings under the Civil code. One is a civil action, the other is a special proceeding. Civil Code §2, Ark. Stat. Ann. § 27-105 (Repl. 1962). A civil action is an ordinary proceeding in a court of justice by one party against another for the enforcement or protection of a private right or the redress or prevention of a private wrong. Civil Code § 3, Ark. Stat. Ann. § 27-106 (Repl. 1962). It is commenced by the filing of a complaint and causing summons to be issued. Civil Code § 58, as amended, Ark. Stat. Ann. § 27-301 (Repl. 1962). The other type of proceeding is called a special proceeding. All proceedings not covered by the definition of a civil action are special proceedings. Civil Code § 4, Ark. Stat. Ann. 27-107 (Repl. 1962).

The pleading provisions of the civil code apply to the prosecution of actions both at law and in equity, but not in special proceedings. Civil Code §§ 13, 106, Ark. Stat. Ann. §§ 27-215 (Repl. 1962), 27-1102 (Repl. 1962).[1] Some

[1]Procedures for probate and contest of wills were separately set out in Civil Code, § 513.

proceedings in probate court are civil actions, e.g., proceedings by which a claim against the estate of a deceased person is reduced to judgment. *Bright* v. *Johnson,* 202 Ark. 751, 152 S.W. 2d 540. Others are special proceedings, not civil actions, so that the extension of exemption from the statute of limitations which applies to civil actions does not apply. *Nelson* v. *Cowling,* 89 Ark. 334, 116 S.W. 890. There are plaintiffs and defendants in civil actions only. Civil Code §§ 1, 2, Ark. Stat. Ann. § 27-201, 203 (Repl. 1962). Since a counterclaim can only be a claim by a defendant against a plaintiff, it can be asserted only in a civil action.

There is no right to contest a will, except as provided by statute. *Manning* v. *Manning*, 206 Ark. 425, 175 S.W. 2d 982. A will contest is not a civil action, but is a special proceeding. *Rockafellow* v. *Rockafellow*, 192 Ark. 563, 93 S.W. 2d 321. In *Rockafellow*, we held a statute making a spouse of a party in a civil action incompetent to testify inapplicable to a will contest for this reason.

There are no plaintiffs and defendants in a will contest, and it is not instituted by the filing of a complaint. This was the case in the Civil Code, which applied to probate courts only in civil actions and had separate provisions governing will contests. See Civil Code §§ 24, 806, § 513. While those provisions governing will contests have been superseded by the Probate Code of 1949, the nature of the proceedings has not.

The proceedings for probate of a will are governed by Ark. Stat. Ann. § 62-2101 et. seq. (Repl. 1971). The proceedings for contest of a will are governed by Ark. Stat. Ann. § 62-2113-2126 (Repl. 1971). Nowhere is there any indication that either proceeding is a civil action as distinguished from a special proceeding. There are no plaintiffs and defendants. No summons is required. The counterclaim statute simply has no application.

That is not to say that one offering a subsequent will has no rights. Such a person may object to the probate of a prior will. Ark. Stat. Ann. 62-2113, 2116 (Repl. 1971). The provisions of § 62-2116 (b) have particular application here.

It is there provided that:

> WHERE ONE WILL ALREADY ADMITTED OR ADMINISTRATION GRANTED. If, after a will has been admitted to probate or after letters of administration have been granted, a petition for the probate of a will of the decedent, not theretofore presented for probate, is filed, the court shall determine whether the former probate or the former grant of letters should be revoked and whether such other will should be admitted to probate or whether the decedent died intestate.

Thus it will be seen that in this case there were two issues, i.e., (1) should the probate of the former will be revoked and (2) should the subsequent will be admitted to probate. Under the provisions of Ark. Stat. Ann. § 62-2114 (Repl. 1971), a contest on the ground that another will has been discovered must be filed both (1) before final distribution and (2) within the time stated in Ark. Stat. Ann. § 62-2125. Sec. 62-2125 prohibits the admission of a will to probate unless application for its probate was made to the probate court within five years from the death of the testator, with certain exceptions, none of which apply here.

Appellant did not present the will she now asserts as the last will of Anderson Coleman within five years from the death of the testator. This was too late.

The judgment is affirmed.

Vena Welch SCOTT et al, Executors *v.*
John A. JANSSON et al

74-224 516 S.W. 2d 589

Opinion delivered December 23, 1974

Smith, Williams, Friday, Eldridge & Clark, by: *William H. Sutton* and *Frederick S. Ussery,* for appellants.

Ben McCray, for appellees.

Wright, Lindsey & Jennings, for cross-complainants.

GEORGE ROSE SMITH, Justice. This personal injury action arose from a head-on collision on Interstate 30 in North Little Rock, in March of 1973. One of the drivers, Wade H. Scott, was killed, and the other driver, John A. Jansson, was seriously injured. Jansson and his wife brought this suit against Scott's estate and against Minor F. Green, whose car was indirectly involved in the accident. The jury apportioned the total negligence in the ratio of 80% against Scott, 20% against Green, and none against Jansson. The jury awarded $55,000 to Jansson for his injuries and $25,000 to Mrs. Jansson for loss of consortium. The principal appellants, Scott's personal representatives, argue that the trial court erred in directing a verdict for Jansson upon the estate's counterclaim, that the court erred in allowing a police officer to give certain expert testimony, and that the verdict in favor of Mrs. Jansson is excessive.

Upon the first point, the court was right in directing a verdict for Jansson upon the Scott estate's counterclaim. At the place of the accident Interstate 30 is a divided six-lane north-south highway, with a grass median 24 feet wide. Just before the collision Scott was driving north in the inside lane of traffic, and Green was driving north in the center lane, a few car lengths ahead of Scott. Green's left front tire had a blowout, causing his car to swerve across in front of Scott and onto the median.

Scott applied his brakes, laying down a single skid mark, 41 feet long, before he too left the pavement. Scott's car crossed the median, entered the southbound lanes, clipped the left rear side of a panel truck, and collided head-on with Jansson's car, in the center lane. Jansson testified that he saw the Scott vehicle coming across the median, but he was trapped in the center lane by vehicles on both sides of him. Jansson also said that it all happened in the twinkling of an eye and that he tried to put on his brakes before the collision, but he didn't know whether he succeeded.

We find no substantial evidence upon which the jury could have found, except by guesswork, that Jansson negligently failed to take any action that he should have taken to avoid the collision. In this respect the case is not unlike

Prickett v. *Farrell,* 248 Ark. 996, 455 S.W. 2d 74 (1970), where we upheld the trial court's action in directing a verdict upon similar facts. The case of *Gookin* v. *Locke,* 240 Ark. 1005, 405 S.W. 2d 256 (1966), relied upon by the appellants, is not in point, for there the collision occurred on a two-lane highway, and the vehicles laid down more than 300 feet of skid marks before the collision. Certainly that accident did not happen in the twinkling of an eye.

The appellants' second contention concerns the testimony of State Police Officer Robertson, who investigated the accident immediately after it happened. The officer, called as a witness by the plaintiffs, testified that he had worked with the state police for five years and that he was a highway patrolman, drivers' license examiner, and defensive driving instructor. On direct examination he said that Scott's car laid down 41 feet of heavy skid marks "of one of his tires." On cross-examination by Green's attorney the record reflects the following:

> Q. Did you also say that was from one tire?
>
> A. One clear tire.
>
> Q. Ordinarily if all the brakes on a vehicle are operating properly, how many skid marks are laid down?
>
> Mr. Sutton: I object unless this man is a brake expert.
>
> The Court: I believe the Trooper would be qualified to answer the question.
>
> A. If all brakes are properly working, I would say there would be at least some indication left physically that there was four tires skidding, and they would usually be not right on top of each other, but offset a little bit.

The appellants argue that the effect of the officer's testimony was that Scott's brakes were not working properly, and counsel then continue: "The state trooper in the case at bar did not give one single qualification which would entitle him to express an opinion on the operation of a braking system."

That, however, as we read the record, was not the point raised in the trial court. Counsel's sole objection was: "I object unless this man is a brake expert," which the trial judge evidently and justifiably took to mean a person with expert knowledge about the mechanical operation of brakes. In overruling the objection the judge stated his belief that a trooper would be qualified to answer the question. We considered a similar point in *American Ry. Express Co.* v. *Cole,* 183 Ark. 557, 37 S.W. 2d 699 (1931). There the trial court permitted witnesses to testify that the damage to a shipment of strawberries had been caused by poor refrigeration. From our opinion:

> Appellant argues that negligence was not shown because the witnesses of appellee who attributed the damage to poor refrigeration and defective equipment admitted that they had no technical knowledge of refrigeration or refrigerating cars. This argument is not sound, as the opinion of the witnesses was based upon long experience as shippers and not upon technical knowledge relative to refrigeration and refrigerating cars. They testified that, from long experience as shippers of perishable goods in refrigerating cars properly iced, they knew how long such commodities should keep in properly equipped cars sufficiently iced and handled with reasonable care.

So here, the trial court did not abuse its discretion in ruling that Officer Robertson, an experienced highway patrolman, was qualified to express an opinion even though he was not, in the language of counsel, "a brake expert." If counsel doubted the officer's familiarity with the effect of defective brakes upon skid marks, a request should have been made that he be put on voir dire to show his incompetency to testify. *Brown* v. *State,* 24 Ark. 620 (1867); McKelvey on Evidence, § 187 (5th ed., 1944). Absent such a request reversible error is not shown, for upon a retrial it might turn out that the officer was fully qualified to testify as he did.

Finally, the appellants (and cross-appellant Green) contend that the $25,000 award to Mrs. Jansson for loss of consortium is excessive. In the light of our earlier cases this con-

tention must be sustained. We must lay aside the fact, stressed by the appellees, that for some months after the accident Mrs. Jansson had to assume, in place of her husband, all responsibility for operating the couple's motel. As we pointed out in *Ark. La. Gas Co.* v. *Strickland,* 238 Ark. 284, 379 S.W. 2d 280 (1964), the jury presumably took that loss into consideration in fixing the husband's damages. To allow the same recovery in favor of the wife would plainly be a duplication.

The pertinent proof is that Mrs. Jansson was deprived of her husband's companionship during his 51 days of hospitalization and for some months thereafter during his recuperation at home — a period totaling less than a year altogether. The couple's normal marital relationship was also suspended for eleven months. Thus there was a total or partial loss of consortium for less than a year. In *Missouri Pac. Transp. Co.* v. *Miller,* 227 Ark. 351, 299 S.W. 2d 41 (1957), there was a *total* loss of consortium for the husband's remaining life expectancy of 27 years, yet there we reduced the $25,000 award to $15,000. We fully appreciate the decline in the value of the dollar since 1957, but in the case at bar we cannot sustain an award in excess of $10,000 for loss of consortium.

The judgment in favor of Jansson is affirmed. That in favor of Mrs. Jansson is affirmed upon condition that the indicated remittitur be filed within 17 days; otherwise that judgment will be reversed and the cause remanded for a new trial.

I.V. CHAPMAN and Alvin Hugh PEARSON *v.* STATE of Arkansas

5809 516 S.W. 2d 598

Opinion delivered December 23, 1974

Walker, Kaplan & Mays, P.A., for appellants.

Jim Guy Tucker, Atty. Gen., by: *Alston Jennings Jr.*, Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. The two appellants were charged by information with having urged a riot and with having urged others to commit acts of violence by destroying property, in violation of Ark. Stat. Ann. § 41-1445 (Supp. 1973). After a long trial both defendants were found guilty, the jury fixing Chapman's punishment at a $500 fine and three years' confinement and Pearson's punishment at a $500 fine. We find it necessary to discuss only five of the nine points for reversal that are argued.

I. The appellants first question the constitutionality of the statute, which reads in pertinent part as follows:

> Section 41-1445. Every person who, with the intent to cause a riot, does an act or engages in conduct which urges a riot, or urges others to commit acts of force or violence, or the burning or destroying of property, and at a time and place and under circumstances which produce a clear and present and immediate danger of acts of force or violence or the burning or destroying of property, is guilty of a felony and upon conviction shall be subject to [specified fines or imprisonment or both].
>
> Section 41-1446. This Act shall not apply to, nor in any way affect, restrain or interfere with, otherwise lawful activity engaged in by or on behalf of a labor organization or organizations by its members.

Counsel contend that the statute is so broad and so vague as to deny due process of law and that the exemption of labor union activity is so discriminatory as to deny the equal protection of the laws. Among the principal cases relied upon are *Cox* v. *Louisiana,* 379 U.S. 536 (1965), and *Chaplinsky* v. *New Hampshire,* 315 U.S. 568 (1942).

We hold the statute to be constitutional. The same arguments with respect to a California statute that is in every material respect a verbatim copy of the Arkansas act were unanimously rejected by the Supreme Court of California in *People* v. *Davis,* 67 Cal. Rptr. 547, 439 P. 2d 651 (1968). There the court, in a carefully reasoned opinion, said in part: "To persons of ordinary understanding, the urging of others to acts of force or violence or to burn or destroy property . . . is neither similar nor comparable to speech which merely stirs to anger, invites public dispute, or brings about a condition of unrest. * * * The term 'clear and present danger' has long been used by the courts to distinguish between constitutionally permissible limitations on speech and limitations which run afoul of the constitutional guaranties. * * * There is no unconstitutional vagueness in charging an accused with knowledge of the meaning or import of such a phrase as applied to his acts or conduct, by speech or otherwise, if he 'urges a riot, or urges others to commit acts of force or violence, or the burning or destroying of property.' "

The court also disposed of the equal protection contention by pointing out that the second paragraph of the statute merely declares the intent of the legislature "that the provisions of the first paragraph are not to be construed to prohibit *lawful* labor union activity of a character which does not fall within the conduct described in the first paragraph." Without quoting further from the California court's excellent opinion, it is sufficient for us to say that we entirely agree with that court's reasoning and adopt its discussion as our own.

II. We find the evidence amply sufficient to sustain the convictions. On March 16, 1972, racial strife in Arkadelphia resulted in fighting and property damage at one of the schools. Late that afternoon a crowd of 200 or more black citizens gathered outside the courthouse and jail, apparently because only black students had been arrested in connection with the incidents at the school. There was much testimony to show that the two defendants actively aroused the emotion of the crowd, particularly by leading them in chants such as "Whup, whup, whup 'em up against the side of the head" and "Let our people go." Eventually the angry mood of the

crowd erupted into violence. Rocks were thrown, one officer describing them as "quite a hail of rocks." There were no personal injuries, but an unspecified number of windows were broken in buildings and in automobiles. Although many police officers had been present all along, the two defendants were not arrested until after the incidents of violence and property destruction. There is an abundance of testimony in the record to support the jury's conclusion that the two defendants were guilty of acts falling squarely within the prohibitory language of the statute; that is, that they urged others to commit acts of violence and property destruction.

III. We must sustain the appellants' contention that their defense was or may have been prejudiced by the trial court's critical remarks, in the presence of the jury, about the conduct of the defendants' attorneys. Unfortunately, there was friction between the trial judge and defense counsel almost from the beginning of the litigation. One attorney was cited for contempt of court (and found not guilty by the trial judge), and there are references to an order by which the trial judge attempted to disbar the defense law firm from practicing in the circuit court.

Most of the conflicts between court and counsel took place outside the presence of the jury, but there were other instances — two in particular — that were witnessed by the jury. The first incident occurred when a defense attorney, Mr. Mays, was introducing photographs that had been taken by the State. Confusion understandably arose, because the prosecution had intended to introduce the pictures and had put State's Exhibit Numbers on the back of them. We quote from the record:

> Q. Now, may I ask you one question; do you know whether these pictures were taken —
>
> Mr. Mathis: May I see the photographs?
>
> Mr. Mays: This is State's No. 4.
>
> Mr. Mathis: No, this is Defendants' No. 5.
>
> Mr. Mays: I know it's Defendants' No. 5, but on it, it

> says State's No. 4.
>
> Mr. Mathis: Sir?
>
> Mr. Mays: It says State's No. 4 on the back here, your Honor.
>
> The Court: Now, Mr. Mays, you know how to conduct yourself in court. These are photographs. They are your exhibits. They are not State's No. 4.
>
> Mr. Mays: I understand.
>
> The Court: You understand?
>
> Mr. Mays: Yes, sir.
>
> The Court: Now, you either conduct yourself with propriety in this court, or I will deal with the matter at a later date.

We merely observe that the photograph was in fact marked on the back as a State's Exhibit, that the statements made by Mays were correct, and that we discern no basis for the court's implication that Mays had not conducted himself with propriety.

The second incident occurred while another defense attorney, Mr. Walker, was questioning a police officer:

> Q. So up to the point where he took his shirt off, in your judgment, he had not done anything to cause you to arrest him?
>
> The Court: The witness will not answer the question. It is repetitious. It is not a matter for the judgment of this witness, but it is a matter from all the facts that the jury will determine.
>
> Mr. Walker: Your Honor, I respectfully suggest that this witness has arrest authority.

The Court: Every citizen has arrest authority, Mr. Walker. Now, let's move on.

Mr. Walker: Would you note our exceptions?

The Court: Yes, sir.

Mr. Walker: Did you note our offer of proffer to the court?

The Court: Yes, sir.

Mr. Walker: Would his Honor rule on our request to proffer?

The Court: Overruled.

Mr. Walker: Note our exceptions.

The Court: Yes, sir. And the court will also note your dilatory tactics.

Counsel's motion for a mistrial, made outside the hearing of the jury, was then overruled.

The motion should have been granted. As we said in *Western Coal & Mining Co.* v. *Kranc,* 193 Ark. 426, 100 S.W. 2d 676 (1937), and repeated in *McAlister* v. *State,* 206 Ark. 998, 178 S.W. 2d 67 (1944): "No principle is better settled than that a judge presiding at a trial should manifest the most impartial fairness in the conduct of the case. Because of his great influence with the jury, he should refrain from impatient remarks or unnecessary comments which may tend to result prejudicially to a litigant or which might tend to influence the minds of the jury."

In the case at bar the trial judge's reprimand in each instance was unnecessarily severe and critical, as there had been no conduct on the part of counsel calling for such a rebuke. Our settled rule is that error is presumed to be prejudicial unless we can say with confidence that it was not. *Vaughn and Wilkins* v. *State,* 252 Ark. 505, 479 S.W. 2d 873

(1972). Here we cannot conscientiously say with assurance that the trial court's remarks had no prejudicial effect upon the jury's consideration of the case.

IV. We find no abuse of discretion in the trial court's refusal to grant a change of venue, the evidence being in conflict. *Bailey* v. *State,* 204 Ark. 376, 163 S.W. 2d 141 (1942). Moreover, in seeking a change of venue counsel stressed the fact that at the time of trial racial tension in the county still existed, because the riot had occurred only a month before the case was tried. Owing to the court reporter's physical inability to transcribe the testimony promptly, the record was not filed in this court until two years after the trial. Consequently, the state of public feeling may be entirely different upon a retrial of the case. If not, the request for a change of venue may be reasserted.

V. In the only other alleged error that is likely to recur upon a new trial, counsel insist that the court should have told the jury that the assemblage in front of the courthouse would be presumed to be lawful unless and until it was shown that the law enforcement officials instructed the crowd to disperse. The statutes relied upon, Ark. Stat. Ann. §§ 42-207, 42-209, and 42-211 (Repl. 1964), merely impose upon the officers a duty to attempt to persuade the assembled persons to disperse. Their failure to take that action certainly does not convert a riot into a peaceable and lawful assembly.

Reversed.

Nora VEASEY *v.* Roscoe Daniel JOSHLIN

74-214 516 S.W. 2d 596

Opinion delivered December 23, 1974

Dodds, Kidd, Hendricks & Ryan, for appellant.

Gail O. Matthews, for appellee.

LYLE BROWN, Justice. Appellant Nora Veasey sued appellee Roscoe Daniel Joshlin for personal injuries and property damages arising from an automobile collision. A settlement in the case was reached but Nora Veasey subsequently retracted her commitment to settle. The trial court held that the agreement, reached between the attorneys and with the consent of the parties, was binding and consequently not subject to rescission. Judgment was entered for the amount of the settlement. Nora Veasey concedes that the law concerning the validity of a compromise settlement is adverse to her position; however, she contends that she was denied her constitutional right of trial by jury. Ark. Const., art. 2, § 7.

On April 5, 1974, Joshlin's attorneys submitted to Ms. Veasey's attorneys an offer to settle the case for $12,500. Three days later Ms. Veasey's attorneys submitted to her the offer. She accepted it and authorized her attorneys to consummate the settlement. The case was scheduled for trial on April 9 and Mrs. Veasey's attorneys notified the clerk to remove the case from the trial docket. Joshlin's attorneys im-

mediately transmitted the check and release to Ms. Veasey's attorneys. Thereafter, and on April 12, Ms. Veasey called her attorneys and informed them that she changed her mind and wanted to retract the settlement. In her testimony at the hearing on motion for entry of judgment, Ms. Veasey testified that after deliberating on the offer for "a day or so" she notified her attorneys to effect the settlement; but then she talked to her husband and it was decided that the amount offered was too small. There was no contention of fraud or overreaching.

Judge Miller concisely stated the rule in *McKenzie* v. *Boorhem,* 117 F. Supp. 433 (1954):

> Under the Arkansas law, an attorney has no implied authority to enter into a compromise agreement. *Turner Furnishing Goods Company* v. *Snyder,* 201 Ark. 699, 146 S.W. 2d 913; *Cullin-McCurdy Construction Company* v. *Vulcan Iron Works,* 93 Ark. 342, 124 S.W. 1023. However, when a client gives his attorney specific authority to enter into a compromise agreement, such an agreement, if entered into by the attorney, is valid and binding. *Byford* v. *Gates Brothers Lumber Company,* 216 Ark. 400, 225 S.W. 2d 929; *Moore* v. *Murrell,* 56 Ark. 375, 19 S.W. 973; 30 A.L.R. 2d, 944-958; 5 Am. Jur., Attorneys at Law, § 98, Pages 318-329; 7 C.J.S. Attorney and Client, § 105, p. 928 et seq.

Ms. Veasey's contention that the entry of the judgment deprived her of a jury trial is wholly without merit. By her action in deliberately authorizing a settlement she, of course, waived a formal trial.

Affirmed.

Harold S. UPTON *v.* STATE of Arkansas

CR 74-97 516 S.W. 2d 904

Opinion delivered December 23, 1974

Richard H. Mays and *Michael Landers,* for appellant.

Jim Guy Tucker, Atty. Gen., by: *Jack T. Lassiter,* Asst. Atty. Gen., for appellee.

JOHN A. FOGLEMAN, Justice. This appeal comes from a retrial of appellant Upton on a charge of first degree murder of Woodrow DeFee alleged to have been committed in the perpetration of a robbery, after our reversal of his conviction in *Upton* v. *State,* 254 Ark. 664, 497 S.W. 2d 696. The points for reversal here are:

> I. The Trial Court erred in refusing to grant defendant's motion to quash and dismiss relative to the appointment of a special prosecutor.

II. The Trial Court erred in refusing to grant defendant's motion to suppress evidence regarding a confession allegedly made by defendant.

III. The evidence was not sufficient to sustain a judgment of murder committed while in the act of or in the attempt to perpetrate robbery.

The second point was asserted on the previous appeal and we held adversely to the appellant. Unless the evidence is materially different from that previously before us, the law of the case governs. *Mode* v. *State,* 234 Ark. 46, 350 S.W. 2d 675. There is very little difference in the evidence on behalf of the state. We find there is no reversible error. We will treat these points separately.

I

Appellant, as one ground for a change of venue, sought a transfer of the case to a county in which James J. Calloway was not a deputy prosecuting attorney. He asserted that his right to a fair and impartial trial was jeopardized by reason of the fact that Calloway, who had previously been one of the attorneys appointed to represent him in the defense of this charge, had been appointed Deputy Prosecuting Attorney in and for Union county. The motion for change of venue was granted, without any indication that it was based only on this ground. Appellant had also filed a motion to quash and dismiss the information filed against him on the same ground. He asked, in the alternative, that the prosecuting attorney and his staff be disqualified and that the court appoint a special prosecutor and enjoin him from discussing the case with the prosecuting attorney or members of his staff and from using any evidence except such as might be on public record or was used in the first trial. The motion was denied upon the trial court's finding that Calloway had respected the confidential relationship with his former client. The court, however, stated that if at any time prior to trial it was shown Calloway had violated or appeared to have violated this confidentiality by revealing any information received from appellant, the court would consider a motion to recuse the prosecuting attorney and his staff or to permit appellant to

renew his motion to quash. The court also enjoined Calloway from discussing the case with the prosecuting attorney, his staff, appellant or appellant's attorneys and from appearing at any subsequent hearings in the case or at the trial or participating in the cause, either as an advocate or spectator. The circuit judge warned that any appearance by Calloway in the courtroom at any time this case was under consideration would constitute a violation of the court's order and any violation would immediately result in the prosecuting attorney and his staff being recused and a special prosecutor appointed.

The record discloses that Calloway was appointed to assist in Upton's defense on April 4, 1972, and had conferred with Upton about the charges and his defenses on numerous occasions and had participated in the former trial and appeal. Calloway testified that his principal area of activity was in legal research and briefing and that Denver Thornton was leading counsel throughout the trial and appeal. His appointment as deputy prosecuting attorney was made on March 5, 1973, after he had completed his research in the Upton appeal but before he had dictated his brief. He stated that he had not subsequently had any contact with Upton, had never reviewed the state's file in the case against Upton, except when it was made available to him as defense counsel, had not related any confidential information received from Upton to any of the prosecuting attorney's staff, and had not done anything or become involved in any way in the case against Upton. He did say that after the reversal of Upton's first conviction he had received a note from Upton and had gone to the jail to talk to Upton, at which time he gave Upton to understand that the representation was terminated. Calloway stated that he had done everything within his power to stay away from the case.

Calloway related that his primary duties as deputy prosecuting attorney were to attend municipal court, but said that he had made some felony court appearances and had handled a great deal of office traffic and some special assignments. There is no evidence contrary to that of Calloway and no indication that Calloway violated the confidence of appellant or participated in the case on behalf of

the state in any way, or that appellant was prejudiced by anything Calloway had said or done. There is not the slightest indication that Calloway violated the trial court's injunction in any way.

Appellant's whole argument is based upon the potential for prejudicial violation of the confidential relationship. In support of his argument appellant relies upon numerous authorities from sister states, none of which is in point. If Calloway had appeared in the case at any time on behalf of the state in any capacity or prepared, presented or argued charges against appellant or instructions to be given the jury, or had communicated with the prosecuting attorney or any member of his staff about the case or had been a partner of the defense counsel serving at the second trial, we would have an entirely different situation. It appears from this record that Calloway scrupulously avoided any possibility of violation of any confidence and that the circuit judge was just as scrupulous in taking steps to avoid even the possibility of impairment of appellant's right to a fair trial insofar as Calloway's previous representation of him was concerned. To say the least, there was no abuse of the trial court's discretion under these circumstances.

II

The alleged confession attacked by appellant is the same we held to be voluntary upon the record before us on the prior appeal. The trial court, after another Denno hearing before the second trial, also held the statement was voluntary and it was admissible both on that ground and on the law of the case. Appellant has not pointed out to us any significant difference in the testimony at the two Denno hearings. The impact of the law of the case is as great on questions of admissibility of evidence and voluntariness of statements by an accused as on any other question. See *Fuller* v. *State,* 246 Ark. 704, 439 S.W. 2d 801; *Mode* v. *State,* 234 Ark. 46, 350 S.W. 2d 675.

Appellant's argument on this point is based entirely upon the fact that there was a two-day interval between the warnings as to his constitutional rights and the statement

made by him to the prosecuting attorney. He says that the statement should have been held inadmissible because of the failure of the prosecuting attorney and the officers accompanying him to Upton's jail cell on the occasion the statement was made to advise him of his constitutional rights. Even if this is an objection to admissibility not previously made, the law of the case, as the rule is applied by this court, probably would govern on the question of admissibility. See *St. Louis Southwestern Railway Co.* v. *Jackson,* 246 Ark. 268, 438 S.W. 2d 41; *Turner* v. *State,* 251 Ark. 499, 473 S.W. 2d 904. Still, we find no merit in appellant's argument on this appeal.

The statement was made at an interview requested by appellant. The statement did not result from any interrogation. It was spontaneous. Upton started giving his version of the case as soon as the prosecuting attorney and the accompanying officers entered the cell. We have never attempted to set a fixed limit on the interval of time which must elapse between advice to an accused of his constitutional rights and an incriminating statement before a new warning is essential to admissibility of the statement. Probably we never will, because we must view the totality of the circumstances in our independent review of the record to determine whether such a statement is voluntarily made. See *Degler* v. *State,* 257 Ark. 388, 517 S.W. 2d 515 (1975). We have held that a three-month interval is too long. *Scott* v. *State,* 251 Ark. 918, 475 S.W. 2d 699. On the other hand, we held that a three-hour delay between warning and confession was not so long as to require repetition of a warning where other evidence that the confession was voluntary preponderated. *Summerville* v. *State,* 253 Ark. 16, 484 S.W. 2d 85. In a factual situation very analogous to this, we found the evidence that a statement was voluntary to be overwhelming in spite of the fact that at least three or four days intervened between the accused's being informed of his constitutional rights and his relating his version of a killing to officers he asked to come to the jail where he was incarcerated. *O'Neal* v. *State,* 253 Ark. 574, 487 S.W. 2d 618. To say the very least, we cannot say that when we view the totality of the circumstances the trial judge's finding in this case was clearly against the preponderance of the evidence. See *Degler* v. *State,* supra.

III

On the prior appeal we found no merit in any of appellant's arguments for reversal other than the one upon which we reversed his conviction. While he did not specifically argue in that appeal that the evidence was insufficient to support a verdict finding him guilty of committing a murder in the perpetration of a robbery, he did raise a point closely related to his present argument. The point he did assert was that the court erred in failing to instruct the jury that he could not be convicted of murder in the perpetration of robbery if he did not perpetrate, or attempt to perpetrate, a robbery on the deceased or if the intention to rob the deceased was formed subsequent to the infliction of the mortal wound. Now he argues that the evidence fails to show that he perpetrated or attempted to perpetrate a robbery. In so arguing appellant says the evidence that the victim, Woodrow DeFee, was robbed is purely circumstantial and that the preponderance is to the contrary. Of course, we are not concerned with the preponderance of the evidence. Basically, it is sufficient if it does more than give rise to a suspicion that the victim was robbed and does not leave the jury to speculation and conjecture only in determining whether other reasonable hypotheses are excluded. *Jones* v. *State,* 246 Ark. 1057, 441 S.W. 2d 458; *Ledford* v. *State,* 234 Ark. 226, 351 S.W. 2d 425. See also *Ayers* v. *State,* 247 Ark. 174, 444 S.W. 2d 695; *Taylor* v. *State,* 178 Ark. 1200, 10 S.W. 2d 853.

True enough, his confession, which was admitted, left nothing to speculation. As related by the Chief Criminal Deputy Sheriff of Union county, Upton said he picked DeFee up just out of Strong en route to El Dorado and this "dude" had a check stub he was flashing, and was bragging about how much money he had made, so Upton made up his mind that he would rob DeFee, but was talked out of it by his female companion. According to this officer, Upton also said that, after stopping in El Dorado, when the "dude" asked to be taken back to some point they had passed, Upton stuck a gun in his ribs, and later pulled off the road, made DeFee give up his billfold and told him to get out of the car. The officer also said that Upton stated that after having shot DeFee twice, he took $20 out of the billfold after which he threw it away.

Of course, it was necessary that the state show by other evidence that the particular crime with which Upton was charged had been committed. Ark. Stat. Ann. § 43-2115 (Repl. 1964). In a very similar case, we held that the fact that the victim was missing for five days, that his body was found far from the route he normally would have followed in returning home and that his purse had been taken would have constituted sufficient evidence that he had been robbed and had not died from natural causes. *Moore* v. *State,* 227 Ark. 544, 299 S.W. 2d 838. Appellant's attack is, of course, directed toward the evidence of robbery and not the cause of DeFee's death.

Alton Vestal saw DeFee about 4:00 a.m. on the day of the homicide. He saw a check for about $400 in DeFee's possession. Vestal cashed a smaller check, for an amount less than $50, deducting $5.50 DeFee owed Vestal and giving DeFee between $35 and $40. Opal Lemmons sold DeFee a half pint of whiskey on that morning. He paid for it with two one dollar bills which he took from his shirt pocket and showed her his payroll check for more than $400, which he removed from his billfold. Marie Jerry testified that DeFee was in her place of business from 9:00 or 10:00 a.m. until noon on that day when his wife came and took him home. He paid cash for beer he bought. She remembered that he had a check in his possession and that DeFee returned about 2:00 or 3:00 p.m. and his attire was different from what he had worn in the morning.

Francine Chadwick also saw DeFee at this place during the morning. She said that DeFee purchased one can of beer while there, took out his billfold and handed Marie Jerry a check and a piece of currency, the denomination of which she did not know, but she saw a $20 bill which remained in his billfold.

Shirley DeFee said she had talked to her husband about his paycheck when they got home, and he gave it to her. She tried to get his billfold from him, but he refused to give it to her. She thought if she could get it he would stay at home. She related that she unsuccessfully tried to get hold of it while it was in his pants pocket and that they had a tug of war

which she lost. She testified that he went to sleep wearing his work clothes and she left without any further effort to get the billfold, knowing that he was intoxicated and had been without sleep for 36 hours. She said that, thinking her purpose had been accomplished, she took his check, cashed it, paid some bills, returned home and, finding her husband still asleep, went to her mother's. She stated that when she returned, he had changed clothing and left.

Later Hazel Hollis saw DeFee at Jerry's Drive-Inn where he bought beer and paid for it with change. She did not see a billfold.

There was testimony that there was no billfold or other means of identifying DeFee found on his body but that there were three one dollar bills, nine quarters, four dimes and five pennies found. The body was found at a place off Highway 82 about five miles west of El Dorado. The billfold was never found, although the officers searched for it.

Appellant argues that the evidence pertaining to intention to rob DeFee is insufficient, because no one saw DeFee with a billfold after he left home, and it is probable that Mrs. DeFee took the billfold after he went to sleep and her statement that she did not was unlikely, so that it should be inferred that DeFee had less than $30 in his possession when he was last seen, that it would have been a perfectly simple matter for one intent upon robbery to reach into DeFee's pockets after he was on the ground on his back, as he was found, and take the $5.70 found after the body was discovered.

These arguments were appropriate if addressed to the jury, and they undoubtedly were. It is true that the evidence pertaining to perpetration of a robbery, which was independent of Upton's confession, was purely circumstantial. Since Mrs. DeFee's testimony is not inherently improbable so that it must be rejected as a matter of law, and since her credibility and the weight to be given her testimony was for the jury to decide, it had the right to believe her. *Tyler* v. *State,* 168 Ark. 1168, 271 S.W. 451; *Butler* v. *State,* 192 Ark. 802, 95 S.W. 2d 636; *Melton* v. *State,* 165 Ark. 448, 264 S.W. 965; *Brown* v.

State, 176 Ark. 1203, 4 S.W. 2d 947. If her testimony is true, it is highly unlikely that DeFee, having surrendered his paycheck, but having won his battle to keep his billfold, would walk away from home and leave it. Of course, the amount of money taken is of no concern, if any was taken. *Radcliff* v. *State,* 249 Ark. 1, 457 S.W. 2d 847. The failure of DeFee's assailant to search each of his pockets after he had been shot twice was only a circumstance for the jury to weigh.

After all, the jury might draw any reasonable inference from circumstantial evidence to the same extent it could from direct evidence. *Casteel* v. *State,* 202 Ark. 663, 152 S.W. 2d 554; *Moran* v. *State,* 179 Ark. 3, 13 S.W. 2d 828. We think it was reasonable for the jury to have drawn the inference that DeFee was robbed, when full credit is given to Mrs. DeFee's testimony. Certainly in the light of all the testimony independent of the confession, the evidence that he was robbed rises far above mere suspcion so that the jury, in arriving at its conclusion, did not have to resort only to speculation and conjecture.

When circumstantial evidence rises above suspicion and is properly connected, and when, viewing that evidence in the light most favorable to the state, the jury is not left to speculation and conjecture alone in arriving at its conlusions, it is basically a question for the jury to determine whether the evidence excludes every other reasonable hypothesis. *Ledford* v. *State,* 234 Ark. 226, 351 S.W. 2d 425; *O'Neal* v. *State,* 179 Ark. 1153, 15 S.W. 2d 976; *Caradine* v. *State,* 189 Ark. 771, 75 S.W. 2d 671. See also *Walker* v. *State,* 174 Ark. 1180, 298 S.W. 20; 30 Am. Jur. 2d 295, Evidence § 1125. It is only every other reasonable hypothesis, not every hypothesis, that must be excluded by the evidence. *Bartlett* v. *State,* 140 Ark. 553, 216 S.W. 33; *Bost* v. *State,* 140 Ark. 254, 215 S.W. 615. See also, *Walker* v. *State,* supra. The jury certainly should test the reasonableness of any other hypothesis.

It should be noted that Upton and his wife, who was his female companion at the time of their encounter with DeFee, both testified. Both denied that there was any robbery or attempt to rob. She said that the shooting was precipitated by DeFee's attempt to rape her. She said that while she and

DeFee were seated in the front seat of Upton's car with Upton driving, DeFee reached into the back seat of the car, got a shotgun of Upton's, laid it across her lap, and holding it on Upton, commanded that the vehicle be stopped. Then she said, while holding the gun on Upton, DeFee threw her on the ground, knelt over her and tried to remove her clothes. According to her, DeFee and Upton became involved in a struggle over the shotgun, resulting in its going off twice. She attributed an entirely different statement incriminating both herself and Upton which failed to refer to any advances by DeFee toward her, to the fact that she had been drinking and taking pills. She said the officers had made up the statement. She admitted that she had then made the statement that Upton took DeFee's billfold, but that it was untrue.

Upton testified that he did not put DeFee out of his car when the latter first became familiar with Mrs. Upton, because she asked him not to. Yet, he said that after they later stopped in El Dorado to check the transmission fluid in his car, DeFee was permitted to continue on the trip with them and that they had only gone two blocks when DeFee put a shotgun in his stomach and ordered him to turn up a dirt road and stop. He likewise testified that the shotgun went off during a struggle between the two men after DeFee had ordered Mrs. Upton to get on the ground. He denied robbing DeFee and said he did not see a billfold. He attributed his confession to his desire to protect his wife and the prosecuting attorney's alleged statement that she would burn in the electric chair.

We think the circumstantial evidence that DeFee was killed in the perpetration of a robbery is sufficiently connected to constitute substantial evidence to support the verdict when viewed in the light most favorable to the state.

The judgment is affirmed.

SEARCY COUNTY *v.* Billy Joe HOLDER

74-198 516 S.W. 2d 901

Opinion delivered December 23, 1974

Matthews, Purtle, Osterloh & Weber, for appellant.

Jerry D. Patterson, for appellee.

J. FRED JONES, Justice. This is an appeal by Searcy County from a circuit court judgment which reversed an order of the county court on appeal, and granted certain claims filed by the appellee Billy Joe Holder, as sheriff of Searcy County, which claims had been denied by the county court. On appeal to this court Searcy County has designated the points on which it relies for reversal as follows:

> "... the court erred in allowing claims Nos. 11815, 11814, 11816 as they are barred by Arkansas Statutes Ann. § 27-2001 (Supp. 1973).
>
> ... the court erred in allowing the claims made for the deputy sheriff car expense in that such claims were not

proper and are not authorized by law."

We now discuss the assignments in the order designated and we shall confine our discussion to the designated points. As to the first point, Sheriff Holder filed claim No. 11611 and it was disallowed by the county court on May 1, 1973. He filed claims No. 11683 and 11753 and they were disallowed by the county court on June 29, 1973. On August 1, 1973, Sheriff Holder refiled the previously disallowed claims as claims No. 11814, 11815 and 11816. These claims filed on August 1, 1974, were disallowed by the county court on the same date they were filed, and Sheriff Holder perfected his appeal to the circuit court on January 30, 1974.

It was the county's contention that the six month statute of limitations for appeals from county court orders to the circuit court under Ark. Stat. Ann. § 27-2001 (Supp. 1973) started running from the date the claims were first denied by the county court, and that the appeal filed on January 30, 1974, was filed too late. It was the sheriff's contention that the appeal time under the statute, started running from August 1, 1973, when the claims were again denied by the county court. The circuit court agreed with the sheriff and rendered judgment accordingly and in so doing, we conclude that the circuit court erred.

The pertinent portion of § 27-2001 provides as follows:

> "Appeals shall be granted as a matter of right to the circuit court from all final orders and judgments of the county court . . . at any time within six (6) months after the rendition thereof, . . . the clerk of the circuit court shall forthwith order an appeal to the circuit court . . . at any time within six (6) months after the rendition of any other judgment or order, and not thereafter."

When the time in which an appeal must be taken is fixed by statute, the provision which limits the time is jurisdictional in nature, and the appeal must be taken within the time designated. *Bank of El Paso* v. *Neal,* 181 Ark. 788, 27 S.W.2d 1024; *Camden Gas Corp.* v. *Camden,* 183 Ark. 583, 37 S.W.2d 74; *Edgmon* v. *Edgmon,* 193 Ark. 1076, 104 S.W.2d

452. See also *Titsworth* v. *Mayfield, Judge,* 241 Ark. 641, 409 S.W.2d 500.

As to the appellant's second point, claims No. 11817, 11818, 11910, 11967, 12178, 11265 and 11266 were filed by the sheriff for expenses for a deputy sheriff's car and were denied by the county court. The orders denying these claims were timely appealed to the circuit court and the circuit court rendered judgment therefor. It was the county's contention that there was no statutory authority for allowing these claims and it was the sheriff's contention that the claims were legitimate and should be paid under authority of § 64 of Act 610 of the Acts of the Legislature for 1973.

Act 610 is entitled "AN ACT to Fix the Salaries or Remunerations of the Sheriffs of the Various Counties of the State of Arkansas; and for Other Purposes." Section 64 of the Act pertains to Searcy County and provides as follows:

> "(64) Searcy County — Salary or remuneration and Deputies as now provided by law, plus the further and additional sum of $4,800.00 for Deputy Hire, payable on a monthly basis out of the County General Fund, Sheriff's car expense of $3,600.00 annually payable on a monthly basis out of the County General Fund. Said Sheriff shall be allowed $4.00 per day per person for feeding prisoners.
>
> Plus the further and additional sum of $4,800.00 for second Deputy hire, paid on a monthly basis out of County General Funds. A car furnished with radio equipment, shall be furnished by County for use of Sheriff's Department. Expenses for said car shall be paid from County General Fund.
>
> Plus the additional hiring of part-time radio operator at the rate of $2,400.00 annually to be paid from excess fees and commissions.
>
> All other excess fees and commissions shall be paid into the County General Fund."

It was the county court's position that the last two sentences in the second paragraph of § 64, *supra,* "A car furnished with radio equipment, shall be furnished by County for use of Sheriff's Department. Expenses for said car shall be paid from County General Fund," were the only authority the county had for paying expenses of a car for the sheriff's department; and, that the phrase "said car" referred only to a car belonging to, and purchased by, the county for use of the sheriff's department.

It appears from the abstract of the record that under a previous mandamus order from the circuit court, Searcy County had placed an order for an additional automobile furnished with radio equipment in compliance with § 64 of Act 610. It appears that pending delivery of the automobile, the sheriff substitued a privately owned automobile so equipped, for use in the department by one of the deputies, and that the claims were for gasoline used in connection with the operation of said automobile. The amounts or the integrity of the claims is not questioned.

We are of the opinion that the county court placed too narrow construction on the statutory authority for "furnishing a car" with radio equipment and that the circuit court did not err in the judgment it rendered on these claims.

The judgment is reversed as to claim No. 11814 in the amount of $490, claim No. 11815 in the amount of $645 and claim No. 11816 in the amount of $486. In all other respects the judgment is affirmed.

Affirmed in part; reversed in part.

Doyle STEVENS *v.* MID-CONTINENT INVESTMENTS, Inc.

74-221 517 S.W. 2d 208

Opinion delivered December 23, 1974
[Rehearing denied January 27, 1975.]

Atchley, Russell, Waldrop & Hlavinka, for appellant.

Young & Patton, by: *David Folsom,* for appellee.

FRANK HOLT, Justice. This case results from a collision involving appellee's diesel Mack tractor-tank trailer and appellant's pickup-cattle trailer. The jury found appellant negligent and awarded appellee $20,000 for damages to its vehicle and $5,578 for lost profits. Appellant's only contention on appeal is that damages for loss of use are not recoverable. Therefore, appellant asserts that the trial court erred in instructing the jury as to lost profits.

The tractor-trailer, the only one owned by appellee, was used on daily short hauls to transport fuel from a supplier to appellee's truck stop. Appellant agrees that the rig was irrepairably damaged. Appellee promptly attempted to find a replacement by bidding on a used one and, also, ordering a new truck of the same model as the damaged one. A strike, however, prevented action on the bid. Other tractor-tank trailers were immediately available. However, they were considerably more expensive and did not meet appellee's need

for a particular type vehicle, which is a tractor designed to pull two tank trailers. It was unique equipment known as a "West Coast" model. Approximately six months after the accident, appellee received the new truck it had ordered. Several days later, appellee was notified that it was the high bidder on the used truck. Since appellee then had two trucks and needed only one, it sold the used truck. During the six months' period that appellee was without the use of the special type equipment, it contracted with an independent carrier to haul its daily fuel supply. The record shows that this expense reduced its monthly earnings by $1,758.76. The reasonableness of the time in acquiring the needed replacement and speculation as to the loss of profits are not questioned on appeal. As indicated, the loss of profit based upon loss of use of this vehicle is the only issue presented.

In *Jones* v.*Herrin,* 252 Ark. 837, 481 S.W.2d 362 (1972), we adhered to our cases that an individual could not recover compensation for loss of use of a vehicle pending repair of the damages caused by a wrongdoer. However, we recognized "that there is some merit" in allowing recovery. The concurring justices said that our rule denying the loss of use of a vehicle as an element of damages ". . . . is demonstrably unjust, especially when, as here, the plaintiff customarily uses the vehicle in his business. Such an award is essential if the injured person is to be made whole." Subsequently, in *Sharp* v. *Great Southern Coaches, Inc.*, 256 Ark. 773, 510 S.W. 2d 266 (1974), we recognized and approved the recovery of compensation for loss of use as an element of damages where a commercial vehicle was partially damaged and enunciated the criteria in making that determination. The owner was allowed the income lost while the truck was being repaired, citing Ark. Const. Art. II, § 13 (1874), which in pertinent part reads:

> Every person is entitled to a certain remedy in the laws for all injuries or wrongs he may receive in his person, property or character . . . .

We further said:

> We note that we ordinarily recognize loss of use as an

element of damages where the detention of other types of property is involved, *McDanial* v. *Crabtree,* 21 Ark. 431 (1860), and *Continental Gin Co.* v. *Clement,* 176 Ark. 864, 4 S.W.2d 901 (1928). When our prior decisions with reference to the compensability of loss of use of a vehicle are considered along with the criticism that has been leveled at them, *Jones* v. *Herrin, supra,* together with the inconsistent position we have taken when loss of use of other property is involved, we find that our former decisions with reference to the compensability for loss of use of a vehicle were somewhat arbitrary and should be overruled when only a partial destruction is involved.

Appellant correctly asserts that *Sharp, supra,* awards loss of use only when a partially damaged vehicle is involved. Appellant is correct in stating that numerous jurisdictions refuse to allow loss of use where the vehicle is totally destroyed, as here, and must be replaced. See 18 ALR3d 497; Blashfield, Automobile Law and Practice, 15 § 480.4. The denial of such relief apparently stems from the historical limitations on the action of trover at common law. *Nashban Barrel & Con. Co.* v. *G. G. Parsons Trucking Co.*, 49 Wis. 2d 591, 182 N.W. 2d 448 (1971); 18 ALR 3d, § 9, p. 519.

The most recent cases, and seemingly just approach, allow recovery for loss of use where, as here, upon proper pleading and proof, there is total destruction of the vehicle. The recovery is subject to the reasonableness of time required for replacement and unspeculative lost profits. See *Nashban Barrel & Con. Co.* v. *G. G. Parsons Trucking Co., supra; Dennis* v. *Ford Motor Company,* 332 F. Supp. 901 (W.D. Pa. 1971); *Daniel* v. *Kerby,* Ky., 420 S.W. 2d 393 (1967); *New York Central Railroad Company* v. *Churchill,* 140 Ind. App. 426, 218 N.E. 2d 372 (1966); *Laney Tank Lines, Inc.* v. *United States,* 237 F. Supp. 205 (E.D. S. Ca. 1965); and 18 ALR3d, § 9, p. 519. In *New York Central Railroad Company* v. *Churchill, supra,* a tractor-trailer unit was totally destroyed. The court allowed damages for loss of use. The owner was awarded the reasonable rental value of a rig during the time needed to replace the destroyed vehicle.

There seems to be no logical reason to allow loss of use as was awarded in *Sharp* and not extend it in the case at bar.

Appellant negligently damaged appellee's truck and it took six months, after diligent effort, to replace it because of its unique design. During this period, appellee suffered pecuniary loss. If the truck had been severely damaged, but repairable, our rule, as announced in *Sharp,* would unquestionably be applicable. The main consideration in *Sharp* was to make the plaintiff whole, a concept which certainly is not novel.

Affirmed.

JONES and BYRD, JJ., dissent.

W. C. McMINN CO., Inc. *v.* CITY of Little Rock and Calvin BIGGERS et al

74-92 516 S.W. 2d 584

Opinion delivered December 23, 1974

Stubblefield & Matthews, for appellant.

Joseph C. Kemp, City Atty., by: *David Henry* and *Plegge, Lowe & Whitmore,* for appellees.

Charles Mott Jr. and *Walker, Kaplan & Mays, P.A.,* and *John M. Bilheimer,* for intervenors-appellees.

H. Clay Moore, for Quapaw Quarter Association, *amicus curiae.*

Darrell D. Dover and *House, Holmes & Jewell,* for Little Rock and North Little Rock Board of Realtors, *amicus curiae.*

DAN M. BURGE, Special Justice. This is a zoning case involving a total of nine and one-half (9½) lots owned by the Appellant, W. C. McMinn Co., Inc., out of a total of twelve (12) lots in Block 206 of the original City of Little Rock, which block is located between 15th and 16th Streets, Broadway and Arch Streets, in the City of Little Rock.

The North side of Block 206 adjoins and is immediately adjacent to the south boundary of the Central Little Rock Urban Renewal District. There are numerous lots along Broadway used and zoned as F Commercial as well as on other streets within the immediate area of Appellant's property. The south half of the adjoining block facing Broadway and within 200 feet of the southeast corner of

Appellant's property is used commercial as is the entire west half of the block adjoining Appellant's property on the west side. There are service stations located on Broadway within 300 feet of Appellant's property, both to the north and to the south. There are also numerous vacant and undeveloped lots in the immediate area of Appellant's property.

Appellant commenced the acquisition of its lots in 1967 and purchased the last lot in 1972, all of which purchases were made after this Court handed down decisions in 1964, through 1966, approving F Commercial Zoning on South Broadway in this area. Prior to Appellant's purchase, said lots had various zoning classifications. Before purchasing its largest and most expensive single tract from the Third Baptist Church at a cost of $135,000.00, Appellant required and the church did join with Appellant in obtaining rezoning of all of the church's and Appellant's property in Block 206 to F Commercial in February 1971. Thereafter, Appellant renovated the church property for commercial use at a cost of $100,000.00 and leased it to a tenant with usage clearly within the F Commercial classification. In 1972, Appellant purchased its last lot in Block 206 for a total investment of approximately $350,000.00. It requested that this last lot be rezoned F Commercial, but the City refused, and the same was classified E-1 for quiet business use.

At the time of the 1972 application and hearing, the City Board of Directors requested the City Planning Commission to make a land use study of the South Broadway area from 14th Street to the North to Roosevelt on the South, Louisiana Street on the East to High Street on the West. The Planning Commission then reduced the area of its study to include a 63 block area bounded by 15th Street on the North, Roosevelt Road on the South, Center Street on the East, and the alley line between Chester and Izard Streets on the West. Appellant's property in Block 206 being located on the West side of Broadway between 15th and 16th Street is in the extreme North edge of the study area. In February 1973, following the Planning Commission's Study, the City adopted Ordinance No. 12,739 reclassifying and rezoning various properties in the South Broadway study area whereby all of Appellant's property in Block 206 was rezoned from F

Commercial District to E-1 Quiet Business District over its objections.

Appellant then filed suit in the Pulaski Chancery Court seeking to restrain and enjoin the Appellee City from denying its use of its property for F Commercial purposes, alleging that the action of the City in rezoning its property was arbitrary, unreasonable,. capricious and unconstitutional as applied to Appellant. The Trial Court denied the relief requested and Appellant brings this appeal.

Prior to the trial in the Pulaski Chancery Court, and over Appellant's objections, certain intervenors, who were property owners within the 63 Block area, were permitted to file interventions opposing the relief sought by Appellant. They have also filed a separate brief and argument in this appeal. We hold that this participation was not an abuse of the Chancellor's discretion, as such interventions have been approved in other zoning cases. *Fields* v. *City of Little Rock,* 251 Ark. 811, 475 S.W. 2d 509.

We have also been favored with excellent amicus curiae briefs and arguments filed by the Little Rock and North Little Rock Board of Realtors, Inc. in support of the Appellant and in behalf of the Quapaw Quarter Association in support of the Appellee. These briefs and arguments have been considered by the Court.

Twenty-six (26) witnesses testified in this trial and numerous and voluminous exhibits were introduced into evidence. It would unduly prolong this Opinion to separately summarize the testimony of each witness or separately discuss each exhibit. Accordingly, after carefully reviewing all the evidence, we will merely summarize same as it applies to each party's contentions and the applicable law.

Between 1960 and 1970 the census records for the City of Little Rock revealed that the South Broadway area included in Ordinance No. 12,739 decreased 11.1% in population while the City as a whole increased 23%; owner occupied property in the area was reduced 20.9% while for the City as a whole there was an increase of 41%; tenant occupied

property in the area increased to 74.2% while for the City as a whole tenant occupied property was only 40%; vacancy rate increased in the area to 15.4% while for the City as a whole it was only 6.6%; and employment, income, school age children and other factors reflect similar comparisons.

Numerous witnesses in behalf of the Appellant and Appellee testified to the effect that the area continued to be a declining neighborhood in the twilight zone or transition period which was obviously depressed with a high vacancy rate. They further testified that practically all of the building activity in the area was for the renovation of existing homes into multiple apartments and rooming houses and that there were no new family dwellings being constructed in the area, with the area adjacent to Appellant's property becoming progressively undesirable for single family dwellings. Testimony further revealed that when an existing home or apartment building burned or deteriorated to the point it could not be used the property normally remained vacant or undeveloped.

The testimony from witnesses for both Appellant and Appellee clearly revealed that this trend evidenced by the census reports continued after 1970 and up until the time of the trial of this cause. In fact, Appellees' own witnesses, Mr. Russell McLean, Chairman of the Little Rock Planning Commission, Mr. Jim Finch, a member of the Department of Community Development Staff, and Mr. Donald Venhaus, a Director of the Department of Community Development, all testified to the fact that the neighborhood adjoining Appellant's property continued as a declining or depressed area with high vacancy rates, approximately two and one-half times that of the City of Little Rock as a whole.

Mr. Russell McLean, Chairman of the Little Rock Planning Commission and Appellees' own expert witness, further testified that he would favor permitting F Commercial zoning on Broadway Street from 15th to 18th Street, which area includes all of Appellant's property. Other witnesses testified in behalf of the Appellant to the effect that the highest and best use of Appellant's property was for commercial purposes; and that the use of the former Baptist Church property at the time of the adoption of the rezoning ordinance was F

Commercial and after the adoption of said ordinance it became a nonconforming use. Appellant's witnesses further testified that the "rezoning" or "dezoning" of its property reduced the overall value by approximately $100,000.00 and Appellee did not seriously contest these figures nor did it offer any evidence to the contrary. The evidence further revealed that not one of the intervenors or any other property owner in the area objected to the rezoning of Appellant's property to F Commercial in February 1971. Furthermore, the parties conceded in oral arguments before the Court that the rezoning of the property in question to F Commercial classification in February of 1971 was a proper and lawful act on the part of the City as of that time; and, therefore, we have to assume that it was justified under the facts and circumstances then and there existing.

We find that Appellant's property and the area immediately adjacent thereto has not undergone any material change since our prior decisions involving Broadway properties in *City of Little Rock* v. *Andres,* 437 Ark. 658, 375 S.W. 2d 370 (1964); *City of Little Rock* v. *Gardner,* 239 Ark. 54, 386 S.W. 2d 923 (1965); and *City of Little Rock* v. *Miles,* 240 Ark. 735, 401 S.W. 2d 741 (1966).

Furthermore, we have held in numerous decisions that in determining whether or not a zoning ordinance is valid as to a certain litigant's property, it is severable. This appeal involves only Appellant's property and the ordinance as it applies to its property. Our holding in this cause does not affect the validity of the ordinance as it applies to other property that may have been rezoned or otherwise affected thereby in the 63 Block area. *City of Little Rock* v. *Sun Building & Development Company,* 199 Ark. 333, 135 S.W. 2d 582.

The issue is then whether or not the Chancellor's findings that the City Zoning Authorities did not act arbitrarily in rezoning Appellant's property is supported by a preponderance of the evidence. If so, the finding will be affirmed on appeal.

In determining the validity of the 1973 rezoning ordinance as it applies to Appellant's property, we must

emphasize that we have consistently recognized that zoning ordinances are valid as against constitutional objections only by reason of the police power, and further that such ordinance must bear some definite relation to the health, safety, morals and general welfare of the inhabitants of that part of the City affected by the ordinance. *City of Blytheville, et al* v. *Harold Thompson, Sr., et al,* 254 Ark. 46, 491 S.W. 2d 769.

As previously stated, zoning ordinances are valid only by reason of the police power and cannot be arbitrarily enforced. Such ordinances are in derogation of common law and operate to deprive an owner of property of a use thereof which would otherwise be lawful, and should be strictly construed in favor of the property owner. *City of Little Rock* v. *Andres,* 237 Ark. 658, 375 S.W..2d 370.

This Court, while recognizing that the word "arbitrary" has several definitions, has recognized the following as the most generally accepted usage: "Arising from unrestrained exercise of the will, caprice, or personal preference; based on random or convenience selection or choice, rather than on reason or nature." *City of Little Rock* v. *Parker,* 241 Ark. 381, 407 S.W. 2d 921. Then, we have held that "arbitrary" also means decisive but unreasoned action and that "capricious" means not guided by steady judgment or purpose. *City of Little Rock* v. *Habrle,* 239 Ark. 1007, 395 S.W. 2d 751.

Appellee has admitted that it undertook the land use study in the area involved for the personal preference of overturning previous Supreme Court Opinions permitting spot or strip commercial zoning in the area in question. In this connection we must take note that Appellant's property is one of the largest single tracts in the entire area owned by one person or firm and furthermore that the property is border line property located adjacent to established business zones and property actually being used for commercial purposes. It does not involve what is commonly referred to as "spot" or "strip" zoning.

In rezoning or dezoning Appellant's property in February of 1973, the City of Little Rock has placed a more restrictive use on the property than that permitted in their

February 1971 rezoning without any showing that such action would stabilize property values in the area or otherwise show any change of conditions that would justify this action, especially in view of the fact that Appellant, relying on the previous zoning classification, purchased portions of the property and made substantial additional expenditures and investments in upgrading portions of the property to be used for F Commercial purposes.

We find that over the two year period between February 1971 and February 1973, Appellant, in good faith relied upon its F Commercial zoning, incurred substantial expenses and obligations in upgrading its property without any complaint or objections from the Planning Commission, the City or its adjoining property owners. To uphold Appellee's action would result in a substantial loss of Appellant's investment, making such action inequitable and unjust. *Tankersly Brothers Industries* v. *City of Fayetteville,* 227 Ark. 130, 296 S.W. 2d 412.

Accordingly, we conclude that there was no public necessity or change in conditions affecting Appellant's property between February 1971 and February 1973 that would justify the rezoning of same and that the acts of the Appellees in so doing were arbitrary and capricious with the result that the Chancellor's findings in this particular case as it relates to the Appellant's property are not supported by a preponderance of the evidence and the Decree is accordingly reversed.

It is so ordered.

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

GEORGE ROSE SMITH, J., not participating.

CARLETON HARRIS, Chief Justice, concurring. I agree that the decree of the Pulaski Chancery Court (Third Division) must be reversed and this conclusion is predicated on the fact that not a single intervenor or property owner in the area objected to the rezoning of appellant's property to "F"

Commercial in February, 1971, and of course, this rezoning was entirely lawful and permissible at the time.[1] However, while the majority opinion points out that our holding in this cause does not presently affect the validity of Ordinance No. 12, 739 reclassifying and rezoning various other properties in the South Broadway Study Area (a 63-block area described in the majority opinion), I desire, as far as my individual views are concerned, to emphasize that fact. In *City of Little Rock* v. *Gardner,* 239 Ark. 54, 386 S.W. 2d 923, I dissented to the holding of the majority that the city authorities were arbitrary in refusing to rezone certain property on Broadway from "D" Apartment District to "F" Commercial District. In that dissent, it was stated:

> "The majority apparently depend almost entirely upon the recent case of *City of Little Rock* v. *Andres,* 237 Ark. 658, 375 S.W. 2d 370. That opinion contains language which would appear to hold that no part of Broadway is now suitable for residential purposes, but since *Andres* only actually involved a small area on Broadway, I have considered the 'sweeping language' as to the entire street to be nothing more than *dicta.*"

My views in this respect have not changed, and my position in the litigation now before us is based entirely upon the fact situation set out in the opening sentence of this concurrence.

JOHN A. FOGLEMAN, Justice, concurring. I concur on the sole basis that the action of the city was arbitrary because there is evidence that there was no change in conditions justifying "dezoning" of appellant's property after it was zoned F-1 commercial but no substantial evidence that there was. To me, it follows, as a matter of course, that it would be equally arbitrary to deny the same zoning classification to appellant's subsequently acquired adjoining property.

The occasion for my registering my agreement by separate opinion stems from my feeling that too much weight is being accorded our previous opinions in cases involving property on Broadway in Little Rock. I consider them res

[1]This was two years before the present reclassification ordinance was passed.

judicata as to the particular property involved in those cases on the basis of the particular evidence before the trial court in each case. Otherwise, they are only legal, not factual, precedent. To me, evidence showing changes since those decisions is wholly beside the point.

Jerry CHATMAN *v.* Willard MILLIS, Jr.

74-139 517 S.W. 2d 504

Opinion delivered January 13, 1975

Boyett & Morgan, P.A., by: *Comer Boyett, Jr.,* for appellant.

Pickens, Boyce, McLarty & Watson, by: *James A. McLarty,* for appellee.

CARLETON HARRIS, Chief Justice. The question in this case is whether appellee, a psychologist, can be held liable to appellant for malpractice under the facts hereinafter set out.

The facts as set forth in appellant's complaint are as follows. Mrs. Robbie Chatman was divorced from her husband, appellant herein. Appellant had visitation privileges with the couple's 2½ year old son. Mrs. Chatman, partly because of actions of the child, became concerned that her ex-husband had subjected the child to homosexual conduct, and, as a matter of terminating the father's visiting privileges, sought the aid of appellee in evaluating appellant's conduct. After talking with Mrs. Chatman and the child, appellee wrote her attorney a letter advising that Mrs. Chatman and her child had been referred to him by Dr. Ben Lowery for the purpose of his providing assistance in determining whether or not the child (Christopher) had been sexually molested by his father, and if so, the future implications for Christopher's psychosexual development. In this letter, Dr. Millis, Jr. went into detail as to comment made to him by Christopher and concluded his letter by stating:

> "While it will be the Court's decision, and not mine, I feel that it would not be a good idea to allow Chris to continue to visit his father at all. If it is necessary that visitation rights be continued, I would strongly urge that the presence of a third person, preferably a relative, be in their presence at all times.
>
> "As I mentioned in our telephone conversation of April 10, 1973 I would be willing to testify in Court about my interview or the statements made in the letter above."

Thereafter, Chatman instituted suit in the Circuit Court of White County, home of Chatman, alleging both defamation of character, and malpractice against appellee. Service was had on appellee at his residence in Jackson County. Millis responded to the complaint with a special appearance and motion to quash asserting that venue in White County was improper in that appellee was neither a citizen not resident of White County, and further, was not served in White County.

On hearing, the court held no action for malpractice exists in this state against a psychologist; that even if such an action were permitted in this jurisdiction, there would have to

be a doctor - patient relationship or some similar relationship between the parties, and that the complaint in the instant litigation alleged, and counsel had admitted, that Chatman had never been examined by Millis, and in fact, was not even known to the doctor; accordingly, there could be no action for malpractice. The court then found:

> "Since there is no cause of action for malpractice the only cause of action left is defamation of character the proper venue of which is not in White County the motion to quash the service of summons upon the defendant should be granted."

Appellant admits after the holding of the court that there was a lack of relationship between the parties to support the malpractice action, the complaint was correctly dismissed because of improper venue on the remaining count of defamation.

It is not necessary, in determining this litigation, to pass on the question of whether there is a cause of action in Arkansas for malpractice available against a psychological examiner or psychologist, since we are of the view that, even though such a cause of action exists, the allegations of appellant's complaint do not state a cause of action.

We do not flatly state that a cause for malpractice must be predicated upon a contractual agreement between a doctor (psychologist) and patient, but we do say that a doctor-patient relationship must exist, i.e., there must be a duty, *as a doctor,* owed from the practitioner to the patient. Under the allegations before us, Millis made no examination of Chatman; in fact, he did not even know Chatman, and had never seen him. Appellant was not a patient of Millis, and the diagnosis reached was not for the benefit of Chatman. Even if the findings of the psychologist were negligently made, Chatman did not rely upon this diagnosis to his detriment.

Of course, all persons owe a duty to refrain from defaming others, but this is simply a duty that all citizens have toward each other, and has nothing to do with a doctor-patient relationship. After all, Chatman was not damaged by

the allegedly negligent diagnosis — he was damaged by the alleged defamation. An example given by appellee appears pertinent to illustrate the point. Let us assume that a physician is engaged in lighthearted pleasure at a large cocktail party. Assume further that this physician openly refers to a non-patient individual, and by name, refers to him as a homosexual. Certainly, under these circumstances, the physician might be found to have slandered that person's character, and, if so found, held to be answerable to that person for damages sustained. However, the fact that the speaker happened to be a physician does not mean that what was said constituted malpractice.

Concisely stated, we simply reiterate that under the facts alleged, appellee owed no duty, *as a doctor,* to appellant, and this duty must be in existence before appellant can recover because of negligence, constituting malpractice.

Since we agree that, under the allegations, no action for malpractice exists, and it being admitted that the complaint was correctly dismissed because of improper venue on the defamation count, the judgment quashing the service is affirmed.

It is so ordered.

JONES, J., concurs.

BROWN and FOGLEMAN, JJ., dissent.

JOHN A. FOGLEMAN, Justice, dissenting. The peculiar manner in which the issues presented reach this court puts them in an odd perspective for proper treatment on appellate review. As I read the complaint the allegations pertinent to the issues are stated separately. The allegations relating to defamation are stated in Paragraphs I through VI. The allegations relating to negligence (or malpractice) are as follows:

VII

Defendant at all times mentioned in the complaint was either a psychological examiner or psychologist

duly licensed under the laws of the State of Arkansas, with offices in Jackson County, Arkansas, as well as White County, Arkansas. On or about April 10, 1973, defendant diagnosed the plaintiff as a homosexual who had engaged in incestuous activities with his 1 ½ year old son and such diagnosis was disseminated to plaintiff's former wife, Robbie Chatman, and Cecil A. Tedder, Jr.

VIII

Defendant was negligent and careless in making such diagnosis by failing to exercise the degree of skill and care, or to possess the degree of knowledge, ordinarily exercised or possessed by other psychological examiners or psychologists engaged in this type of practice in White County, Arkansas, or similar localities, in that he failed and neglected to ever interview the plaintiff and in fact did not even know him, failed to administer any diagnostic tests which would reveal any homosexuality tendencies or to use any of the proper methods that psychologists use in exercising ordinary care to protect others from injury or damage; the defendant acted in a manner willfully and wantonly in disregard to the rights of plaintiff.

IX

As a proximate result of the negligence and carelessness of the defendant as aforesaid plaintiff suffered excruciating mental anguish, humiliation, embarrassment and will continue to do so in the future; he suffered financial injury.

This complaint was not tested by demurrer. Appellee entered a special appearance and moved the summons be quashed because venue was not properly laid in White County. The grounds stated were that the complaint alleged a cause of action based upon defamation, pointing out that appellant had alleged in Paragraph V that the publication of a letter stating appellee's findings as to appellant's conduct was defamatory per se. Appellee did not then allege and has

never contended he could not be liable for malpractice. Appellee responded in his brief here upon the sole ground that the allegations of the complaint did not show the existence of a physician-patient relationship, which was apparently a secondary basis for granting the motion to quash. If an action for malpractice was stated, then the motion to quash was not well taken, because the venue was proper. The trial court granted the motion to quash, saying (1) there can be no cause of action for malpractice against a psychological examiner or psychologist, and, (2) if there could be, the allegations of the complaint are insufficient to state a cause of action. The motion to quash was granted as pointed out in the majority opinion because "there is no cause of action for malpractice" so that the "only cause of action left is defamation of character".

I see no way we can approach this problem except by determining whether a malpractice action was brought in this case. If it was, the venue was properly laid. It seems strange, to say the least, to dispose of this matter without determining whether the trial court's primary, if not sole, basis for granting the motion to quash was sound. It obviously was not and even though appellee has insisted that this was not in issue in the case, his counsel admitted, in oral argument, that a cause of action for malpractice would lie under proper circumstances, against a psychological examiner or psychologist. This admission was certainly appropriate and consistent with the ethical standards required of a legal practitioner.

Malpractice has been defined as "Any professional misconduct, unreasonable lack of skill or fidelity in professional or fiduciary duties, evil practice, or illegal or immoral conduct". Black's Law Dictionary (4th ed.) 1111. In Arkansas, malpractice has been recognized as negligence in the practice of various professions, among which are law, medicine, and dentistry. See *Welder* v. *Mercer,* 247 Ark. 999, 448 S.W. 2d 952; *Burton* v. *Tribble,* 189 Ark. 58, 70 S.W. 2d 503; *Black* v. *Bearden,* 167 Ark. 455, 268 S.W. 27. In the last of the cited cases we held that the rules governing duties and liabilities of physicians and surgeons applied to practice of kindred branches of the healing arts. Our statutes make the practice

of psychology a profession of the healing arts. Ark. Stat. Ann. §§ 72-1501 - 1518 (Repl. 1957) deal with this profession. They provide for licensing of psychological examiners and psychologists and for suspension and revocation of licenses, for privileged communication between such a licensee and his client, and for a code of ethics governing practice and behavior. It seems so clear such a malpractice action can lie against such a practitioner as to be beyond argument. This should end this court's inquiry and serve as a basis for reversal of the order granting the motion to quash, because it is clear the pleader was asserting such a cause of action separate and distinct from the cause of action for defamation. Any defect could easily be cured by amendment when and if a demurrer or motion to make more definite and certain was filed.

The determination of the question posed in the trial court and here, i.e., propriety of the venue, can only be made by reference to the pleadings. Where venue depends upon the essential nature of the action, as it does here, resort can only be had to the complaint in deciding the question. This proposition is well stated at 92 C.J.S. 676, Venue § 6, as follows:

> *Allegations as controlling.* Under the venue statutes a plaintiff bringing a cause of action in good faith is entitled to invoke the venue that accords with the allegations of the petition, regardless of the possibility that venue may fall with the suit on plaintiff's failure to maintain the merits of the suit. To the extent that a venue statute makes the character and nature of a suit controlling with respect to its venue, the nature is determined by the facts alleged in the petition, and if more than one ground is relied on to establish venue, it is sufficient if either is shown to exist. However, it is only as to the nature of the action that the pleading is controlling; the court may not look to the petition for facts of venue, such as the residence of the parties, the place where fraud was committed, or similar facts.

See also *Eckstrand* v. *Wilshusen,* 217 Cal. 380, 18 P. 2d 931 (1933); *Pacific Air Lines, Inc.* v. *Superior Court,* 231 Cal. App. 2d

587, 42 Cal. Rptr. 68 (1965); *Davey* v. *Davey,* 77 N.M. 303, 422 P. 2d 38 (1967); *Renwar Oil Corp.* v. *Lancaster,* 154 Tex. 311, 276 S.W. 2d 774 (1955); *High* v. *Karell,* 346 S.W. 2d 920 (Tex. Civ. App., 1961); *Stuckey* v. *Stuckey,* 143 Neb. 610, 10 N.W. 2d 458 (1943).

The substance of the pleading, not the demand or prayer for relief, governs. *State* v. *Hess,* 472 S.W. 2d 362 (Mo., 1971). In determining venue, the question is what cause of action is alleged, not whether, on the merits, the plaintiff can successfully sustain the cause of action. *Leonard* v. *Carter,* 389 S.W. 2d 147 (Tex. Civ. App. 1965); *Vitopil* v. *Gray,* 111 S.W. 2d 1202 (Tex. Civ. App. 1937); *McKee* v. *McKee,* 12 S.W. 2d 849 (Tex. Civ. App. 1929). See also *Calder* v. *Third Judicial District Court,* 2 Utah 2d 309, 273 P. 2d 168, 46 ALR 2d 887 (1954).

Instead of determining the venue on the nature of the cause of action as disclosed by the complaint, the majority launches an exploration into whether appellee can recover from appellant in a malpractice action. Assuming, without conceding, that, on motion to quash, the allegations of a complaint are to be tested just as we would test evidence precisely limited to the bare words of those allegations, I thoroughly disagree with the view that a doctor-patient relationship - as it is described by the majority - is a necessary prerequisite to a recovery for malpractice by appellant. I submit that the attempt to analogize this case and this issue to cocktail party chatter is illustrative of the majority's approach to the issue and the faulty basis for its result. The dissimilarity of this example to this case should be obvious. It does not involve the professional relationship in any aspect or even remotely approach an involvement of the practice of a profession. I agree with the premise of the majority's result only in the respect that, in order for a presumably skilled professional to be liable, he must have owed a duty to the person who claims to have been injured and he must have violated that duty. Thereafter, I agree only with the conclusion that the physician at the cocktail party might be held answerable for his chatter in defamation, but not in a malpractice action. The majority's result has imported a rule of privity into malpractice actions. I consider this not only undesirable but improper.

A malpractice action, however it may be necessary to define it in order to give recognition to factors peculiar to the practice of a profession, should be considered nothing more or less than a tort action to recover damages for either willful, ignorant or negligent misconduct of a practitioner in the practice of his profession. See Introduction, Chapter 15, AMI, Civil (2d); Black's Law Dictionary (4th Ed.) p. 1211; 54 CJS 1111, Malpractice; Note on Use, AMI 1501, AMI, Civil (2d), p. 177. The appropriate standards are set out in AMI, Civil, 1501. Under that instruction, any practitioner (including appellee and others in his field) would be required to possess and, using his best judgment, apply with reasonable care the degree of skill and learning ordinarily possessed and used by members of his profession in good standing engaged in the same type of practice in the locality in which he practices or in a similar locality; otherwise he is guilty of negligence.

Still, when boiled down to its essentials, this definition of malpractice states precisely the duty owed by a practitioner of a profession, the violation of which renders him liable for negligence. But it is now almost universally recognized, as Mr. Justice (then Judge) Cardozo phrased it in *Palsgraph* v. *Long Island Railroad Co.*, 248 N.Y. 339, 162 N.E. 99 (1928), there can be no "negligence in the air". *Hill* v. *Wilson,* 216 Ark. 179, 224 S.W. 2d 797; *Haralson, Adm'x.* v. *Jones Truck Line*, 223 Ark. 813, 270 S.W. 2d 892. Dr. Leflar defined negligence, in light of the concept that "negligence in the air" is non-existent. That definition (which should be applied here) reads:

> ****In other words, a negligent act is one from which an ordinary prudent person in the actor's position - in the same or similar circumstances - would foresee such an appreciable risk of harm to others as to cause him not to do the act, or to do it in a more careful manner.

We repeated and applied this definition in *Haralson, Adm'x.* v. *Jones Truck Line*, supra.

In other words, there can be no actionable negligence, unless the actor has violated a duty he owed the victim of his

act or omission. Prosser, Law of Torts (4th ed.) 244, § 42. The question then becomes "To whom does the practitioner owe a duty?" Actionable negligence must arise from violation of a duty imposed upon the actor by common law, by statute or by contract. 57 Am. Jur. 2d 380, 382, Negligence §§ 33, 36; 65 CJS. 453, Negligence § 1 (12); 65 CJS. 485, 487, 494, Negligence §§ 4 (2), 4 (3), 4 (6). Judge Cardozo said that negligence was a matter of relationship between the parties which must be founded upon the foreseeability of harm to the person in fact injured. See also, Prosser, Law of Torts (4th ed.) p. 255, § 43; 2 Harper & James, The Law of Torts, p. 1018, § 18.2 (1956). "Duty" is determined by answering the question whether the defendant is under any obligation for the benefit of the other party. Prosser, Law of Torts, p. 324, § 53. Prof. Prosser's concept of "duty" fits Dr. Leflar's definition of negligent act quite well. Prof. Prosser says:

> *** No better general statement can be made, than that the courts will find a duty where, in general, reasonable men would recognize it and agree that it exists.

The "foreseeability" test is not new to Arkansas law. It was applied in *Chapman Chemical Co.* v. *Taylor,* 215 Ark. 630, 222 S.W. 2d 820, in 1949. The application by this court of the test of actionable negligence by foreseeability of harm to the person injured was treated by Senior District Judge John E. Miller with his usual thoroughness in *Ozark Industries, Inc.* v. *Stubbs Transports, Inc.,* 351 F. Supp. 351 (D.C. Ark. 1972). A review of this excellent opinion should leave no doubt about our adherence to this concept. In another excellent treatment of the subject, Chief Judge Henley has demonstrated that Arkansas cases hold that a duty to use care arises when it is reasonably foreseeeable that injury will probably result to another if care is not used and that it depends upon the foreseeability of injury or damage, not upon privity of contract. *Rhoads* v. *Service Machinery Company,* 329 F. Supp. 367 (D.C. Ark. 1971).

The test of actionable negligence, insofar as "duty" is concerned, becomes one of foreseeability, i.e., whether the consequences of the alleged wrongful act were reasonably to be foreseen as injurious to the person seeking recovery (either

individually or as a member of a class). *Palsgraf* v. *Long Island Railroad Co.,* 248 N.Y. 339, 162 N.E. 99 (1928). Prosser, Law of Torts (4th ed.) p. 324, § 53; 57 Am. Jur. 2d 408, Negligence § 58. See *Haralson Adm'x.* v. *Jones Truck Line,* 223 Ark. 813, 270 S.W. 2d 892. In making the determination, "foreseeability is not to be measured by what is more probable than not, but includes whatever is likely enough in the setting of modern life that a reasonably thoughtful man would take account of it in guiding practical conduct." 2 Harper & James, The Law of Torts, p. 1020, § 18.2.

The Maryland Court of Appeals treated the question whether a physician giving certification to a hospital for the insane, that a plaintiff was mentally deficient, owed any duty to the plaintiff in *Miller* v. *West,* 165 Md. 245, 167 A 696 (1933). That court said that the weight of authority, in states having similar statutory proceedings, seemed to " *** support the view that the physicians, although they are not employed by the patient, and make no report to him, are under a legal duty to him which will support an action, if the duty is violated, and if as a consequence a person who should not be confined is confined."

In rejecting the argument that a doctor-patient relationship was essential to a recovery for negligence in such case, the court in *Kleber* v. *Stevens,* 39 Misc. 2d 712, 241 N.Y.S. 2d 497 (1963) quoted extensively from *Ayers* v. *Russell,* 50 Hun. 282, 288 289, 3 N.Y.S. 338, 340, 341 (1888). A part of that quotation follows:

> *** The physicians followed the forms of the law. Whether the reasons set forth by them in the certificate for their conclusion that the plaintiff was insane were sufficient or not, is immaterial. The presumption is that they set forth such reasons as in their opinion were sufficient, and such as appeared to them to be true in fact. But the complaint charges that the physicians made the certificate 'without proper and ordinary care and prudence, and without due examination, inquiry, and proof into the fact whether plaintiff was sane or insane.' We think the physicians owed the plaintiff the duty of making the examination with ordinary care. Their duty

> must be measured by the trust which the statute reposes in them, and by the consequences flowing from its improper performance. They assume the duty by accepting the trust. They are not judicial officers, but medical experts. They are not clothed with judicial immunity and are chargeable with that negligence which attaches to a professional expert who does not use the care and skill which his profession, per se, implies that he will bring to his professional work.

Appropriately the court added:

> *** It was plaintiff's contention throughout the trial that the certificates rendered in compliance to this section were ill-conceived and based on the hearsay of an allegedly vindictive husband rather than good medical practice and examination, and it is conceivable that a doctor examining for purposes of commitment may comply mechanically with the requirements of the law and without malice and yet fail to utilize the minimal skill required to effectuate this process.

A closely analagous case applying the principles I feel should be applied here is *Harriott* v. *Plimpton,* 166 Mass. 585, 44 N.E. 992 (1896). In that case, Harriott was engaged to be married to the daughter of Morrill, who took him to the office of a physician named Plimpton, who examined Harriott and told both Harriott and Morrill that Harriott had gonorrhea. As a result, the marriage engagement was broken. Harriott brought suit against Morrill for slander and Plimpton for slander and negligence in making the examination. The jury found that Harriott did not have gonorrhea and that neither Morrill nor Plimpton was actuated by express malice. The presiding judge directed a verdict for the physician. The Supreme Judicial Court of Massachusetts said:

> The verdict in the action for negligence must be set aside. The evidence tended to show that the defendant was employed by Morrill. Having undertaken, for compensation to be paid by another, to examine the plaintiff, and to report whether he was diseased, the defendant was bound to have the ordinary skill and learning

> of a physician, and to exercise ordinary diligence and care; and if he failed, and the plaintiff was injured because of his want of such skill and learning or his want of such care, the defendant was answerable to him in damages. See *Gill* v. *Middleton*, 105 Mass. 479; *Higgins* v. *McCabe*, 126 Mass. 13; *Small* v. *Howard*, 128 Mass. 131; *Mallen* v. *Boynton*, 132 Mass. 443. In our opinion, the fact that the purpose of the examination was information, and not medical treatment, is immaterial; and the breaking of the plaintiff's marriage engagement, in consequence of the wrong diagnosis, was not too remote a damage to sustain the action. Upon the evidence, it was for the jury to say whether the defendant used ordinary care, learning, and diligence.

The "privity requirement" was gasping its last breath in Arkansas prior to today's decision. This court clearly recognized its illness and foresaw its demise in *Chapman Chemical Co.* v. *Taylor*, 215 Ark. 630, 222 S.W. 2d 820, saying:

> It is said there was no privity of contract between the Chemical Co. and cross appellants. This showing was at one time, and for some time considered necessary to occasion liability, the line of decisions to that effect going back to the early English case of *Winterbottom* v. *Wright*, 10 Mees. & W. 109, 152 Eng. Reprint 402, decided in 1842. But the courts have been getting away from that doctrine and many have entirely repudiated it and discarded it. The opinion of Justice Cardozo, then a member of the Court of Appeals of New York, and later an Associate Justice of the United States Supreme Court in the case of *MacPherson* v. *Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050, L.R.A. 1916 F, 696, Ann. Cas. 1916C, 446, is credited with the inception of the modern doctrine of manufacturer's liability based upon foreseeability rather than privity of contract.
>
> The Supreme Court of Massachusetts in the case of *Carter* v. *Yardley & Co.*, 319 Mass. 92, 64 N.E. 2d 693, 700, annotated in 164 A.L.R. 559, expressly repudiates the privity contract rule and stated that the MacPherson case, supra, was now generally accepted and the sum-

> mary of the Mass. case and others there cited in that "The question in each case was whether the danger was sufficient to require the manufacturer to guard against it." In other words, that foreseeability and not privity was the proper test. See also Sec. 824, Chapter on Sales, Sec. 824, 46 Am. Jur. page 946.

Thus we used the "foreseeability" test as a vehicle for elimination of the privity requirement in the context of that case. See, *Green* v. *Equitable Powder Mfg. Co.,* 94 F.S. 126 (D.C. Ark. 1950).

It is significant that we were able to find negligence in the gratuitous act of one truck driver giving a passing signal to another, whose truck struck and killed a pedestrian, whose administratrix sued both and their employers. We said:

> Nor does it matter that Fulfer was under no legal duty to give any signal at all. As Judge Cardozo observed in the leading case of *Glanzer* v. *Shepard,* 233 N.Y. 236, 135 N.E. 275, 276, 23 A.L.R. 1425: "It is ancient learning that one who assumes to act, even though gratuitously, may thereby become subject to the duty of acting carefully, if he acts at all." Even though Fulfer's invitation to Duvall was gratuitous the law required that his conduct be characterized by ordinary care.

The "privity" test seems to have yielded to foreseeability in many similar situations. One of them involves the question of liability of an attorney-scrivener engaged by a testator to an intended beneficiary who is frustrated by the invalidity of a will. See 7 Am. Jur. 2d 162, Attorneys at Law, § 199. In 1961, the Supreme Court of California overruled a previous holding in order to lay to rest the "privity" test previously utilized in such a case. *Lucas* v. *Hamm,* 15 Cal. Rptr. 821, 364 P. 2d 685 (1961).

In stating the appropriate test, the court adverted to a previously stated rule, saying:

> ....In restating the rule it was said that the determination whether in a specific case the defendant will be held

> 'liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury, and the policy of preventing future harm.

For other cases in which it has been held that an attorney may be liable to one other than his client in a tort action, see *Hoppe* v. *Klapperich,* 224 Minn. 224, 28 N.W. 2d 780, 173 ALR. 819 (1947); or other action, *Higgins* v. *Russo,* 72 Conn. 238, 43 A 1050 (1899).

An annotator has said: "But the privity of contract principle has been the subject of increasing criticism from the courts in recent years. It has been so overlaid with exceptions that, as has been said in another connotation, the exceptions 'have almost, if not completely, swallowed up the so-called "rule".' Many courts have come to the verge of repudiating the privity of contract doctrine in toto." See Annot. 65 ALR 2d 1363, 1364 (1959).

Of course, the requirement of privity in actions for breach of warranty in sales of goods was abolished in Arkansas by legislative action. Act 35 of 1965 [Ark. Stat. Ann. §§ 85-2-318.1 - 318.3. (Supp. 1973)]. It seems to me that the public policy of Arkansas is clearly opposed to the privity requirement where one person suffers as a result of the failure of another to use reasonable care. We should not resurrect the "privity" doctrine by imposing it where we have never imposed it before.

The allegations in this case are that appellant was damaged by appellee's failure to exercise the requisite degree of skill in making a psychological diagnosis of appellant. Such diagnoses are certainly within the scope of appellee's practice. Assuming the allegations of the complaint to be true, as we must, it would border on absurdity to say that appellee could not reasonably have foreseen that a misdiagnosis of homosexuality would harm appellant. The fact that the

diagnosis was made without appellee's having known, seen or interviewed appellant or having administered any tests to him would seem, in and of itself, to be malpractice, but whether it is or not is a matter of evidence when the case is tried on its merits. It certainly is a sufficient allegation to state a cause of action. As a matter of fact, the only flaw the majority perceives in the complaint is the fact that Chatham was not a patient of Mills. I submit that reason and logic do not support the majority opinion. I would remand this case for further proceedings.

I am authorized to state that Mr. Justice Brown joins in this dissent.

RELIANCE INSURANCE COMPANY *v.* OKLAHOMA GAS AND ELECTRIC COMPANY

74-186 517 S.W. 2d 499

Opinion delivered January 13, 1975

Warner and Smith, by: *Ben Paddock,* for appellant.

Bryan & Fitzhugh, for appellee.

J. FRED JONES, Justice. This is an appeal by Reliance Insurance Company from a circuit court judgment for $3,-

501.92 plus penalty and attorney's fee on a surety bond executed by Reliance in favor of the appellee Oklahoma Gas and Electric Company. Reliance contends on this appeal that the trial court erred, as a matter of law, in holding the surety liable under the bond for unpaid electric service furnished by the obligee to a trustee in bankruptcy and in entering a judgment based on such holding.

The facts as they appear in the record are as follows: J. P. O. Enterprises Corporation of Arkansas owned and operated several retail outlet stores in the Fort Smith area and obtained its electrical energy from the appellee Oklahoma Gas and Electric Company. Oklahoma Gas and Electric experienced some difficulty in collecting utility bills from J. P. O. and on October 27, 1972, demanded that J. P. O. furnish by November 15, 1972, a cash surety deposit or an equivalent surety bond to secure the payment for future electric service. Effective November 15, 1972, the appellant Reliance Insurance Company, as surety, and J. P. O., as principal, executed a surety bond in favor of the appellee Oklahoma Gas and Electric Company under the terms of which the surety agreed to pay up to the maximum of $5,500 to the obligee in the event, and to the extent, of the principal's failure to pay for service furnished to the principal by the obligee for the principal's operation of its stores. The bond contained a provision giving the surety the right of cancellation at any time upon 60 days prior written notice to obligee.

On January 3, 1973, the principal filed a petition in bankruptcy at which time it owed electric bills to Oklahoma Gas and Electric in the amount of $363.19 for unpaid electric service. On January 8, 1973, when the obligee, Oklahoma Gas and Electric, learned of the petition in bankruptcy, it demanded a cash deposit or new bond from the trustee in bankruptcy. [1] The trustee refused to make a cash deposit or obtain or execute a bond but according to Oklahoma Gas and Electric, he orally agreed to take care of electric bills under the continued operation of the stores by the trustee.

[1]The original bankruptcy petition was for arrangement under Chapter XI of the Federal Bankruptcy Act and a receiver was appointed. The same receiver was later appointed trustee under straight bankruptcy.

Oklahoma Gas and Electric continued to furnish electric service to the stores and on January 19, 1973, the appellant-surety, Reliance Insurance Company, exercised its right of cancellation by a written notice of cancellation effective as of that date or 60 days after receipt of the notice.

Under date of April 23, 1973, the assistant secretary and division auditor of Oklahoma Gas and Electric executed a "Proof of Claim in Bankruptcy" stating under oath that the bankrupt estate was justly indebted to the creditor Oklahoma Gas and Electric in the amount of $4,841.80, and stated that the creditor had furnished electrical energy to the bankrupt estate after the bankrupt filed its petition for arrangement under Chapter XI of the Federal Bankruptcy Act on January 3, 1973, and after appointment of trustee in straight bankruptcy. It stated that no part of the debt had been paid except $1,000. The proof of claim then states as follows:

> "That said creditor does not hold, and has not, nor has any person by its order, or to deponent's knowledge or belief, for its use, had or received any security or securities for said debts (or liability)."

A Photostat copy of this instrument appears in the record but the filing date is not shown thereon. It was dated April 23, 1973, and apparently when it was filed $1,000 had been paid on the account by the trustee in bankruptcy.

On March 22, 1973, the trustee in bankruptcy filed a petition in the bankruptcy court reporting his activities in the operation of the stores in winding up the business under straight bankruptcy. He alleged that several utility companies including Oklahoma Gas and Electric had threatened to discontinue utility service to the various stores for the nonpayment of utility bills. He alleged that it was necessary for the referee in bankruptcy to enjoin the plaintiff from cutting off utilities in the stores and an injunction was prayed to that effect. On March 22, 1973, a temporary injunction was granted as prayed and notice was given to show cause why the injunction should not be made permanent.

In separate response to the show cause order Oklahoma

Gas and Electric prayed that the temporary restraining order be vacated or in the alternative that the trustee be required to furnish a cash deposit or surety bond securing the payment of utility bills. In connection with the response, Oklahoma Gas and Electric filed an affidavit dated March 29, 1973, in which it set out the difficulty it had had in collecting for electric service furnished to J. P. O., and setting out its original letter dated October 27, 1972, demanding that J. P. O. put up a cash deposit or bond. The affidavit then stated as follows:

> "Affiant further states that in response to this letter JPO Enterprise Corporation of Arkansas furnished a surety bond to the Oklahoma Gas and Electric Company with the Reliance Insurance Company as surety. A copy of this bond is attached hereto, marked Exhibit B, and made a part hereof as though copied word for word.
>
> Affiant further states that the said surety bond with the Reliance Insurance Company was by it canceled on January 3, 1973.
>
> Affiant further states that on or about January 8, 1973, he received a notice that JPO Enterprise Corporation of Arkansas had filed a voluntary petition in bankruptcy and that Hugh W. Thistelthwaite as Receiver was appointed by the court to continue with the business operations of this debtor pending the filing of the plan arrangement therein. A copy of this notice is attached hereto, marked Exhibit C, and made a part hereof as though copied word for word.
>
> Affiant further states that shortly after the receipt of this notice dated January 8, 1973, he telephoned Joe Lopez, Administrator for Receiver, and that Joe Lopez told him over the telephone that no change was to be made in the operation and the bills could be mailed to the same address and the trustee in bankruptcy would take care of the bills."

On June 11, 1973, Oklahoma Gas and Electric filed its complaint herein, alleging and setting out the execution of the bond as aforesaid, and alleging that the defendant in-

surance company attempted to cancel the bond as of January 19, 1973, but that under the terms of the bond, such cancellation did not become effective until 60 days after notice of cancellation or March 19, 1973. The complaint then alleged that J. P. O. owed the sum of $3,508.90 and prayed judgment for that amount together with penalty and attorney's fee.

Reliance Insurance Company filed its answer on February 5, 1973, in which it admitted liability to Oklahoma Gas and Electric for electric bills owed by J. P. O. Enterprises to January 3, 1973, on which date a receiver in bankruptcy was appointed for J. P. O. As affirmative defense it alleged that on January 3, 1973, J. P. O. filed its petition for reorganization under Chapter XI of the Federal Bankruptcy Act in United States District Court of Louisiana and on that date a receiver in bankruptcy was appointed for J. P. O. and served in that capacity until March 8, 1973, when he was appointed trustee in bankruptcy of the estate of J. P. O.; that from January 3, 1973, through April 10, 1973, and thereafter, said receiver or trustee was in charge of and managed the estate of J. P. O., and that Oklahoma Gas and Electric furnished electric service to said receiver and trustee and not to J. P. O. Reliance further alleged that the trustee in bankruptcy became liable for all bills incurred after January 3, 1973, and was liable on his official bond to Oklahoma Gas and Electric for electric service so furnished.

The case was tried before the trial judge sitting as a jury and the court found that as of January 3, 1973, when J. P. O. Enterprises was declared bankrupt, there was due and owing to Oklahoma Gas and Electric by J. P. O., the sum of $363.19 for electrical energy furnished to that date; that as of March 19, 1973, being 60 days after notice of cancellation of the bond, there was still due and owing to the plaintiff Oklahoma Gas and Electric the sum of $3,501, rather than the $3,508.90 as alleged in the original complaint. The court further found that Reliance Insurance Company had tendered the sum of $363.19 in full settlement of the amount it owed to Oklahoma Gas and Electric; that Oklahoma Gas and Electric had refused to accept said amount in satisfaction of the debt owing, and that Reliance Insurance Company had refused to pay the sum of $3,501.92 claimed by

Oklahoma Gas and Electric. The trial court then found that Oklahoma Gas and Electric was entitled to judgment against Reliance Insurance Company in the amount of $3,501.92, plus a 12% penalty and attorney's fee in the amount of $750, and rendered judgment against Reliance for a total of $4,-672.15, together with interest at six per cent per annum until paid.

We are of the opinion that the trial court erred in rendering judgment against Reliance Insurance Company for the amount of service furnished by Oklahoma Gas and Electric to the receiver and trustee in bankruptcy after January 3, 1973. The pertinent part of the bond reads in its entirety as follows:

> "KNOW ALL MEN BY THESE PRESENTS:
> That J. P. O. Enterprises Corporation of Arkansas, hereinafter called the PRINCIPAL, AND Reliance Insurance Company of Pennsylvania, hereinafter called the SURETY, are firmly bound unto OKLAHOMA GAS AND ELECTRIC COMPANY, 311 Lexington Avenue, Fort Smith, Arkansas, hereinafter called the OBLIGEE, in the sum of ($5,500.00) Five thousand, five hundred and no/100 — Dollars, for the payment whereof to the Obligee the Principal binds its heirs, executors, administrators, successors, and assigns, and the Surety binds itself, its administrators, successors and assigns, jointly and severally, firmly by these presents.
>
> SIGNED, SEALED AND DATED this 15th day of November, 1972.
>
> WHEREAS, the Principal has contracted for and shall receive from the Obligee ELECTRIC service at his business or establishment located at the following address: SEE RIDER ATTACHED.
>
> * * *
>
> NOW, THEREFORE, the conditions of the foregoing obligation are such that if the Principal shall promptly pay for such service upon the respective dates when payment therefor becomes due then this obligation shall be

void; otherwise to remain in full force and effect.

The following conditions are hereby made a part of this bond:

1. The aggregate liability of the Surety for all or any defaults of the Principal hereunder shall not exceed the penal sum of the bond.

2. No extension of time for payment and no waiver of any default by Principal nor any failure to give notice to Surety of nonpayment shall operate to relieve Surety of liability for service rendered while this bond is effective.

3. This bond may be canceled by the Surety at any time by giving sixty (60) days prior written notice to the Obligee but no such cancellation shall relieve Surety of liability for payment for services rendered prior to the effective date of such cancellation."

The appellee recites the above wording in the bond with emphasis as follows:

"for the payment whereof to the Obligee the Principal binds *its heirs, executors, administrators, successors, and assigns,* and the Surety binds itself, its administrators, successors, and assigns, *jointly and severally, firmly by these presents.*"

The appellee then points out that the Bankruptcy Act in 11 USC 34 provides that "liability of a person who is a co-debtor with, or grantor or in any manner a surety for, a bankrupt shall not be altered by the discharge of such bankrupt," and the appellee argues that the bond by its express provision binds the successors of the principal which would include a receiver and trustee in bankruptcy.

We do not agree with the appellee in its interpretation of the provision of the bond. The obligee in the case at bar was Oklahoma Gas and Electric Company who had furnished the electric service to the principal J. P. O. The principal did bind its heirs, executors, administrators, successors and

assigns to pay the amount it owed to the obligee Oklahoma Gas and Electric, but Reliance Insurance Company was not an heir, executor, administrator, successor or assign of the principal J. P. O. The same applies to the surety, Reliance Insurance Company. It had no administrators, successors or assigns involved in this case, but if Reliance Insurance Company should have had administrators, successors and assigns, they would have been jointly and severally obligated under the bond to the same extent Reliance was obligated, and they would have been jointly and severally liable to Oklahoma Gas and Electric to the same extent Reliable would have been liable.

As we interpret the provision of the bond, only the principal and the surety were firmly bound unto the Oklahoma Gas and Electric Company. The principal bound its heirs, executors, administrators, successors and assigns for the obligation incurred and so did Reliance do likewise, but Reliance did not obligate itself for defaults occurring on indebtedness incurred by the principal's heirs, executors, administrators, successors and assigns. In other words, J. P. O. Enterprises agreed to pay for the electric service furnished to it by Oklahoma Gas and Electric. It further agreed that its heirs, executors, administrators, and assigns would be liable and would pay for the electric service so acquired and used by it. Reliance agreed to pay for the electric service furnished by Oklahoma Gas and Electric to J. P. O. Enterprises and used by it in the event J. P. O. or its heirs, executors, administrators or assigns failed to do so and Reliance agreed that its heirs, executors, administrators and assigns would be bound in carrying out its obligation.

There is no question that Oklahoma Gas and Electric is entitled to pay for its energy sold and delivered in connection with the operation of the businesses in this case. There is no question that J. P. O. Enterprises Corporation of Arkansas obligated itself as well as its heirs, executors, administrators, successors and assigns to pay the obligee Oklahoma Gas and Electric for electric service the principal J. P. O. contracted for and received from the obligee for electric service at its businesses located as set out in the rider attached. There is no question that Reliance Insurance Company obligated itself as

well as its administrators, successors and assigns jointly and severally to guarantee the payment for services the principal contracted for and received from the obligee at such establishments. But, the fact of the matter is, J. P. O. did not contract for and receive the electric service furnished to the trustee in bankruptcy at said locations after January 3, 1973.

It is abundantly clear from the affidavit filed in the bankruptcy court on behalf of Oklahoma Gas and Electric that it considered the obligation of J. P. O. Enterprises as well as Reliance Insurance Company's obligation at an end as of January 3, 1973, and that it only continued service to the trustee in bankruptcy because it felt that it was prohibited from doing otherwise under rules and regulations of the Public Utility Department of the state, and because of an injunction against it as well as against other utility companies under order of the referee in bankruptcy.

The appellee relies on the case of *People* v. *United States Fidelity & Guaranty Co.*, 114 P. Rpt. 2d p. 389, where a district court in California held a surety liable on a bond for the payment of excise tax on beer sold after the principal had gone into bankruptcy and a receiver had been appointed. The appellee points out that in that case, the surety was held liable for the payment of taxes on beer sold by the receiver after his appointment, and the surety's argument that its obligation under the bond terminated upon the appointment of the receiver was rejected. The *People* case might be good precedent for the surety's liability in the case at bar for electric service furnished to the date of bankruptcy, but the surety admits that liability in the case at bar. In the *People* case the beer involved had already been manufactured when the principal went into bankruptcy and the receiver was appointed. The bond in the *People* case was given for the express purpose of insuring the payment of excise tax. The distinguishing feature in that case is set forth in the first sentence of that part of the decision quoted by the appellee as follows:

> " 'It is appellant's theory that the license of the Bailey Brewing Company to manufacture and sell beer, or the right to exercise that license, terminated with the appointment of the receiver, with the result that the beer

was not sold under the license, so that the tax was not due either from the brewing company or its surety.' "

In light of our interpretation of the bond provision as above set out, we deem it unnecessary to prolong this opinion by analyzing the other cases relied on by the appellee, but in none of them was a surety held liable under an obligation to its principal for services performed, continued or rendered under a new and separate agreement with, and to, a trustee in bankruptcy in the continuation and winding up of the original principal's business.

The appellant has cited several cases where liability on surety bonds, with corporations as principals, was held terminated upon consolidation and mergers of the principals with other corporations. We are of the opinion, however, that in the case at bar Reliance Insurance Company only obligated itself to pay Oklahoma Gas and Electric for such utility service it furnished to J. P. O. Enterprises under its contract, and did not obligate itself for default in payment by the trustee in bankruptcy for service furnished the trustee under a new agreement or for service continued under orders of a referee in bankruptcy.

The judgment is affirmed as to the $363.19 for service furnished to J. P. O. Enterprises Corporation but is reversed as to penalty and attorney's fee and the $3,501.91 for service furnished to the trustee in bankruptcy.

Affirmed in part; reversed in part.

Gerry Kent DILLAHA *v.* STATE of Arkansas

CR 74-111 517 S.W. 2d 513

Opinion delivered January 13, 1975

Murphy & Blair, by: *H. David Blair,* for appellant.

Jim Guy Tucker, Atty. Gen., by: *Milton Lueken,* Asst. Atty. Gen., for appellee.

CONLEY BYRD, Justice. The jury found appellant, Gerry Kent Dillaha guilty of burglary and grand larceny and fixed his punishment on each charge at 21 years in the penitentiary. For reversal he relies upon the following points.

> "POINT I. The trial court erred in allowing appellee to introduce into evidence guns carried by persons other than appellant, which guns had relevance neither to the crimes charged nor in connection with appellant.
>
> POINT II. Because of appellee's highly prejudicial statements to the jury of matters outside of the record, the trial court should have granted appellant's motion for mistrial and erred in failing to do so.

POINT III. Statements of appellant made shortly after an illegal arrest were improperly admitted into evidence.

POINT IV. Evidence of property of others found in appellant's vehicle was improperly admitted into evidence."

The record shows that the burglary and grand larceny occurred at the clinic of Dr. Charles Tucker located just north of Ash Flat near the intersection of Highways No. 167 and No. 62. During the early morning hours of May 26, 1973, two men, Thomas E. Norton and Richard K. Stone were observed in the clinic by a deputy sheriff. The sheriff Ray Martin lives north of the clinic toward Hardy. When he received the summons from his deputies for help he drove from his home directly to the clinic on Highway No. 167. As the sheriff topped the hill where he could view the clinic he saw a slow moving vehicle going south on Highway No. 167, turn right on Highway No. 62 and proceed in a like manner toward Salem. After Norton and Stone had been apprehended and the sheriff had determined that they were from Little Rock, he immediately began to look for their get-away vehicle. About that time a slow moving vehicle came down Highway No. 62 from Salem and proceeded slowly toward Hardy on Highway No. 167. The sheriff stopped appellant at that time and after determining that he was from Little Rock arrested him. At the jail appellant was given the Miranda warnings and placed in a cell some distance from Norton and Stone. While the sheriff was outside the jail he heard Norton yell to appellant, "Gerry, why didn't you get to hell out of here while you could?" Appellant's response was; "I didn't know where you fellows were." Other proof in the record shows that Ash Flat has a population of only 200 people and that appellant's vehicle was the only vehicle on the highway for approximately an hour. The sheriff also testified that he had investigated a number of burglaries and that when adults were involved there was always a "get-away" vehicle.

POINT I. We find no merit in appellant's contention that the guns found in the clinic belonging to Norton were not

admissible in evidence. Stone testified for the State that the parties left Little Rock in appellant's automobile for the purpose of "ripping off a drug store" and that appellant knew that the guns were in the car. Stone further testified that the plan was for him to enter the building with Norton waiting outside for the purpose of shooting anyone who showed up. Thus the guns were admissible to corroborate the testimony of an accomplice and to show that the parties had acted pursuant to a plan or scheme. In the cases relied upon by appellant such as *Long* v. *State,* 240 Ark. 687, 401 S.W. 2d 578 (1966), the weapons there erroneously admitted in evidence were neither used nor possessed for the commission of the crime.

POINTS III & IV. Under these points appellant contends that since the arrest was illegal the evidence obtained as a result thereof was improperly admitted — *i.e.* part of the fruit of the poisonous tree, *Wong Sun* v. *United States,* 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). As we view the record there was probable cause for the arrest made by the sheriff.

POINT II. During the prosecuting attorney's argument to the jury the following occurred:

> "Dr. Tucker and my law partner grew up together down at Oil Trough, but to his old friends and maybe some of you all know him as Bo — Bo and I have known each other for several years now and after court yesterday he went with me to get some gas up the way, I was afraid I couldn't get home and back. He said, 'Terry, I hope you realize and I hope that jury realized I could have gotten killed in a deal like this.'
>
> MR. POST: We object to that, Your Honor. This is not in evidence, we feel that it is a prejudicial error for the prosecutor to mention it, and we ask for a mistrial.
>
> BY THE COURT: The objection will be sustained and that will be taken from the Jury's consideration. The jury will be instructed to disregard that statement. The motion for mistrial will be overruled. You may proceed.

MR. POYNTER: My point is, ladies and gentlemen, I tell you that for illustrative purposes anyway."

The statement by the prosecuting attorney is not supported by the record. In fact if such testimony had been offered, it should have been excluded as irrelevant. The effect of the prosecutor's statement was to transmit a direct appeal from a local doctor for the obvious purpose of appealing to the jury's passions and prejudices. In reversing a similar appeal to passions and prejudices in *Adams* v. *State,* 229 Ark. 777, 318 S.W. 2d 599 (1958), we quoted from *Holder* v. *State,* 58 Ark. 473, 25 S.W. 279 (1874), as follows:

> ". . . 'A prosecuting attorney is a public officer 'acting in a *quasi* judicial capacity.' It is his duty to use all fair, honorable, reasonable and lawful means to secure the conviction of the guilty who are or may be indicted in the courts of his judicial circuit. He should see that they have a fair and impartial trial, and avoid convictions contrary to law. Nothing should tempt him to appeal to prejudices, to pervert the testimony, or make statements to the jury which, whether true or not, have not been proved. The desire for success should never induce him to endeavor to obtain a verdict by arguments based on anything except the evidence in the case and the conclusions legitimately deducible from the law applicable to the same. To convict and punish a person through the influence of prejudice and caprice is as pernicious in its consequences as the escape of a guilty man. The forms of law should never be prostituted to such a purpose.' "

Because of the improper remarks of the prosecuting attorney we find that the trial court erred in not declaring a mistrial.

Reversed and remanded.

David STRODE *v.* STATE of Arkansas

CR 74-120 517 S.W. 2d 954

Opinion delivered January 20, 1975

Jeff Duty, for appellant.

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

CARLETON HARRIS, Chief Justice. David Strode, appellant herein, was charged with assault with intent to kill and on trial was convicted by a jury, receiving a sentence of seven years imprisonment. From the judgment entered in accordance with the jury verdict, Strode brings this appeal. For reversal, it is asserted that "The method and proceedings used in the selection of the jury amounted to a denial of a fair and impartial trial and due process of law guaranteed by the

Constitutions of the State of Arkansas and of the United States." Actually, this argument covers two asserted errors.

To understand the contentions, it is necessary to point out certain background facts. The current charge against appellant relates to an alleged assault made on Harvey Dean Henshaw on December 7, 1973. Appellant was also charged with assault with intent to kill James Hamblin on December 8, 1973. The assault charge relating to Hamblin was tried on January 17, 1974, and Strode was convicted, this court affirming such conviction.[1] The same jury panel which had been used in this January trial was likewise in use for the trial of Strode in the Henshaw case, which went to trial in February, 1974. It is the contention of appellant that the use of the same panel which had heard the prior case approximately a month earlier, the jury having returned a verdict of guilty in that case, deprived him of the fair and impartial trial guaranteed by the Constitutions of the United States and the State of Arkansas. While the trial court excused the particular 12 persons who served as jurors in the Hamblin assault charge, appellant argues that this step by the court was not sufficient to remove any bias, and a motion was made to quash the entire jury panel, or in the alternative, all members of the panel who were present for the trial of the earlier case. This motion was denied. In arguing here that the trial court erred in its ruling, appellant says:

> "We know that the previous panel must have consisted of, at least twenty-four jurors. We find in the record that all but three members were questioned on Voir Dire in the previous trial.[2] The charge was the same, the defendant was the same, the only difference being that the victim was a different one.

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[1]The opinion was handed down on October 28, 1974, but was not published.

[2]The record only discloses that in pre-trial proceedings the attorney for appellant, referring to Strode's first trial, stated:

> "If my memory serves me correctly, we worked through all but three members of this panel on voir dire examination. Each of them heard the charge levied against David Strode. During voir dire there were certain questions regarding Assault with Intent to Kill in that particular case, mentioned to the jury. The jury understood further that — it is defendant's firm belief that each member of that jury panel would have heard results of the case, whether they served on the actual jury or not."

"Common, ordinary, 'horse sense' tells one that these jurors would be unable to eradicate, from their minds, all things learned and impressions made, during the first trial of appellant only about a month before."

We do not agree. In *Montaque* v. *State,* 219 Ark. 385, 242 S.W. 2d 697, Montaque insisted that he did not obtain a fair trial because he was required to select a jury from a panel which had, immediately prior to his trial, heard him vigorously denounced and his credibility violently attacked in another case. James Thompson had been convicted of an assault on Montaque and counsel for Thompson had denounced Montaque to the same jury panel with numerous uncomplimentary terms and phrases.

The jurors, when interrogated on *voir dire,* stated that they had formed no opinions from the previous trial as to the credibility of Montaque, and said that they could try the charge against Montaque impartially. After peremptory challenges had been used, the court refused to quash the remaining members of the panel, i.e., those members who were on the Thompson petit jury, and appellant asserted error. On appeal, we held contrary to the contention of Montaque, stating:

"The trial court is given a large discretion in determining the bias or prejudice of a juror as affecting his qualifications to serve in any particular case. In *Lane* v. *State,* 168 Ark. 528, 270 S.W. 974, we held: 'The question of the impartiality of the jury, as guaranteed by the Constitution, Art. 2, § 10, is a judicial question of fact within the sound discretion of the trial court.'

"Jurors must be presumed to possess the qualifications required under §§ 39-208 and 39-206 of the statutes (Ark. Stats., 1947) and that is 'persons of good character, of approved integrity, sound judgment, and reasonable information.' We find no abuse of the trial court's discretion here. The jurors appear to have been carefully examined on their *voir dire* as to possible bias or prejudice against appellant and each answered that he had none."

The record of the present trial does not contain the *voir dire* examination, and we do not know what questions were asked the members of the panel. Of course, if actual bias were shown, a juror would be disqualified, but there is no contention by appellant of actual bias on the part of any member of the panel, nor is it even shown that any tentative opinions had been formed. In *Rowe* v. *State,* 224 Ark. 671, 275 S.W. 2d 887, this court said:

> "While it is true that some of the veniremen said that they had formed tentative opinions based upon newspaper reports or what some one had told them, all who were accepted stated that they could and would be guided solely by the testimony, giving to the defendant the benefit of all doubts that the law defines. There was no error in accepting these men. It is no longer practicable in an intelligent society to select jurors from a psychological vacuum or from a stratum where information common to the community as a whole is lacking."

As previously stated, there is no showing here that any member of the panel possessed any actual bias. The argument is really that members of the panel should be assumed to be biased because they were members of the same panel that served in the first Strode trial.

The second phase of appellant's argument relates to the fact that in the current case, Strode was originally charged along with a co-defendant, his brother, Walter Strode. Prior to the commencement of the trial, Walter Strode moved for a severance, such motion being denied by the court. After counsel for Walter had used two peremptory challenges to remove two members of the panel, and appellant had exercised one peremptory challenge, the court changed its view, and granted the motion for severance. The two jurors who had been excused by Walter were then, by order of the trial court, returned to the jury panel and the court ruled that appellant had only used his one challenge and was entitled to seven more. Appellant argues that this constituted error, stating:

> "A juror challenged peremptorily can have a 'good'

taste in his mouth and might not be that fair and impartial juror guaranteed by the Constitution of the United States and the State of Arkansas.

"Such procedure, necessarily, makes it imperative that the defendant challenge all such jurors which may be drawn from the box. This precludes his right to otherwise have a free hand at peremptory challenges."

The record reflects that after appellant had used four of his seven challenges, the panel was exhausted and additional jurors were summonsed. The record is thereafter silent as to whether further peremptory challenges were exercised, and we do not know whether appellant exhausted all eight challenges to which he was entitled under the law. Accordingly, it cannot be contended that he was forced to go to trial with a jury composed of some individuals who were biased. For, to make such a contention, it was necessary that he exhaust his challenges. See *Trotter and Harris* v. *State,* 237 Ark. 820, 377 S.W. 2d 14, and the numerous cases cited therein.

Appelant's contentions have been closely examined, and we find no prejudicial error.

It follows that the judgment of the Washington County Circuit Court should be affirmed.

It is so ordered.

ROWE AUTO & TRAILER SALES, Inc. *v.* Henry KING

74-194 517 S.W. 2d 946

Opinion delivered January 20, 1975

Robert D. Smith III and *Smith & Peters,* for appellant.

R. David Lewis and *Griffin J. Stockley,* for appellee.

GEORGE ROSE SMITH, Justice. This action at law was brought by Rowe Auto, a used car dealer, to recover an unpaid balance of $580 due under a contract by which it sold a 1965 Chevrolet car to King. King counterclaimed for cancellation of the contract on the ground that it was usurious under Arkansas law and violative of the federal Truth In Lending Act. The trial judge, sitting as a jury, entered a judgment canceling the contract and awarding King damages of $1,000 and an attorney's fee of $500. Rowe Auto questions the sufficiency of the evidence and the court's ruling upon issues of law.

On November 24, 1972, King signed a contract by which he purchased the 1965 Chevrolet for a recited cash price of $1095. The down payment was $250. The unpaid balance of $845 was payable in weekly installments of $20 each, with a final installment of $5. The contract, although reciting the "Amount Financed" as $845, stated that there was no finance charge and thus no annual percentage rate of interest.

King's theory of the case, with respect both to usury and to the Truth in Lending Act, is that Rowe Auto in fact exacted a finance charge by inflating the credit price far above what the seller would have accepted in a cash transaction. Inasmuch as the provisions of the federal statute and accompanying regulations are more explicit than our case law with regard to usury, we confine our discussion to the federal law. We should add, however, that the appellant's reliance upon our holding in *Ford* v. *Hancock,* 36 Ark. 248 (1880), is not justified, in view of our decisions in *Hare* v. *General Contract Purchase Corp.,* 220 Ark. 601, 249 S.W. 2d 973 (1952), and *Sloan* v. *Sears, Roebuck & Co.,* 228 Ark. 464, 308 S.W. 2d 802 (1957).

The Truth In Lending Act, 15 USCA, Chapter 41, Subchapter I, has been extensively implemented by Regulation Z (which is printed immediately after the Act in USCA). Section 226.2 (i) of the Regulation provides that a "cash price" may include the cash price of accessories or services related to the sale, but it cannot include interest or a time price differential, as set out in § 226.4 (a) (1) of the Regulation. In sustaining the Regulation the Supreme Court pointed out in *Mourning* v. *Family Publications Service,* 411 U.S. 356 (1973), that one former means of circumventing the objectives of the Act, as passed by Congress, was that of "burying" the cost of credit in the price of goods sold.

King, to show such a violation of the Act (and usury) in this instance, introduced the testimony of Larry Davis and Jim Ahrend. Davis testified that he had gone to the Rowe Auto used car lot on the afternoon before the trial, had asked the credit price of a certain dented 1966 Chevrolet, and had been quoted a price of $995, payable $200 down and $15 a week. Davis testified that he talked to Rowe Auto's assistant

manager, who had testified earlier and was sitting in the courtroom.

The second witness, Ahrend, testified that he too had gone to Rowe Auto, had proposed to a salesman that he would pay cash for the same car, and had been quoted a price of $450. Ahrend obtained a written statement of that price, which was received in evidence. Rowe Auto made no effort to contradict the testimony of either witness.

The trial court overruled Rowe Auto's objections to the testimony, holding it admissible to show that interest was hidden in the credit price. The only plausible argument now urged against the admissibility of the testimony is that it was too remote, because the date of trial was slightly more than eight months after King's original purchase.

That argument is without merit. In *Fulwider* v. *Woods,* 249 Ark. 776, 461 S.W. 2d 581 (1971), we considered the admissibility, in civil cases, of evidence of other transactions as tending to show a general plan or motive. Although such evidence is usually offered in criminal cases, we discerned no reason why the same rule should not apply in civil cases. Since there is no precise way of determining what is too remote in time, we said that the admission of such testimony rests largely in the sound discretion of the trial court. In *Caton and Headley* v. *State,* 252 Ark. 420, 479 S.W. 2d 537 (1972), we again considered the issue of remoteness and discussed one case where the similar conduct had occurred about a year before the offense charged, a second case where the interval was more than two years, and a third where it was from four to five years. In each instance the evidence was held to be admissible. Our conclusion: "The trial court's latitude of discretion in the matter of remoteness is illustrated in these cases."

There was certainly no abuse of discretion in the case at bar. In fact, if the two witnesses had priced a car at the Rowe Auto lot, say, six months before the trial, Rowe Auto might easily have been at a disadvantage in trying to refute their testimony after that lapse of time. By contrast, no similar handicap existed with reference to incidents that took place

on the day before the trial. The trial judge was doubtless impressed, as we are, by Rowe Auto's failure to dispute the proffered testimony and, additionally, by Mr. Rowe's failure to take the witness stand and submit to cross-examination under oath, even though his assistant manager had testified that Rowe handled all such cash transactions.

In view of the testimony just mentioned we must reject the appellant's argument that King failed to prove a violation of the Truth in Lending Act. Under that statute a cash price must not include interest or a time price differential. Thus the trial court, in order to sustain the appellant's contention, would be required not only to reject the testimony of Davis and Ahrend but also to conclude, without proof, that Rowe Auto would have been equally willing to sell the car to King either for $1095 in cash or for that amount payable, as the contract specified, $250 down and $20 a week for 42 weeks.

We must, however, sustain the appellant's contention that King failed to offer substantial proof that the car which he bought was worth only $500, as the trial court found. King did not introduce any expert testimony of value. Instead, he relied upon a finance company employee, who testified that a "Red Book" of used car values showed the car to be worth $500. In overruling the appellant's objection to that proof the trial court expressed his belief that the Red Book valuation would have been inadmissible at common law but was admissible under the Uniform Commercial Code, Ark. Stat. Ann. § 85-2-724 (Add. 1961), which permits the introduction of trade journals or periodicals.

To begin with, the witness was able to testify only that the Red Book used in the Arkansas offices (their number not being specified) of his own employer. That testimony fell short of establishing the Red Book as a trade journal or periodical. Moreover, the trial court was in error in concluding that the UCC rule of evidence is applicable to this case. Even though the contract of sale between the parties is governed by various provisions of the Code, that statute has no bearing upon the issues now presented, involving usury and Truth In Lending. The UCC does not purport to lay down general rules of law governing litigation not arising un-

der the provisions of the Code. Hence the trial court's ruling upon the admissibility of the evidence should have followed the common law rather than the UCC rule. It follows that there is no substantial evidence to support the lower court's essential finding that the value of the car purchased by King was $500.

We find it unnecessary to discuss other arguments urged by the appellant.

Reversed and remanded for a new trial.

Imogene WILLIAMSON, Executrix of the Estate of Mary Ann MERRITT *v.* James Clyde MERRITT II & Michael Wheatly MERRITT

74-235 519 S.W. 2d 767

Opinion delivered January 20, 1975
[Rehearing denied March 24, 1975.]

Imogene Williamson, for appellant.

Botts & Jenkins, for appellees.

LYLE BROWN, Justice. The sole issue is whether the withdrawal by the testatrix from a savings account willed to appellees showed an intention to revoke the legacy as to the funds withdrawn. The trial court, upon stipulated facts, held there was no such ademption. The appellant is Imogene Williamson, executrix of the estate of Mary Ann Merritt. The appellees are James Clyde Merritt II and Michael Wheatley Merritt, who were designated in the will to receive the proceeds in the savings account.

On January 26, 1965, Ms. Merritt, the testatrix, deposited in the First Federal Savings and Loan Association of Stuttgart, Arkansas, $6,170.05. The account was in the names of "Miss Mary Merritt and James Clyde Merritt and Mike Wheatly Merritt". There was this written entry: "No withdrawals made without the signature of Miss Merritt. Payable upon her death to James and Mike equally." The initial deposit was the only one made. By the time of her death Ms. Merritt had, by withdrawals, reduced the savings account to $2,376.68.

Ms. Merritt executed a will on February 12, 1972. Among other things it provided: "I give, devise and bequeath to James Clyde Merritt II and Michael Wheatly Merritt my savings account in First Federal Savings and Loan Ass'n of Stuttgart, Ark." The will further directed that the residuary estate be divided equally among nine grandnieces and grandnephews including James and Michael.

On May 1, 1972, by letter, the testatrix gave this directive to First Federal: "Make a transfer in the amount of $3,000 to the account of Miss Mary Merritt, First National Bank, DeWitt, Arkansas" for "the purpose of taking care of medical expenses for myself". At that time Ms. Merritt had a checking account at First National and the $3,000 was commingled with $518.78 already in that account. Before her death on May 21, 1972, Ms. Merritt wrote two checks on the account, those checks totaling $69.86.

In the situation before us, we look to the intent of the

testatrix. Generally, the courts look with disfavor upon the ademption of a specific legacy; however, "In construing a will to determine whether there has been an ademption of a specific legacy, the intention of the testator is the controlling factor, the same as in the construction of all wills. Once the intention of the testator has been determined, all other rules of law pertaining to ademption must bend to such intent, so long as his intent does not violate some positive rule of law." *In Re Estate of Brown*, 252 N.E. 2d 142 (Ind. 1969). In *Brown*, the testator willed to his sister-in-law all his rights and title which testator had received from the estate of his deceased brother. Before his death the testator purchased bank certificates with the money obtained from his brother's estate. The certificates were held intact until testator's death. The court held there was no ademption.

Looking at the will itself and all other relevant facts and circumstances occurring between the execution of the will and the death of the testatrix, we have concluded there was an ademption. The wording of the will is of no substantial significance on the point in question. However, it should be noted that the will did not "freeze" the savings account at any specific sum. For example, that was the situation in the case cited by appellee — *Prendergast* v. *Walsh,* 42 Atl. 1049 (N. J. 1899). In *Prendergast,* the testatrix bequeathed "whatever of my money *now* on deposit" (our emphasis) in four named banks to "my beloved sisters". The money was subsequently withdrawn from the four banks and deposited in another bank. There were no withdrawals. Oral testimony was admitted to show that testatrix moved the money because she thought it would be safer. In that situation the court held there was no ademption.

Upon the opening of the savings account Ms. Merritt made it clear that as long as she lived she held the exclusive right to control withdrawals. As previously stated she had the entry made that no withdrawals would be made without her signature. She did in fact make several withdrawals to the exclusion of all other people. In fact she treated the account as being little more than a checking account. Up until the withdrawal of the $3,000 she had made numerous withdrawals, all of which amounted to $2,599.04.

When Ms. Merritt withdrew the $3,000 from savings she left a tidy balance on savings. By placing the $3,000 in an existing checking account and commingling it with other funds the indication is strong that she no longer wanted the $3,000 to remain a part of her special bequest to James and Michael. In fact she dedicated the funds to her personal needs. The fact that she did not live long enough to expend the funds is not important.

It is also of some significance that the bequest of the savings account was in general terms — "my savings account — rather than naming a specific amount.

Appellee cites *Willis* v. *Barrow,* 119 So. 678 (Ala. 1929). But the facts are different from our case. In *Willis,* money on deposit in a named bank was bequeathed. The money thereafter was transferred to another bank; however, it was placed in a separate savings account rather than commingled with another savings deposit in the same bank. "Significant is the fact that the identical fund was put in a separate savings deposit rather than being commingled with a like savings deposit then in the same bank."

Appellee also cites *In Re Estate of Hall,* 160 Atl. 2d 49 (N.J. 1960). Hall, the testator, had money in four banks in Rochester, New York, which he bequeathed to designated relatives. After the execution of the will Hall moved to Maplewood, New Jersey, and he transferred the funds in the four banks to a bank, and a savings and loan association in Maplewood. It was agreed that the funds in the latter account could be directly traced as coming from the banks in Rochester. There was no evidence of commingling of the transferred funds with other funds. The court held it to be obvious that the transfer was purely one of convenience. The court interpreted the will to mean that the testator desired that a grandnephew, Harknett, receive only a nominal sum from his estate. If it held (the court continued) there was an ademption Harknett would receive a substantial sum of money contrary to the wishes of the testator. So we do not think the facts in Hall help in the solution of the problem before us.

Of course appellees are entitled to the balance in First

Federal; however, the $3,000 withdrawn from First Federal was adeemed and therefore becomes a part of the residual estate.

Reversed and remanded.

HARRIS, C.J., and HOLT, J., dissent.

CARLETON HARRIS, Chief Justice, dissenting. I very much disagree with the majority opinion for two reasons. For one (recognized by the majority), the law looks with disfavor upon the ademption of a specific legacy, and secondly, I cannot agree that the fact situation herein denotes an intent upon the part of Ms. Merritt to revoke the legacy to the two nephews. In the case of *In Re Estate of Brown,* 252 N.E. 2d 142 (Ind. 1969), cited in the majority opinion,[1] there is a thorough discussion of the subject under consideration and the court sets out the law on ademption clearly and definitely as follows:

> "The courts look with disfavor upon the ademption of a specific legacy and will not approve of such an ademption unless the facts and circumstances of the particular case unmistakenly demand such a result.
>
> "It is only when the subject matter of the specific legacy has been completely destroyed, alienated or extinguished, or so changed in character that it cannot be recognized or identified, that the legacy will be adeemed. But where the subject matter of the specific legacy has not been completely destroyed, alienated or extinguished, but merely changed in form, shape or location, by accident, operation of law, or some act of the testator, *and such subject matter in its changed or altered form can be traced into the possession of the testator, and is a part of his estate as the time of his death, and the attitude of the testator toward such altered property has been such as to indicate no*

[1]The majority cite this case and correctly state its holding, which is entirely contrary to the majority view taken in the instant litigation; no effort, however, is made by the majority to distinguish *Brown* from the case now before us, and it is noticeable that the holding there went beyond the holding of the chancellor in the case before us, in that in *Brown* the money at issue had been converted to bank certificates.

change in his testamentary intent, there is no ademption and the legatee will take such property in its altered form." [My emphasis].

In *Mee* v. *Cusineau, Executrix,* 213 Ark. 61, 209 S.W. 2d 445, we pointed out the circumstances under which an ademption will occur, and as will be subsequently shown, these circumstances are not present in the instant case. In *Mee* this court said:

> "At § 341, 28 R.C.L. 345, appears statements of the law to the following effect. The distinctive characteristic of a specific legacy is its liability to ademption. *If the identical thing bequeathed is not in existence, or has been disposed of so that it does not form a part of the testator's estate, at the time of his death, the legacy is extinguished or adeemed, and the legatee's rights are gone.* [My emphasis]. The rule is universal that in order to make a specific legacy effective the property bequeathed must be in existence and owned by the testator at the time of his death, and the nonexistence of property at the time of the death of a testator which has been specifically bequeathed by will is the familiar and almost typical form of ademption. [Citing cases]. ***
>
> "The reason for this rule as stated in the numerous cases cited in the note to § 543, 68 C.J. 844, is that as the testator no longer owns the property specifically devised, there is no property for the devisee to take, and also that subsequent conveyance of the property by the testator after having made a specific devise of it indicates conclusively a change of testamentary intent as to that property."

The majority also mention the case of *Prendergast* v. *Walsh,* 42 A. 1049 (N.J), cited by the appellees, but, in my opinion, do not satisfactorily distinguish that case from the one at hand. In *Prendergast,* the testatrix left a bequest of money to her three sisters, or their survivors, "whatever of my money now on deposit in four banks in New York City (naming them) which may be on hand, and not otherwise disposed of, share and share alike." During her lifetime, the testatrix

withdrew the money from the four New York banks and deposited same in another bank, where it remained until her death. The court, holding there was no ademption, *inter alia,* said:

> "The thing she bequeathed, she drew from the bank. It remained the identical thing bequeathed, until disposed of in some way by her. She could have disposed of it by consuming it in living, or turning it into other property, or devoting it to a purpose inconsistent with the bequest. She did neither of these things, but, on the contrary, took the specific thing which she got from the bank, and kept it until April 1st following, and then, with a slight addition, placed it in the Hoboken Bank. While by this deposit in this last-named bank she lost the right to have the same money again in specie, she retained the right to have it as money or cash. If thereafter it was properly designated as money or cash, it must be regarded as a part of the same cash which she had taken from the four banks. If the money remained practically the same money, then the removal of it from the place of its deposit did not amount to an ademption. The place of deposit was merely used as descriptive of the thing bequeathed. It was used to identify the particular money given, and it is entirely settled that, where the place is merely descriptive, the removal of the things to another place is immaterial."

Numerous other cases are to the same effect.

It is apparent that the law strongly looks with disfavor upon an ademption, and if the legacy can be traced and clearly identified and the attitude of the testator toward such altered property has been such as to indicate no change in the testamentary intent, there is no ademption.

Accordingly, the question in this litigation, to which the majority agree, is whether Mary Ann Merritt indicated an intention to revoke the legacy of the two nephews. I contend that there is absolutely nothing in this record — not a single fact — to indicate in any way that Ms. Merritt had any intention to revoke such legacy. In withdrawing the money from

the savings and loan association, and depositing it into her checking account, Ms. Merritt specifically and clearly gave her reason for doing so, "the purpose of taking care of medical expenses for myself." In other words, it is obvious that the testatrix, whose checking account only consisted of $518.78, contemplated that she would need to expend additional funds for medical expenses, and withdrew the money from the savings and loan account and placed it in her checking account solely for that purpose. This is not unusual, and is done every day by those who are required to live on their savings. She was withdrawing this money *for her own use* and not for the purpose of leaving it to some different legatee. Of course, if the money was not placed in a checking account, but instead retained at her home, her future expenses could only have been paid in cash and this could hardly be considered practical.

The majority indicate that there is significance in the fact that Ms. Merritt deposited the money withdrawn from the savings account in the checking account that she already maintained, rather than setting it up in a separate account.[2] I cannot attach any importance to this fact. Why should Ms. Merritt, whose *only purpose* in withdrawing the money from the savings account was to place such money in a location where she could write checks for her medical expenses, open a separate checking account when she already had one? To me, this would be ridiculous.

Succinctly stated, the facts reflect that this withdrawal of funds from the savings and loan association was not occasioned by any change in testamentary intent — but rather (according to her own written statement) was occasioned by her expectation that she would need the money withdrawn for her own personal use.

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[2]From the majority opinion:

"In *Willis*, money on deposit in a named bank was bequeathed. The money thereafter was transferred to another bank; however, it was placed in a separate savings account rather than commingled with another savings deposit in the same bank. 'Significant is the fact that the identical fund was put in a separate savings deposit rather than being commingled with a like savings deposit then in the same bank.' "

There is another fact which I consider quite pertinent, and that is that Ms. Merritt's Will was executed on February 12, 1972, and her death occurred on May 21, 1972, only slightly more than *three months* after execution of the Will.

To summarize, the depository was changed because Ms. Merritt could not write checks on the money in its original depository. As in *Brown,* the money can easily be traced into the possession of the testator and was a part of her estate at the time of her death; as in *Prendergast,* it was not disposed of by her, was not even used for the purpose of turning it into other property, and was not, in my view, set apart for a purpose inconsistent with the bequest.

I, therefore, respectfully dissent to the holding of the majority.

HOLT, J., joins in this dissent.

B. Frank MACKEY *v.* STATE of Arkansas

CR 74-102 519 S.W. 2d 760

Opinion delivered January 20, 1975
[Rehearing denied March 24, 1975.]

Wright, Lindsey & Jennings, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Gary Isbell,* Asst. Atty. Gen., for appellee.

LYLE BROWN, Justice. Pulaski County Judge B. Frank Mackey was convicted of violating the county purchasing procedure act. Ark. Stat. Ann. § 17-1601 *et seq.* That act requires bidding on most county purchases where the estimated purchase equals or exceeds $1,000. It also prohibits a purchasing official from splitting any item with the intent to avoid bidding procedures. The four indictments on which Judge Mackey was convicted may be summarized as follows:

Indictment 77664 charged that appellant on eight separate days in September, 1973, purchased corrugated metal pipe with the intent of splitting a single purchase of $5,-325.48 into eight separate purchases under $1,000 to avoid bidding procedures.

Indictment 77666 charged that appellant on seven separate days in July, 1973, purchased corrugated metal pipe with the intent of splitting a single purchase of $6,083.78 into seven separate purchases under $1,000 to avoid bidding procedures.

Indictment 77668 charged that appellant on August 9, and 14, 1974, purchased a quantity of culvert with the intent of splitting a single purchase of $1,802.82 into two separate purchases under $1,000 to avoid bidding procedures.

Indictment 77671 charged that appellant purchased personal property assessment forms at a total cost of $8,068.72; and that eight separate orders were made, splitting the orders in amounts under $1,000 to avoid bidding procedures.

For reversal appellant contends (1) that the actual purchases described in the indictments were made by people other than appellant and that the sole participation of appellant was the approval of the claims for the purchases;

(2) that the State failed to prove criminal intent; and (3) that it was error to give an accessory instruction.

The first witness called by the State was Frank Winburne, a certified public accountant who had been retained by the grand jury to audit the county records with regard to a multitude of purchases. Through him was introduced a summary of the purchases described in the four indictments. From a study of those records and conferences with county officials and employees he ascertained that no bids were taken on the purchases described in the four indictments. He further ascertained that the orders described in the first three indictments (metal pipe culverts) were all placed with the manufacturers by appellant's employees; that the order for the assessment forms was placed with the printing company by the county assessor; and that appellant had nothing to do with the purchases except to pass on the claims filed by the sellers.

Official county records of the involved purchases were introduced through the county clerk. The amounts of the purchases are not questioned, nor is it contended that bids were taken. Mr. Al Stafford, owner of Arkansas Culvert Company, verified the purchase and delivery of the metal pipe and culverts. The witness said he had no dealings with appellant in connection with any of the purchases. He assumed that the orders were placed by the county road and bridge supervisor, W. T. Morgan. Witness Robert E. Hill, representing Democrat Printing and Lithographing Company, produced the records of purchases of personal property assessment forms which formed the basis of the fourth indictment. He verified the amount of each invoice and delivery. He testified that the purchases were made by L. E. Tedford, the county assessor. "All Judge Mackey had to do with the purchase was that he ultimately had to pay for it."

The county comptroller, C. B. Rotenberry, described the procedure for processing claims against the county. The supplier makes out one claim form for supplies furnished during a given month. He attaches thereto the various invoices supporting the total amount of the claim. The invoices are checked by the comptroller and he satisfies himself that the purchase has been authorized, the products delivered, and the correct billing extended. Thereupon the comptroller af-

fixes his signature on the outside of the claim form below this imprint: "The within claim, together with all written and printed matter thereto attached, have been by me carefully examined and checked, and same is hereby certified as correct in amount, and a legal demand against Pulaski County in the sum of $ _____." Below the comptroller's signature is this printed form: "Examined and the sum of $ _____ allowed out of appropriation for expense of _____ this ____ day of _____, 19 ____.

_____
County Judge."

Mr. Rotenberry testified he examined the invoices supporting the claims upon which the first three indictments were based and saw no reason not to approve them. He said he noted that the purchases were made on different invoices with different dates of purchase; that each invoice was under the limits requiring bidding, and he considered them separate and distinct purchases. With reference to the assessment supplies he said he contacted the county assessor and verified the invoices before approving the claim therefor.

The State also called Theron Morgan. He has worked for Pulaski County under the last five county judges. His work is principally concerned with bridge and road construction and repair. Since 1969 he has been the road and bridge commissioner, working, of course, under the direction of the county judge. He verified having made the purchases described in the first three indictments and related the three particular jobs to which the materials were assigned. In fact he said he had been doing the purchasing for road and bridge work for the past 23 years — "18 years under Judge Campbell and five under Judge Mackey". In that capacity he executed the purchase orders and approved the invoices when they were filed with the county, usually at the end of the month. After his (Morgan's) approval "Mr. Rotenberry gets it from there, checks it out and then presents it to the judge". He asserted he was sure that "all this culvert was in the ground with water pouring through it before Judge Mackey knew the culvert had been bought".

Witness Morgan described his method on construction projects, which can be reasonably interpreted as some explanation for "installment" purchase of materials: "When we

start to repair a road like these three, we figure out what material we are going to use as we go along. We do not put our plans on the drawing board. We have a road built before most anyone else could get it on paper. We travel a road and figure out ahead of time how many culverts we are going to use. We know in general terms where our trouble spots are. Then we have to figure out the square foot area of culvert that will be required as we go along."

Appellant B. Frank Mackey testified that with an annual budget of over three million dollars he had to rely on employees for much of the paper work required of the office. For that reason he said W. T. Morgan was authorized to make purchases for the road and bridge department and the comptroller, Mr. Rotenberry, was counted on to audit all invoices for purchases of any nature. In addition, a full-time state auditor is assigned to Pulaski County. The witness said the state auditor, who goes over all county accounts, had never criticized the purchasing procedures. He said the first knowledge he had of the purchase of the materials in question was when the claims reached his desk. He said he noted they were approved by Mr. Rotenberry as being a just claim, that he examined the claims and saw nothing to indicate there was any problem with regard to the manner in which the purchases had been made. With respect to the purchase of assessment forms, again he said he had no connection with the actual purchase. He testified that it was approved by Mr. Rotenberry and initially authorized by the county assessor, and he relied on the latter to conform to the purchasing requirements.

Other than evidence of the four transactions forming the basis for the four indictments there is evidence of divers other transactions which generally followed the same pattern as those forming the basis of the four convictions. For example, there was evidence of a lease-purchase contract for a bulldozer costing $51,081; there was evidence of the purchase of asphalt sealing materials for $2,750; and there was evidence of a transaction with Dixie Culvert Company dated July 5, 1973, for a total of $1,802.58 which was split into two invoices. We are unable to tell whether the recited additional transactions were introduced to support indictments which were dismissed during the course of the trial; or to support in-

dictments wherein the jury returned verdicts of not guilty; or to substantiate the indictments wherein the jury was unable to reach a verdict. Additionally, the transactions may have been introduced to show an overall scheme of operation. Our dilemma is caused by the fact that only those indictments upon which convictions were returned are in the record. Other indictments are referred to only by case number. However, since the State's own evidence relative to the four purchases forming the basis of the convictions shows that those purchases were made, not by Judge Mackey, but by Mr. Morgan and Mr. Tedford, evidence of other transactions are of no benefit. We shall have more to say about that later.

The county purchasing procedure act imposes a penalty on an official who *intentionally* violates the provisions of the act. Ark. Stat. Ann. § 17-1613 (Repl. 1968). The State did not produce a single witness to testify that splitting practices were followed. The State relied solely on the suspicious fact that on eight separate days in September, 1973, corrugated metal pipe was purchased, each purchase order being under $1,000; that on seven separate days pipe was purchased, each order being under $1,000; that on August 9, and 14, 1974, two purchases were made, each under $1,000; and that nine separate invoices were approved for the purchase of tax assessment forms. It is significant that the suspicion is not corroborated by proof of fraud, personal gain, or a showing that the suppliers were paid more than the fair market price for the products. Of course, bare suspicion of guilt is not enough and we hold that the State did not meet its burden of proof; in other words, we find no substantial evidence of guilt, either as a principal or accessory, of intentional violation of the act.

Another controlling factor contributing to our action is that Judge Mackey, in approving the claims, was acting in his capacity as presiding judge of the county court. The acts of approving the claims did not constitute purchases; the purchases had already been made during the months previous to their approval. The legislative act of which he was accused of violating has a single purpose, that of regulating *purchasing* procedures; hence the title of the chapter, "County Purchasing Procedure". The appellant was tried on the

theory that he violated the purchasing act by splitting purchases. Ark. Stat. Ann. § 17-1603 (d) (Repl. 1968). The overwhelming proof was to the effect that appellant's sole participation was in approving claims for purchases made by other parties, and there is no evidence of conspiracy between the judge and those making the purchases. In fact the grand jury specifically found no evidence of fraud.

Finally, the State argues in essence that appellant is criminally liable for the acts of his subordinates. To support that contention it cites *Russell* v. *Tate,* 52 Ark. 541, 13 S.W. 130 (1889). That case holds that the mayor was *civilly* liable for ordering the payment of an illegal appropriation. Also cited is *Davis* v. *Jerry,* 245 Ark. 500, 432 S.W. 2d 831 (1968). That was a civil proceeding. We there held that the county judge should be enjoined from failing to follow the county purchasing procedure act. Even if there might be circumstances under which a county judge could be criminally liable for the acts of his subordinates we cannot agree that such liability should be attached under the facts in this case. In fact the only Arkansas case in point which has been called to our attention does not favor the State's position. *Robinson & Warren* v. *State,* 38 Ark. 641 (1882).

Reversed and remanded.

GEORGE ROSE SMITH, JONES and BYRD, JJ., dissent.

CONLEY BYRD, Justice, dissenting. The County Purchasing Procedure Act, Acts 1965, No. 52 provides:

> "Ark Stat. Ann. § 17-1601. 'From and after the passage and approval of this Act it shall be unlawful for any County Official within the several counties of the State of Arkansas to make any purchases with county funds in excess of $1,000.00, unless the hereinafter method of purchasing is followed. ...' "

Under Section 2 of the Act, Ark. Stat. Ann. § 17-1602(d) the Act provides:

> "*Purchase* shall mean and include not only the outright purchase of a commodity but also the acquisition

of commodities under rental-purchase agreements or lease-purchase agreements. . . ."

Subsection (b) of Section 2 [Ark. Stat. Ann. § 17-1602 (b)] makes the following requirement:

> "*Commodities* shall mean all supplies, goods, material, equipment, machinery...purchased for or on behalf of the county."

Section 3 of the Act [Ark. Stat. Ann. § 17-1603] provides:

> "All purchases of commodities made by any county purchasing official with county funds, except those specifically exempted by this act, shall be made as follows:
>
> (a) 'Formal Bidding' shall be required in each instance in which the estimated purchase price shall equal or exceed $1,500.00.
>
> (b) 'Informal Bidding' shall be required in each instance in which the estimated purchase price shall equal or exceed $1,000.00 but be less than $1,500.00.
>
> (c) 'Open Market Purchases' may be made of any commodities where the purchase price thereof is less than $1,000.00.
>
> (d) No purchasing official shall parcel or split any item or items of commodities or estimates, with the intent or purpose to change the classification or to enable the purchase to be made under less restrictive procedure."

Section 5 of the Act [Ark. Stat. Ann. § 17-1605] provides that all contracts shall be let to the lowest responsible bidder. Section 7 requires the purchasing official to make every effort to notify all eligible bidders before purchases are made. Section 8 requires all bids to be open in public and read at the time and place specified. Section 9 [Ark. Stat. Ann. § 17-1609] makes the following requirement:

"(a) No contract shall be awarded or any purchase made until the same has been approved by the County Court, and no contract shall be binding on any county until the County Court shall have issued its order of approval.

(b) The Order of the County Court shall be properly docketed, and all documents and bids pertaining to the solicitation of bids and awarding of contracts under the purchasing procedure of this act shall be filed with the County Clerk, together with the order of the court which shall be filed by said County Clerk.

(c) No claim filed with the county for payment of any commodity, the purchase of which is regulated by this act, shall be paid, or no warrant shall be issued by the county clerk for the payment of same, until the order of the county court approving same shall have been issued and filed with the county clerk."

Before passing to the facts, I should here note that while Ark. Stat. Ann. § 17-1609, *supra,* has to do with the approval of a contract before a purchase is made, the procedure for filing, presenting and allowance of claims by the County Court is regulated and controlled by Chapter 7 of Title 17 of the statutes — see Ark. Stat. Ann. § 17-701 et seq.

Now on the facts appellant readily admitted that he had allowed claims against the county in excess of THREE MILLION DOLLARS and that the County Purchasing Procedure had been followed only three times in the taking of bids. The State produced a lease-purchase contract signed by B. F. Mackey, County Judge on March 20, 1973, whereby the county acquired a D-6 Bulldozer at a total cost of $51,081.00. Frank Winburne, the accountant hired by the County Grand Jury to investigate the County's purchasing procedure testified that he attended a meeting wherein appellant, Therion Morgan, Conrad B. Rotenberry and Mr. Tedford, the Pulaski County Assessor, were present. When asked about the purchase of the bulldozer without bids appellant took the position that the equipment was used (Tr. 59). Mr. Morgan stated it was new. At the trial appellant readily ad-

mitted that no bids were taken on the lease-purchase of the bulldozer but at that time took the position that the bulldozer was actually purchased in 1972, which would have barred an indictment on that item because of the one year statute of limitation.

On cross-examination appellant admitted that he had purchased from American Coating Company a slurry seal of asphalt for Mission Road in the amount of $2,750.00 without requiring bids. He justified this on the basis that it was an experiment. However he admitted that the vendor had been trying to get him to try his product for four years.

Appellant's only explanation for not requiring bids on the county assessment forms was that he relied upon Mr. Tedford to conform to whatever purchasing requirements there were. Since the majority has touched so lightly on the assessment form purchase that it is impossible for me to comprehend what actually transpired, I undertake to set the matter out in some detail.

State's Exhibit No. 9 shows that on September 18, 1972, *Requisition No. 7356,* was given to Democrat Printing & Lithographing Company for 62,000 "Sets Quad Personal Assessment Lists for 1973." On January 15, 1973, the Democrat Printing & Litho. Co. presented its claim to the County Court for payment in the amount of $8,068.72. Attached to the claim were invoices which referred to "YOUR NO. req. 7356" and showed the following information.

11/14/72	7500 sets	Personal	Assessment	Blanks			$947.62
						tax	28.43
							976.05
11/22/72	"	"	"	"	"		947.62
						tax	28.43
							976.05
11/29/72	"	"	"	"	"		947.62
						tax	28.43
							976.05
12/5/72	"	"	"	"	"		947.62
						tax	28.43
							976.05

12/11/72	7500 sets Personal Assessment Blanks		$947.62
		tax	28.43
			976.05
12/15/72	" " " " "		947.62
		tax	28.43
			976.05
12/18/72	" " " " "		947.62
		tax	28.43
			976.05
12/20/72	" " " " "		947.62
		tax	28.43
			976.05
12/22/72	2,000 sets personal assessment blanks		252.74
		tax	7.58
			$260.32

On January 15, 1973, Mr. Tedford issued another requisition No. 8255 to Democrat Printing & Lithographing Co. for "see Attached invoices" in the amount of $8,068.72. The attached invoices were the invoices above described. Thus we see that there was no splitting of purchases by Mr. Tedford. The splitting was done by Democrat Printing & Litho. Co. which was obvious from the information presented with the claim.

Other invoices in the record include the presentation and allowance of a claim from Dixie Culvert Manufacturing Co., in the amount of $1,802.58, that was charged to "Road & Bridge." Those invoices show that both invoices were dated "7-5-73". One was #87476, and the other was #87477. Invoice #87477, was in the amount of $526.54 and invoice #87476 was in the amount of $1,284.82. These purchases were admittedly made without taking bids.

After appellant had admitted that in August 1973, the county had purchased $2,664.61 worth of steel from AFCO Steel Company without taking bids, the record on cross-examination shows the following:

"Q. When a new road is sought to be built or a new

bridge is sought to be built or one is sought to be rebuilt, who has final approval of whether it will be done and how it will be done?

A. Mr. Morgan has final approval over how it will be done, and he and I usually talk together about these things and determine when and how it ought to be done.

Q. You mean, you avail yourself of his professional services in deciding whether or not to do it?

A. Yes, sir.

Q. Did it occur to you when you purchased that steel from AFCO that it was over a thousand dollars?

A. I didn't know it until the invoices reached my desk.

Q. Did you bring that to the attention of Mr. Morgan?

A. No, sir; because I knew it went into a bridge and I knew where the bridge was being constructed that it went into.

Q. Did you advise him in the future not to do that?

A. No, sir; I did not.

Q. Have you ever advised him not to make purchases over a thousand dollars without taking bids?

A. He has knowledge of that, sir.

Q. He has knowledge. Have you advised him?

A. Yes, sir.

Q. When did you advise him?

A. I don't remember the exact date.

Q. Within the last five years, I assume?

A. I'm sure it was; yes, sir."

I submit that the record contains more than substantial evidence to sustain the conviction herein—in fact it looks to me that it is supported by the overwhelming evidence.

For these reasons I respectfully dissent.

GEORGE ROSE SMITH and JONES, JJ., join in this dissent.

ARKANSAS DEPARTMENT OF LABOR, Dale CLINE, Director *v.* AMERICAN EMPLOYMENT AGENCY, et al

74-200 517 S.W. 2d 949

Opinion delivered January 20, 1975

Silas H. Brewer, Jr., for appellants.

William A. Lafferty, Terry Matthews, James L. Sloan, Smith, Williams, Friday, Eldredge & Clark, by: *Oscar E. Davis, Guy Amsler Jr.*, for appellees.

JOHN A. FOGLEMAN, Justice. In these consolidated actions appellees challenged the issuance of directives by Dale Cline, as Commissioner of Labor, which admittedly amounted to the adoption of rules and regulations governing operations of private employment agencies. The attack was centered upon a prohibition against the use of fictitious names by agents and employees of the agencies and the requirement that all agencies use a standard form of contract, or receipt, drawn so as to require the negotiation and execution of a new and separate contract on each referral of a job applicant to an out of state or out of city employer. Appellees also complained that the directives required the disclosure of the identity of the prospective employer to the applicant before he signed the contract, and that this would effectively bypass the agency in contracts between the applicant and the employer and deprive the agency of compensation for having brought the two together. The circuit court entered the following judgment:

> 2. That on or about June 13, 1972, Director Dale Cline of the Arkansas Department of Labor issued a "standard contract" form for use by all private employment agencies in the state effective July 1, 1972. Director Cline informed all private employment agencies that use of the new "standard contract" form would be a prerequisite to renewal of a license for such agencies to operate in the state. Such action by Director Cline constituted adoption of administrative rules or regulations affecting operations of private employment agencies in this state. Director Cline is without statutory authority

to adopt rules and regulations regarding use of "standard contract" forms by private employment agencies in this state. Therefore, the directive of Director Cline regarding use of "standard contract" form is hereby declared null and void.

3. That on June 21, 1972, the Arkansas Department of Labor issued letters to plaintiffs advising that their contract forms and their applications for license renewal were being disapproved for non-compliance with the "standard contract" form adopted by the Arkansas Department of Labor for general use (T. 135) by private employment agencies in the state effective July 1, 1972. Such action by the Arkansas Department of Labor constituted adoption of administrative rules or regulations governing operations of private employment agencies in this state. The Department of Labor is without statutory authority to issue administrative rules and regulations governing operations of private employment agencies in this state and the directives issued by the Arkansas Department of Labor on June 21, 1972 are therefore declared to be null and void.

4. On June 13, 1972, the Director of the Department of Labor issued a directive to all private employment agencies regarding registration and use of fictitious or "desk" names effective July 1, 1972. This directive further advised that the practice of using fictitious or "desk" names would not be permitted after July 1, 1972. The directive issued by the Director of Labor on June 13, 1972 constituted adoption of administrative rules or regulations regarding use of fictitious or "desk" names. The Director of Labor is without statutory authority to issue administrative rules or regulations regarding use of fictitious or "desk" names, and the directive of the Director of Labor issued on June 13, 1972 is hereby declared null and void. Notwithstanding the above, however, the practice by private employment agencies of using fictitious or "desk" names may violate Ark. Stat. Ann. § 81-1003 (Repl. 1960), and this order in no way affects the right of the Director of Labor for the State of Arkansas to in-

itiate duly authorized procedures to revoke the license of any private employment agency engaging in the practice of using fictitious "desk" names.

5. That the "Rules Governing Private Employment Agencies" adopted on September 22, 1969 by Defendant Arkansas Department of Labor and Defendant Dale Cline's predecessor in office were adopted by defendants outside their statutory authority and are, therefore, void in their entirety.

6. That the defendants be, and they are hereby, prohibited from enforcing any of the administrative rules or regulations set forth above.

Appellant lists two points for reversal, viz:

I

Appellants possess legislatively conferred rule-making authority regarding regulation of private employment agencies, and the lower court's contrary holding is erroneous as a matter of law.

II

Appellants properly exercised lawfully conferred rule-making authority regarding regulation of private employment agencies in the circumstances of this case.

As to point II, we agree with appellees that the action of the trial court was correct, insofar as the rules pertaining to the standard contract and the use of fictitious names are concerned, for a reason not relied upon by the circuit judge. It was stipulated that, in the promulgation of these directives, there had been no compliance with Ark. Stat. Ann. § 5-703 (Supp. 1973), a section of the Arkansas Administrative Procedure Act [Ark. Stat. Ann. § 5-701, et. seq. (Supp. 1973)]. Appellant contends that this act exempts it from its provisions. It is in error. The Employment Security Division of the Arkansas Department of Labor is specifically exempted, but neither the Department of Labor nor the Com-

missioner of Labor is. We can neither extend the exemption to them, nor can we find any legislative intent to extend the exemption beyond the agencies carefully and specifically enumerated.

Appellant finds express authority for the rules promulgated by him in Ark. Stat. Ann. §§ 81-101 - 123 (Repl. 1960). We are unable to find that authority. Giving the Commissioner of Labor power to administer and enforce all rules and regulations which it is the duty of the Department of Labor to administer and enforce, as § 81-102 does, certainly does not confer the power to adopt them. Granting to the Department of Labor and the Commissioner of Labor all the powers and duties previously conferred upon the Bureau of Labor & Statistics and the Commissioner of Labor & Statistics, as § 81-106 does, is not a grant of any powers or authority these agencies did not have.

Appellant places his principal reliance upon §§ 81-107, 81-109 and 81-110. In § 81-107 (a) the legislature gave appellant the power, jurisdiction and authority to enforce all labor laws in the state the enforcement of which was not otherwise specifically provided for, and all rules made pursuant to § 81-110. We find no grant of rule-making power in § 81-110, which relates solely to the notice and hearing required before any rule is adopted, amended or repealed. So § 81-107 (a) only empowers the Commissioner to enforce rules he is otherwise authorized to make, and any rules he might make under any implied rule-making power inherent in his duties to enforce labor laws.

Appellant also argues, however, that there is no limitation upon the Commissioner's rule-making power because the legislature, after having specifically authorized, by § 7 (d) of Act 161 of 1937, the Commissioner of Labor to propose to the Industrial Board rules for the prevention of industrial or occupational accidents or diseases, and for rendering public buildings safe, amended § 7 by Act 273 of 1951 to omit subsection (d). In this connection, we note that § 10 of Act 161 remains intact and appears as Ark. Stat. Ann. § 81-109. By that section the Commissioner is specifically empowered, in addition to other powers and duties conferred upon him by

law, to make reasonable rules for the prevention of accidents or of industrial or occupational diseases, or for making places of employment, places of public assembly and public buildings safe. We cannot find any other language in §§ 81-101 - 123 expressly granting rule-making power. Any express grant must be found in the laws the Commissioner is called upon to enforce.

We turn then to Ark. Stat. Ann. §§ 81-1001 - 1007 (Repl. 1960) relating to employment agencies. It requires that they be licensed by the Commissioner of Labor and authorizes the Commissioner to bring actions for violation of the provisions of the required bond, conditioned that licensees will not violate any of the duties, terms, conditions, provisions or requirements of Act 4 of the Extraordinary Session of 1923 (Ark. Stat. Ann. §§ 81-1001 - 1007). It also authorizes the Commissioner to revoke any license granted under the act, for violations of the act. We have rejected the argument that this act granted any discretion to the Commissioner in issuing a license. *Cline* v. *Plaza Personnel Agency, Inc.*, 252 Ark. 956, 481 S.W. 2d 749. In doing so, we used this significant language:

> It is also argued that the naked authority to issue a license carries with it, by implication, the power to exercise reasonable discretion in granting or refusing to grant such a permit. The fallacy in that argument lies in its assumption that the licensing officer may decide for himself what is a reasonable basis for rejecting an application. Discretionary power may be delegated by the legislature to the licensing authority, but it is essential that reasonable guidelines be provided in the statute. *Walden* v. *Hart,* 243 Ark. 650, 420 S.W. 2d 868 (1967). Inasmuch as the statute now in question affords no guidance whatever for the licensing authority, we must conclude that no discretion in the matter has been invested in the Director.

It only follows that the Commissioner could not have either express or implied authority to impose additional conditions upon the granting of licenses by rules and regulations he might adopt.

Appellant does not point out, nor do we find in §§ 81-1001 - 1007 any express grant of rule-making power. Sec. 3 of Act 4 of the Extraordinary Session of 1923 (see Ark. Stat. Ann. § 81-1003) makes rather stringent requirements of licensed employment agencies regarding records to be kept, the collection of fees, the giving and publication of information and advertisements and such matters. It does not interfere with the right of the parties to contract, and we have said that the portion of this section which limited the amount of the fee a licensed agency might charge was unconstitutional. *Alsup* v. *State*, 178 Ark. 170, 10 S.W. 2d 9. Although the constitutionality of the section is not in issue here, both the administrative agencies and the courts of this state should be extremely sensitive to, and give due regard to, constitutional limitations in this field. We should certainly not construe an act to confer a power which infringed upon constitutional rights to contract with reference to fees in such matters. It is our duty to construe an act so that it will meet constitutional tests. *Gibbs* v. *State,* 255 Ark. 997, 504 S.W. 2d 719. In any event, we nowhere find express authority for making the rules promulgated by appellant.

Of course, this does not necessarily mean that the Commissioner does not have implied power to adopt rules which are necessary to enable him to properly and effectively perform his duty to enforce these laws. See 1 Am. Jur. 2d 894, Administrative Law § 97; 73 CJS 416, Public Administrative Bodies & Procedure, § 95. Appellant states that the manifest purpose of these directives by him is to ensure full disclosure of pertinent information to all utilizing the services of private employment agencies. No other reason for these rules is suggested by him. This is necessary, he says, to his enforcement of the statute making it unlawful for employment agencies to publish any false or misleading information, representation, notice or advertisement.

There was testimony that fictitious or "desk names" for employees were resorted to by agencies to protect them from telephone harassment at their homes. Married women are also permitted to use their maiden names. There was also testimony that the Commissioner's contract requirements required the agencies to disclose the name of the employer to

the applicant in a contract submitted to the applicant for signature, and that a new contract must be signed before each reference. This enabled the applicant to decline to sign the contract and make a direct application to the employer, and, if he obtained employment, to avoid paying the agency, even though he utilized the information furnished by it.

Even if appellant does have the implied rule-making power he asserts, we cannot agree with appellant's argument that either of his directives was necessary to expedite his enforcement of the prohibitions stated in § 81-1003 in the following language:

> ***No licensed person conducting an employment agency shall publish or cause to be published any false or fraudulent or misleading information, representation, notice or advertisement; all advertisements of such employment agency by means of cards, circulars, or signs and in newspapers and other publications, and all letterheads, receipts, and blanks shall be printed and contain the licensed name and address of such employment agent and the word "agency," and no licensed person shall give any false information, or make any false promise or false representation concerning an engagement or employment to any applicant who shall register or apply for an engagement or employment or help.

As a matter of fact, we do not see how they would aid at all.

We note that appellant also argues that his directives were valid as interpretive rules which he says are permitted, though not binding on the courts, whenever an administrative agency finds that it is necessary or advisable that its interpretation of a legislative act be stated in order that the application of the act to be made by the agency may be known. We cannot see just what the Commissioner was attempting to interpret by these directives. If the Commissioner considered the prohibition against publication of false, fraudulent or misleading information or that against giving false information, or making a false representation concerning an engagement or employment to be applicable to

the use of fictitious names by employees of an agency, we unhesitatingly disagree.

Since we find no error in the trial court's action, the judgment is affirmed.

Abb JOHNSON *v.* The EUDORA BANK and Myrtle HANDIE

74-188 517 S.W. 2d 957

Opinion delivered January 20, 1975

Dickey, Dickey & Drake, Ltd., for appellant.

W. K. Grubbs Sr. and *Holloway and Haddock,* for appellees.

CONLEY BYRD, Justice. This action was commenced by appellant Abb Johnson pursuant to Ark. Stat. Ann. § 85-4-

301 et seq. (Add. 1961), to recover from appellee Eudora Bank (hereinafter referred to as "Bank") upon a $2,500 check executed by appellee Myrtle Handie to Johnson. The check had been sent through the Commercial Bank and Trust Company in Monticello on or about March 17, 1972, and the Eudora Bank had held the check as a cash item until September 29, 1972, when it stopped payment at the request of Handie. The "Bank" admitted that Handie had executed the check but denied that the check was deposited in Johnson's account or that the "Bank" had improperly dishonored the check. In addition the "Bank" by way of cross-complaint alleged that the check was executed for the purchase of a car and that it had been held at the request of Handie until Handie received the title papers to the car. The "Bank" prayed that if Johnson should have judgment against it, it should have judgment with a purchase money lien over against Handie.

Handie answered the cross-complaint of the "Bank" and by way of counterclaim alleged that Johnson, his agent, servant or employee had misrepresented the condition of the automobile and that he had failed to deliver legal title. By way of relief Handie sought damages in the amount of $3,500.

The trial court ruled that Johnson was entitled to a judgment against the "Bank" in the amount of $2,500 but that in the event the jury should grant Handie a rescission of the purchase contract between her and Johnson, then Johnson would be entitled to possession of the automobile upon restitution of $570 downpayment and the judgment against the "Bank" would be set aside. The jury found the issues in favor of Handie and from a judgment entered thereon Johnson appeals setting forth the following points for reversal, to-wit:

> "POINT I. The lower court erred in not granting the appellant's motion for directed verdict and motion for judgment notwithstanding the verdict, against the appellee, Handie.
>
> POINT II. The lower court erred in giving court's Instruction No. 16.

POINT III. The lower court erred in overruling the appellant's motion for directed verdict against the appellee, "Bank," and further erred in granting to the "Bank" the right of subrogation."

POINT I. Under this point Johnson contends that there is no substantial evidence to support the jury's finding that Jim Livingston d/b/a West Side Motor Company was his agent, servant or employee. We find no merit in this contention. The record shows that from 1962 to 1965, Johnson owned and operated a used car lot in Pine Bluff and that during part or all of that time Jim Livingston worked for him as a salesman. At the time of the occurrence herein, Johnson was a salesman for Trotter Ford, a new and used car dealer in Pine Bluff, and as such would not have been permitted to operate a used car lot while in Trotter's employment. Jim Livingston had little or no financial means and depended upon Johnson to finance the operation of West Side Motor Company. Handie purchased the automobile in question from Jim Livingston d/b/a West Side Motor Company, but when Livingston made out or filled in the check signed by Handie, he filled in Johnson's name without any mention of West Side Motor Company. However, when Livingston filled in the title papers he showed West Side Motor Company as the seller-dealer. Because West Side Motor Company did not have an automobile dealer's license, the State Motor Vehicle Division would not accept the title that Livingston had given to Handie. Sometime in August, the "Bank" received a substitute title from Hertz Rent-a-Car made out to Handie. When the "Bank" notified Handie to come in and consummate her financial arrangements for the automobile loan, she then requested that the "Bank" stop payment on the check.

Johnson testified that he only floor-planned the automobiles for Livingston for $100 on each automobile purchased and that to do that he had made financial arrangements with a Monticello bank. He stated that Livingston would go either to St. Louis or New Orleans and buy a number of automobiles. Livingston's vendor would send the titles with a sight draft to Livingston's bank who would pay for the titles, then the title would be sent to Johnson's bank at Monticello who would pay Livingston for the

titles by extending credit to Johnson. In turn Johnson's bank would release the titles when Livingston paid the amount of the floor-planning on each automobile. Johnson could not say whether he had ever seen the title to the car here involved. Livingston on the other hand testified that he would go to New Orleans and purchase a quantity of automobiles and cause sight drafts and the titles to be sent directly to Johnson's bank in Monticello. Reginald Glover, an employee of the Monticello bank testified that he only did business with Johnson and knew nothing about West Side Motor Company.

Thus when we consider that Livingston had previously worked for Johnson; that he had little or no financial means; that Livingston purchased automobiles and sent sight drafts through Johnson's bank; and that the check in question was made out to Johnson by Livingston, we find that there is substantial circumstantial evidence to support the jury's finding that Livingston was Johnson's agent.

POINT II. As far as the record shows the first time Handie claimed the right to rescind the contract occurred after all parties had rested. Thus Johnson had no opportunity to determine whether Handie, who had the use of the automobile during the time from March through September of 1972, had properly revoked her acceptance of the delivery of the property and had no occasion to make inquiries with respect thereto. Consequently, we find that the trial court abused its discretion in considering the pleadings as amended to conform to the proof when it gave instruction No. 16. It must be remembered that the proof here admitted would also have been admissible to prove the damage issue prayed for and therefore no objection could have been sustained to the admissibility of the evidence.

POINT III. Johnson here contends that the "Bank" should not be allowed the right of subrogation to Handie's rights against Johnson, under Ark. Stat. Ann. § 85-4-407 (Add. 1961). We need not consider the provisions of the Uniform Commercial Code with reference to subrogation because subrogation is not here involved. The record shows that Johnson at the trial conceded that his $2,500 judgment

against the "Bank" could be reduced by the amount that Handie should recover against him. Consequently, the trial court committed no error in accepting the parties' practical solution in offsetting the conflicting judgments.

Reversed and remanded.

John Lee RANSOM *v.* STATE of Arkansas

CR 74-132 518 S.W. 2d 490

Opinion delivered January 27, 1975

Harold L. Hall, Public Defender, by: *Jewel Brown,* Dep. Public Defender, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Gary Isbell,* Asst. Atty. Gen., for appellee.

CARLETON HARRIS, Chief Justice. Appellant, John Lee Ransom, was charged by information with first degree murder, but subsequently entered a plea of guilty to the crime of second degree murder and was sentenced to 21 years confinement in the Arkansas Department of Correction, the maximum sentence that could be imposed. Thereafter, Ransom filed a petition under the provisions of Criminal Procedure Rule I, alleging various grounds for relief; however, at the hearing held on April 10, 1974, appellant abandoned all allegations except one, *viz.*, that as a matter of right, 5 ½ months spent in pre-trial incarceration should have

been credited on the sentence imposed. This is the sole basis of appeal.

The trial court refused to grant relief, stating that Ransom spent his time in jail under a first degree murder charge and credit for time in jail would not apply where a plea was later entered to second degree murder. In disposing of this appeal, it is not necessary that this question be discussed.[1]

Petitioner relies upon the case of *Shelton* v. *State*, 255 Ark. 932, 504 S.W. 2d 348, but we do not agree that this case supports appellant's argument. The sole question there was whether Shelton was entitled, as a matter of right, to credit for the full time he was incarcerated, and we affirmed the circuit court's ruling that Shelton was not, as a matter of right, so entitled. It is argued, however, that language in the opinion indicates that, in a proper case, the credit would be held to be mandatory. It might be added that nothing in the *Shelton* opinion reflects that Shelton was indigent, and this is an important fact.

The case that is actually applicable to the facts here at hand is *Smith* v. *State*, 256 Ark. 425, 508 S.W. 2d 54 (1974), such case containing a comprehensive discussion of the question of when one is entitled to credit on his sentence for jail time served. Federal cases which hold that the state's refusal to give credit for pre-trial detention is an unconstitutional discrimination on the basis of wealth prohibited by the Fourteenth Amendment are listed, it being pointed out that financial inability to post bond should not cause an indigent to spend more time in confinement than one whose wealth enables him to be admitted to bail. *Smith* contains language on this point which is particularly pertinent to the case at hand, this court stating:

> "We think the result appellant seeks would be clearly indicated if he had been held in confinement before trial solely because of his indigency. But this is not the case. *Although petitioner argues vigorously that discrimination in the matter of jail-time credit because of indigency violates the Fourteenth Amendment, he does not even allege that he*

[1]See, however, *Ray* v. *State*, 256 Ark. 695, 509 S.W. 2d 830 (1974).

was unable to make bail because of indigency." [Our emphasis].

Likewise, there is no allegation in the petition in the present case that Ransom spent the 5 ½ months in jail (which he here seeks credit for) while awaiting trial because of indigency, [2] i.e., a financial inability to make the bail which had been set by the circuit court. The record only reflects that prior to the commencement of the hearing, counsel stated that petitioner wished to proceed solely upon one issue, "That the petitioner's sentence should be reduced by the 5 ½ months spent in jail awaiting trial inasmuch as the petitioner received the maximum sentence for Second Degree Murder." It is not shown whether his then counsel (at the time of the plea), a practicing attorney of Little Rock, was retained or appointed, and we reiterate that there is absolutely nothing in the record to indicate that the time spent in jail was occasioned by indigency.

Accordingly, in determining this case, it is only necessary to refer to the language used in *Smith,* herein quoted.

It follows that there is no merit in the argument advanced here on appeal.

Affirmed.

BYRD, J, concurs.

[2]The only time in which the word "indigent" appears in the record is that Ransom's petition says that he is an "indigent inmate". This fact, of course, does not mean that he was indigent prior to the trial, or at the time of trial. Appellant's statement of the case includes the sentence, "Appellant's bond was reduced to Ten Thousand Dollars on the 9th day of November, 1972, but due to appellant's indigency, bond was never executed." The statement of the case, of course, is not evidence, and cannot be considered by this court. The record does not reflect that a hearing was held to reduce bond, but only that, after hearing, the bail was set at $10,000.

THE CORNER, INC *v.* STATE of Arkansas

74-87 518 S.W. 2d 506

Opinion delivered January 27, 1975

Woodward & Kinard, Ltd., for appellant.

Jim Guy Tucker, Atty. Gen., by: *Alston Jennings Jr.*, Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. The appellant, a nonprofit corporation operating a private club in Miller county, appeals from one of two companion orders that were entered by the circuit court in two cases that were consolidated for a hearing. In the first case the prosecuting attorney, under Ark. Stat. Ann., Title 34, Ch. 1 (Repl. 1962), obtained on August 23, 1973, a temporary order padlocking the club until a final hearing could be had after the 5-day notice required by Section 34-104. That case was heard on August 30, with the court entering an order that permitted the club to reopon but enjoined future violations of law upon the premises. The appellant does not question that order, which conformed to the statute, as we have construed it. *Lawson* v. *State,* 226 Ark. 170, 288 S.W. 2d 585 (1956).

The appeal is from the court's order in the companion case. The prosecuting attorney filed that complaint four days after he filed the first one. He asked that the appellant corporation be involuntarily dissolved, as a public nuisance, under Ark. Stat. Ann. § 64-1918 (e) (Repl. 1966). Only three days later, on August 30, both matters were presented to the

court, despite the appellant's insistence that it was entitled to 20 days for the filing of its answer in the second case. The court offered to postpone the hearings only upon condition that the club remain padlocked. The appellant refused to agree to that condition. The court then found that the two cases presented similar issues, that some 30 witnesses were expected to testify in each case, and that there was no need for the testimony to be heard twice. Both cases were accordingly tried together on August 30. In the second case the court entered the order now on review, dissolving the corporation as a public nuisance.

The court was in error. The second case was not a summary proceeding such as the first one. It was a plenary proceeding in which the State asked that the corporation be permanently and finally dissolved, presumably at a financial loss to its members. In such a proceeding, as in any other lawsuit, the statute allows the defendant 20 days in which to file an answer or other pleading. Ark. Stat. Ann. § 27-1135 (Repl. 1966). The cases uniformly hold that the courts cannot reduce the time allowed by the legislature for the filing of an answer. *Elum* v. *Kling,* 90 So. 2d 881 (La. App. 1956); *McCarty* v. *McCarty,* 300 S.W. 2d 394 (Mo., 1957); *Lakeland Water Dist.* v. *Onondaga County Water Authority,* 24 N.Y. 2d 400, 248 N.E. 2d 855 (1969). We took a similar position in *Henry Quellmalz Lbr. & Mfg. Co.* v. *Roche,* 145 Ark. 38, 223 S.W. 376 (1920), where, upon facts not quite like those here, we said: "The court called the case for trial before the twenty days under the statute required of Roche to answer had elapsed. This was error."

Reversed.

Wayne BRIDGES and Lamar HUGHES *v.*
STATE of Arkansas

CR 74-89 519 S.W. 2d 756

Opinion delivered January 27, 1975
[Rehearing denied March 3, 1975.]

Jeptha A. Evans, for Bridges; *William G. Wright,* for Hughes, appellants.

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

GEORGE ROSE SMITH, Justice. Wayne Bridges, Lamar Hughes, and Mike Hurst were jointly tried upon a charge of embezzlement, were found guilty, and were each sentenced by the jury to imprisonment for three years. Bridges and Hughes have appealed, arguing several points for reversal. Their most serious contention is that the State's testimony, even if accepted as true, established the offense of larceny rather than that of embezzlement. This contention must be sustained.

The offense occurred at the Rock Tavern, in the city of Paris, at about closing time on the night of March 8, 1973. Charlotte Kuykendall, an employee, was in charge of the tavern. Four customers were present: The appellants Bridges and Hughes, both age 23, their codefendant Hurst, and Sue Sims.

The proof tends to show that Charlotte asked the other four to co-operate with her in faking a robbery, in return for her promise to provide them with at least a case of free beer. The others agreed. One of the five, probably Bridges, took some $300 from the cash register and hid it outside the building. Charlotte then called the police and reported the alleged robbery.

The police arrived and evidently became suspicious, for they took all five participants to headquarters for questioning. Both appellants at first gave written statements describing an armed robbery committed by two men who came in the tavern after closing time. Both soon retracted their statements, Bridges admitting orally that the robbery had been faked and Hughes making a similar written admission. The missing money was quickly found.

The charge of embezzlement was based upon Ark. Stat. Ann. § 41-3927 (Repl. 1964), reading in part as follows:

> If any clerk, apprentice, servant, employee, agent or attorney of any private person . . . shall embezzle or convert to his own use . . . without the consent of his master or employer, any money . . . belonging to any other person, which shall have come to his possession, or

> under his care or custody, by virtue of such employment, . . . he shall be deemed guilty of larceny, and on conviction, shall be punished as in case of larceny.

The statute has been in force since 1838 and has been construed in many cases. In *Atterberry* v. *State,* 56 Ark. 515, 20 S.W. 411 (1892), an employee of a store had taken articles of clothing that were kept for sale. We held the offense to be larceny, saying that the articles "were legally in the possession of the owner, even if for a time left in the custody of the salesman; and an appropriation of them by the latter was a trespass on the possession of the former, within the meaning of the law defining larceny." That holding was reaffirmed recently in *Edwards* v. *State,* 244 Ark. 1145, 429 S.W. 2d 92 (1968), where we held that a clerk in charge of a bus station, who took money from a drawer, was properly chargeable with larceny, as he merely had custody of his employer's property.

In *Fleener* v. *State,* 58 Ark. 98, 23 S.W. 1 (1893), we held that the statutory reference to property "belonging to any other person" means any person other than the employee rather than any person other than the employer. We went on to say:

> This is not in conflict with *Powell* v. *State,* 34 Ark. 693, which was an indictment against a general household servant, who, having the custody of some tools under the superior possession of the master, appropriated the tools to his own use. This was held to be larceny, and not embezzlement, and the decision is in accord with the weight of authorities. The same authorities hold that when the servant comes into possession of the property before the master, and his possession is by reason of his relation as such servant, and he appropriates it to his own use before it comes into the possession of the master, and while yet in his possession, the fraudulent appropriation thus made is embezzlement, and not larceny. See note 98 Am. Dec. 126-129.

The rule of construction in New York, Missouri

and Minnesota, and perhaps other States, is considered necessary in order that there be not a hiatus in the law, as there would otherwise seem to be.

The crime of embezzlement is purely statutory and is separate and distinct from larceny. *Compton* v. *State,* 102 Ark. 213, 143 S.W. 897 (1911). In *Hall* v. *State,* 161 Ark. 453, 257 S.W. 61 (1923), we sustained the State's right to allege separate counts of larceny and embezzlement arising from the same transaction, where it might be doubtful which would be established by the proof. In that connection we said:

> Larceny and embezzlement belong to the same family of crimes. If the actual or constructive possession of the property was in the owner, then the wrongful conversion would be larceny, and not embezzlement. There must be lawful possession in the defendant at the time of the conversion to constitute embezzlement. The distinguishing feature of embezzlement is that the taking essential to larceny is not required, a breach of trust taking its place.

In the case at bar the possession of the property, as in *Atterberry* and *Edwards,* seems to have been that of the owner, the employee having mere custody. Consequently the State's proof established larceny, rather than embezzlement as charged in the information. The Attorney General is mistaken in arguing that the appellants waived the point now at issue by not objecting to the information. The information was not fatally defective; it simply charged the wrong offense, in the light of the subsequent proof. The defendants were under no duty to alert the prosecution to that possibility.

On the other hand, we cannot sustain the contention, argued by Hughes, that the evidence is insufficient because *(a)* Hughes had no position of trust with regard to the money and *(b)* Charlotte Kuykendall did not physically take the money from the cash register. If, as the State's proof tended to show, all five of those present, in return for a promised reward, abetted Charlotte by agreeing to conceal the truth, they were guilty as principals under Ark. Stat. Ann. § 41-118.

Hughes also argues that the trial court erred in refusing to grant his repeated requests for a separate trial. The original pretrial motion for a severance was properly denied, as no basis for the motion was then shown. During the trial, however, it developed that Hughes's counsel was handicapped in his cross-examination of the officers, because the court refused to allow the jury to consider in Hughes's defense certain admissions by the other participants that were detrimental to Bridges. Problems also arose concerning cross-implicating confessions. *Grooms* v. *State,* 251 Ark. 374, 472 S.W. 2d 724 (1971); *Mosby and Williams* v. *State*, 246 Ark. 963, 440 S.W. 2d 230 (1969). In view of those circumstances a severance should be granted if the cases are retried.

We need not discuss the appellants' other contentions, for they involve matters not apt to arise upon retrial.

Reversed and remanded for further proceedings.

JONES, J., dissents.

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

When *Fleener* v. *State,* 58 Ark. 98, 23 S.W. 1, was decided in 1893, the statute was subject to strict construction then as it is now. In *Fleener* we held that the statutory reference to property "belonging to any other person" means any person other than employee rather than any person other than employer. The decision in *Fleener* was predicated upon the logical reasoning reflected in *Powell* v. *State,* 34 Ark. 693, and it is my opinion the reasoning in *Powell* is still sound. The *Powell* decision was based on the weight of authority holding that:

> "[W]hen the servant comes into possession of the property before the master, and his possession is by reason of his relation as such servant, and he appropriates it to his own use before it comes into the possession of the master, and while yet in his possession, the fraudulent appropriation thus made is embezzlement, and not larceny."

The majority apparently rely on our decision in *Atterberry* v. *State,* 56 Ark. 515, 20 S.W. 411, where in *sustaining* a conviction for larceny of goods by a clerk in a store who had authority to sell them, we said:

> "They [the goods] were legally in the possession of the owner, even if for a time left in the custody of the salesman, and an appropriation of them by the latter was a trespass on the possession of the former, within the meaning of the law defining larceny."

In *Atterberry* the defendant was *charged* with larceny. This court in *Atterberry* pointed out:

> "The articles taken were kept for sale by their owner in a store in which E. C. McBel had authority to be present and sell the goods. They were legally in the possession of the owner, even if for a time left in the custody of the salesman. . . ."

The appellants in *Atterberry* objected to an instruction given by the trial court pertaining to the appellants as accessories to larceny and in refusing to charge the jury that:

> "In larceny the larceny is complete the moment the goods are taken in possession by the person stealing same; and that if, after that, one receives the goods knowing them to have been stolen, this, of itself, could not constitute the crime of larceny on the part of one so receiving them."

The question before this court in *Atterberry* was stated as follows:

> "The appellant alleges as a ground for reversal that the verdict is not supported by the evidence. In determining it we are called to decide whether the evidence warranted a finding that he was guilty of any offense, and if so, whether it was larceny, or some other crime, as embezzlement or receiving stolen property."

The above statement by the court is the only place in *Atterberry* where the word embezzlement appears.

Assuming that the appellants in *Atterberry* argued that the evidence was directed to the crime of embezzlement rather than to larceny, the crime charged; the appellants in *Atterberry* would have been contending the reverse of what the appellants contend in the case at bar. In the case at bar the appellants contend, and the majority so hold, that the crime charged was embezzlement and that the crime proved was larceny. In *Atterberry* we affirmed the judgment and in the case at bar the majority have reversed.

In the case at bar the employee or servant was not one who merely "had authority to be present and sell goods." While the servant in the case at bar did have authority to be present and sell beer, she had the more responsible and apparently the exclusive authority over the cash register and possession and control of its contents. She ran the place for her employer. It was not the beer that was stolen from the premises in this case; it was the cash from the cash register that was embezzled. In *Atterberry* this court did not say a conviction for embezzlement would not have been sustained under the evidence in that case if the indictment had charged embezzlement rather than larceny. Certainly we did not say that the judgment would have been reversed had embezzlement been charged and the conviction was based thereon.

In the case at bar I do not contend the judgment should have been reversed if larceny had been charged and the appellants had been convicted for larceny. It is simply my contention that the judgment in this case should not be reversed and the state put to the expense of another trial under the pleadings and evidence in this case. In other words, I would affirm the judgment under the charge of embezzlement on the evidence of record in this case. I do not say I would not have affirmed a conviction for larceny under the evidence in this case had the appellants been charged with the crime of larceny.

I would affirm.

SOUTHWESTERN ELECTRIC POWER CO.
& BEAVER WATER DISTRICT *v.*
Ted P. COXSEY, Chancellor

74-216 518 S.W. 2d 485

Opinion delivered January 27, 1975

Richard L. Arnold, G. William Lavender, Leonard Greenhaw and *Walter R. Niblock*, for petitioners.

James F. Dickson, for Amicus Curiae, Carroll Electric Cooperative Corp.

LYLE BROWN, Justice. Carroll Electric Cooperative Corporation (Carroll) filed a petition for declaratory judgment. The defendants, appellants here, were Southwestern Electric Power Company (Swepco) and Beaver Water District (Beaver). It was alleged that Swepco was furnishing electric

energy to Beaver and that such territory being serviced came under a certificate of convenience and necessity issued by the Arkansas Public Service Commission (APSC) to Carroll. The defendants demurred to the complaint, contending that the APSC had exclusive jurisdiction of the matter. The demurrers were overruled and Swepco and Beaver come to this court seeking a writ of prohibition directed to the Benton County Chancery Court. It is agreed that the single issue before us is whether APSC is the exclusive forum for the resolution of the dispute.

Carroll is a cooperative organization engaged in the sale of electric energy to its members in Benton County and surrounding areas. It operates in areas allocated to it by APSC. Swepco is in the same business in an area roughly described as the western one-fourth of the State, including certain allocated areas in Benton County. Beaver is a water district chartered by the Circuit Court of Benton County. It impounds, transmits and sells water to various municipalities in northwest Arkansas.

The APSC, several years ago, awarded to Carroll a certificate of convenience and necessity to serve consumers in Sections 4, 5, 6, 7, and 8 in Township 18 north, range 29 west in Benton County. In that area are located water pumps and a water treatment plant belonging to Beaver. In 1972 an electric service contract was executed between Swepco and Beaver. The contract provided for electric service at an existing point of connection located outside the described sections and in Swepco's allocated territory. From that point the electricity would run over lines belonging to Beaver and into the area we have described as being allocated to Carroll. The energy so transferred would serve Beaver's water pumps and water treatment plant. It was the described contract and the service thereunder that generated the complaint filed by Carroll.

In support of its contention APSC is vested with exclusive authority in the matter before us, Swepco relies substantially on several statutes. The first citation is Ark. Stat. Ann. § 73-201 (d), (d) 1, and (d) 2 (Supp. 1973). It is contended that those statutes support the proposition that all

three parties to this litigation are public utilities. We are next referred to the powers and duties of the APSC as reflected in Ark. Stat. Ann. § 73-202 (a) (Repl. 1957). That statute makes it the duty of the APSC to "supervise and regulate every public utility in this Act defined, and to do all things, whether herein specifically designated, that may be necessary or expedient in the exericse of such power and jurisdiction, or in the discharge of its duty". It is next pointed out that complaints against utilities shall be made in writing to the APSC "setting forth any act or thing done or omitted to be done by any public utility . . . ." Ark. Stat. Ann. § 73-216 (Repl. 1957). It is contended that 73-216 and rules adopted by the APSC provide a full and complete procedural scheme for the filing, hearing, and determination of complaints. Statutorywise it is finally pointed out that the law makes it the duty of the APSC to bring suit against any person or corporation in violation of the Act, Ark. Stat. Ann. § 73-235 (Repl. 1957).

Petitioners, Swepco and Beaver, rely heavily on our case of *Southwestern Gas and Electric Co.* v. *City of Hatfield,* 219 Ark. 515, 243 S.W. 2d 378 (1951). The final determination to be made in that case was which of two competing electrical companies would in the future serve the electric distribution systems in the towns of Hatfield and Cove. The case was naturally before the APSC because it involved the sale of a utility, which action is required by statute to first gain the approval of APSC, Ark. Stat. Ann. § 73-253 (Repl. 1957). The primary question — in fact the only question — raised by Carroll in the instant suit is whether, under existing certificates from the APSC, it has the exclusive legal right to service Beaver. The legislative and administrative duties of APSC were exercised when the certificates were awarded. Carroll is saying: "We hold an exclusive franchise from the APSC to service the area upon which Swepco has encroached. We want Swepco ejected."

Justice Millwee, in the *Hatfield* case, affords a thorough and scholarly treatment of the problem before us. We think the rule in *Hatfield* can be succinctly paraphrased. The APSC is a creature of the Legislature and its duties are primarily legislative and administrative; it is not a judicial body. However, when the final act in a given case before the Com-

mission is legislative, that body is empowered to determine legal questions *which are incidental and necessary to the final legislative act.* In the case before us the end result would determine, as argued by Swepco and Beaver, which electrical corporation would serve Beaver; however, that result would hinge on the court's interpretation of the franchises already in existence. Of course the judgment of the Commission, if unfavorable to Swepco, would not prohibit any interested party from seeking legislative action by APSC to reallocate the territory. In oral argument Swepco advanced the theory that a judgment unfavorable to it might be res judicata as to such relief, but we do not agree, Ark. Stat. Ann. § 73-230 (Repl. 1957).

Since we conclude that the legal principles enunciated in *Hatfield* control our conclusion here, we see no point in analyzing every citation of authority. Furthermore, we have carefully considered those cases and conclude that they are not particularly helpful.

In *Prentiss* v. *Atlantic Coastline Company,* 211 U.S. 210 (1908) is recited by Justice Holmes a clear distinction between legislative and judicial powers as it applies to public utilities administrative bodies. We approved the quotation in *Hatfield*:

> A judicial inquiry investigates, declares, and enforces liabilities as they stand on present or past facts and under laws supposed already to exist. That is its purpose and end. Legislation, on the other hand, looks to the future and changes existing conditions by making a new rule, to be applied thereafter to all or some part of those subject to its power.

In the case at bar the APSC has already fulfilled its legislative and administrative duties by making a determination awarding the area which includes Beaver to Carroll. The latter now seeks to get that order enforced. That is a judicial function. In fact, the Legislature contemplated there would at times be need for court action to enforce APSC orders. The statute, Ark. Stat. Ann. § 73-235 (Repl. 1957) authorizes the APSC to take such court action. That authority is certainly not exclusive of the fundamental right of a certificate holder

to likewise resort to the court for the enforcement of its rights under an existing certificate.

Petition denied.

James H. COLEMAN *v.* STATE of Arkansas

CR 74-133 518 S.W. 2d 487

Opinion delivered January 27, 1975

Harold L. Hall, P.D., by: *Robert L. Lowery*, Deputy, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Gary Isbell*, Asst. Atty. Gen., for appellee.

JOHN A. FOGLEMAN, Justice. Appellant James H. Coleman sought credit for time spent in pretrial incarceration by petition for postconviction relief under Criminal Procedure Rule 1. Credit was denied by the circuit court which sentenced him. We affirm.

Coleman was found guilty of robbery by a jury on October 12, 1973, and sentenced to five years in the Department of Corrections pursuant to the jury verdict. He contended that since the sentence was imposed by the jury, the conclusion that he was denied credit for time spent in jail prior to his trial is inescapable. Yet we have no means of knowing whether the jury was aware of the time he had spent in jail.

The trial judge found that appellant was first confined on the charge of robbery on March 30, 1973, that bail was fixed at $5,000, but that appellant remained in confinement until the date of his trial, and held that he was not entitlted to credit for this time spent in jail. Coleman testified that he was unable to make bond because he did not have the money and had no property to put up as security for bail. The judge noted that the record disclosed the following: on May 7, 1973, Coleman's case was passed to enable him to employ a lawyer; on May 15, the public defender was appointed to represent him; on June 4, Coleman entered a plea of not guil-

ty and waived trial by jury, whereupon the case was set for trial before the court without a jury on July 18; on July 16, the case was passed until September for setting, on motion of Coleman; and on August 29, the case was set for jury trial on October 12.

Our statute on the subject provides that the matter of allowing credit for time spent in pre-trial incarceration is addressed to the discretion of the trial court. Ark. Stat. Ann. § 43-2813 (Supp. 1973). We held in *Shelton* v. *State*, 255 Ark. 932, 504 S.W. 2d 348 that when the sentence imposed plus the time spent in jail awaiting trial did not exceed the maximum penalty, a prisoner is not entitled as a matter of right to credit for the full time spent in jail. As we recognized, however, in *Smith* v. *State*, 256 Ark. 425, 508 S.W. 2d 54, constitutional standards prevent the exercise of this discretion when it results in an accused's being held in jail awaiting trial solely because of his indigency. Of course, it seems clear that appellant was endeavoring to employ a lawyer and first asserted his indigency after his case was passed to enable him to do so. And then, after having waived trial by jury, he withdrew his waiver on the eve of trial, and demanded trial by jury, resulting in the necessity of a resetting and the delay occasioned thereby. It can be plainly seen these delays were not due solely to his indigency, and the allowance of credit on his sentence for whatever time elapsed because of his actions certainly was discretionary with the trial court. It seems possible however, that some of his pretrial incarceration may have been due solely to his indigency.

There is nothing in the record to indicate that Coleman ever sought credit for his jail time in the trial court. Postconviction relief is not available to an accused who could have asserted the ground of his attempted collateral attack in the trial court before sentence was pronounced, but did not. *Johnson* v. *State,* 253 Ark. 1, 484 S.W. 2d 92; *Murphy* v. *State,* 255 Ark. 398, 500 S.W. 2d 394; *Clark* v. *State,* 255 Ark. 13, 498 S.W. 2d 657; *Cooper* v. *State,* 249 Ark. 812, 461 S.W. 2d 933, *Ballew* v. *State,* 249 Ark. 480, 459 S.W. 2d 577; *Cox* v. *State,* 243 Ark. 60, 418 S.W. 2d 799.

Our statutes cover sentencing procedures very

thoroughly. See Ark. Stat. Ann. §§ 43-2301 - 2305 (Repl. 1964, Supp. 1973). Of course, there is a presumption of regularity attendant upon every judgment of a court of competent jurisdiction. *Norrell* v. *Coulter,* 218 Ark. 870, 239 S.W. 2d 280; *Cutsinger* v. *Strang,* 203 Ark. 699, 158 S.W. 2d 669; *Stumpff* v. *Louann Provision Co.,* 173 Ark. 192, 292 S.W. 106; *Hooper* v. *West,* 138 Ark. 289, 211 S.W. 143. This strong presumption of validity applies to criminal convictions and sentences, which entitles them to every reasonable intendment in their favor. *State* v. *Plum,* 14 Utah 2d 124, 378 P. 2d 671 (1963); *State* v. *Superior Court,* 82 Ariz. 237, 311 P. 2d 835 (1957); *State* v. *Cowan,* 25 Wash. 2d 341, 170 P. 2d 653 (1946); *Paul* v. *State,* 177 S. 2d 537 (Fla. Ct. App. 1965); *People* v. *Tannehill,* 193 C.A. 2d 701, 14 Cal. Rptr. 615 (1961); *People* v. *Crispell,* 60 N.Y.S. 2d 85, 185 Misc. 800 (1945. See also, *Smith & Parker* v. *State,* 194 Ark. 1041, 110 S.W. 2d 24; 24 CJS 656, Criminal Law, § 1605 (7). In the absence of any showing to the contrary, it will be presumed that a sentence is pronounced and that the circuit court did its duty according to the statutes unless the failure to do so appears upon the face of the record. *Brickey* v. *State,* 148 Ark. 595, 231 S.W. 549; *Brown* v. *State,* 13 Ark. 96. See also, *Morrison* v. *State,* 159 Ark. 323, 251 S.W. 873.

After a jury verdict has been returned, §§ 43-2301, 2303 require that the court must ask the defendant if he has any legal cause why the judgment shall not be pronounced according to the verdict. The privilege is commonly known as the right of allocution. Even when the record is silent, it is to be assumed that such a statute was followed by the trial court, in the absence of evidence showing that it was not. *Nahas* v. *State,* 199 Ind. 117, 155 N.E. 259 (1927); *State* v. *Hunter,* 82 S.C. 153, 63 S.E. 685 (1909). See also, 1 Freeman on Judgments (5th ed.) 830. On collateral attack, the burden of showing non-compliance with such a statute is upon the accused. *People* v. *Sheehan,* 4 A.D. 2d 143, 163 N.Y.S. 2d 313 (1957); 24 CJS 656, Criminal Law § 1605 (7). See also, *State* v. *Terry,* 98 Kan. 796, 161 P. 905 (1916). In this case, it does not appear from the face of the record, and there is certainly no evidence to show, that the court did not afford to appellant the opportunity to ask for credit for his jail time prior to sentencing or that any objection was ever offered to the pronouncement of

the sentence without crediting the pretrial jail time against the term imposed by the jury.

Since the appellant has failed to make the required showing, the judgment is affirmed.

Curtis HAYNIE *v.* STATE of Arkansas

CR 74-130 518 S.W. 2d 492

Opinion delivered January 27, 1975

Forest A. Newcomb, attorney for inmates, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Michael S. Gorman,* Asst. Atty. Gen., for appellee.

FRANK HOLT, Justice. A jury found appellant guilty of robbery and also that the robbery was committed with the use of a firearm. On appeal, appellant only challenges the validity of the 15 year sentence which was imposed by the court for the use of a firearm in the commission of the robbery. Appellant first asserts, through present court appointed counsel, there is no substantial evidence to support the jury's finding that a firearm was used in the commission of the felony.

On appellate review, in determining the sufficiency of the evidence, it is well established that we ascertain that evidence which is most favorable to the appellee and affirm if any substantial evidence exists. *Williams* v. *State,* 257 Ark.

8, 513 S.W. 2d 793 (1974). In the case at bar, the 90 year old robbery victim testified that appellant and one of his two companions forcibly took his billfold and a small gun from his back pocket. He identified appellant, the only one of the trio on trial, as holding the pistol on him. The victim further testified that he was hit in the head with the pistol or something that was "iron." Certainly, this evidence alone amply supports the jury's finding that appellant employed a firearm as a means of committing the robbery.

Appellant next contends that the trial court erred in imposing a sentence for the use of a firearm during the commission of a felony instead of allowing the jury to set the sentence. The jury returned a verdict of guilty of robbery and fixed appellant's punishment at 21 years imprisonment. At the same time, in response to an interrogatory, the jury affirmatively found that the robbery was committed with the use of a firearm. Thereupon, the court assessed an additional 15 year sentence which is authorized by Ark. Stat. Ann. § 43-2336 (Supp. 1973). The sentence was made consecutive which is required by § 43-2337. Appellant correctly argues that any punishment for violation of this statute should be set by the jury and not by the court and is contrary to our decisions: *Johnson* v. *State* 249 Ark. 208, 458 S.W.2d 409 (1970); *Redding* v. *State,* 254 Ark. 317, 493 S.W. 2d 116 (1973); and *Cotton* v. *State*, 256 Ark. 527, 508 S.W. 2d 738 (1974). However, we find no merit in this contention since no objection was made to the court's action. Consequently, the issue cannot now be raised for the first time on appeal. Ark. Stat. Ann. § 43-2725.1 (Supp. 1973); *Ford* v. *State,* 253 Ark. 5, 484 S.W. 2d 90 (1972); *Robinson* v. *State*, 256 Ark. 675, 509 S.W.2d 808 (1974); and *Williams* v. *State, supra.*

Appellant next contends that the information did not properly charge him with the use of a firearm in the commission of a felony in violation of § 43-2336, *supra.* Therefore, the court erred in submitting that issue to the jury. The robbery information, in pertinent part, reads:

> The said defendant on the 12th day of January, 1974, in Jefferson County, Arkansas, did then and there wilfully, unlawfully, feloniously, violently and by force and in-

> timidation, *armed with a pistol,* take approximately $125.00 in money, the property of David Montague. . . . . (Emphasis ours.)

In *Johnson* v. *State, supra,* we found two procedural defects, one of these being that "the use of a firearm was not alleged in the information." In *Redding* v. *State, supra,* the opinion recites that the defendant was charged with the "crime of robbery with the use of a firearm." There we said that the procedural defect of not alleging in that information the use of a firearm did not exist. In the case at bar, even though the use of a firearm was not alleged as a separate count or paragraph, a casual reading of the information reflects that it unambiguously asserts and gives notice to appellant that the robbery was committed by the use of a firearm. By Initiated Act #3 of 1936, Ark. Stat. Ann. § 43-1006, § 43-1008 (Repl. 1964), which relaxed the common law technical pleading requirements, it is only necessary to name the offense and the defendant in charging an offense and it is unnecessary to state the acts constituting the offense "unless the offense cannot be charged without doing so." *Henderson* v. *State,* 255 Ark. 870, 503 S.W.2d 889 (1974); and *Estes* v. *State,* 246 Ark. 1145, 442 S.W.2d 221 (1969). See also *Thompson* v. *State,* 205 Ark. 1040, 172 S.W.2d 234 (1943). Here the information was certain as to the name of the court, the county in which the alleged offense was committed, the defendant's name and the name of the offense: i.e., robbery. It was unnecessary to allege the acts constituting the offense of robbery. However, the information stated with certainty that the robbery was committed with the use of a firearm. We hold the information sufficient. Furthermore, the record here reveals no objection to the information or the manner of the submission of the issue, the use of a firearm, to the jury. As indicated previously, the issue cannot be raised for the first time on appeal.

Moreover, if appellant's counsel construed the words "armed with a pistol" in the information as being descriptive rather than constituting a possible enhancement of sentence, he certainly was apprised sufficiently when the court submitted the interrogatory to the jury as to whether the alleged offense was committed by the use of a firearm. Although we hold the information sufficient, the better practice would be

that the allegation of the use of a firearm be worded with greater specificity to obviate the argument in a case such as the one at bar.

Appellant finally asserts for reversal he was denied effective assistance of counsel because appointed counsel failed to object to the procedure used in charging (the information) and imposing the sentence for the use of a firearm in the commission of a felony. As previously discussed, we are of the view the information sufficiently informed the appellant of the charge of using a firearm, which by statute results in an enhancement of a sentence upon a robbery conviction. § 43-2336, *supra.* As to the court's imposition of the additional sentence following the jury's finding, in answer to an interrogatory, that a firearm was used by the appellant, he correctly asserts, as previously discussed, that this did not comport with the procedure prescribed in *Redding* v. *State, supra,* and *Cotton* v. *State, supra.* However, as appellant acknowledges, it is necessary to object to the court's action and when no objection is made, as here, the issue cannot be raised for the first time on appeal. We recognize that our federal constitution mandates that the defendant have the benefit of effective assistance of counsel. *Franklin and Reid* v. *State,* 251 Ark. 223, 471 S.W.2d 760 (1971). However, we have held that the defendant shoulders the burden of demonstrating that his counsel's alleged incompetence constituted prejudicial error and, further, the mere showing of "errors, omissions or mistakes, improvident strategy, or bad tactics" is not alone sufficient. Counsel is accorded a broad latitude in exercising his judgment for a client's defense. *Leasure* v. *State,* 254 Ark. 961, 497 S.W.2d 1 (1973); *Clark* v. *State,* 255 Ark. 13, 498 S.W.2d 657 (1973).

In *Leasure* v. *State, supra,* we said:

> [W]e will presume, in the absence of a contrary showing, that: a duly licensed, appointed attorney is competent; a charge of inadequate representation can prevail only if the acts or omissions of an accused's attorney result in making the proceedings a farce and a mockery of justice, shocking the conscience of the court, or the representation is so patently lacking in competence or

> adequacy that it becomes the duty of the court to be aware of and correct it.

See also *Credit* v. *State,* 247 Ark. 424, 445 S.W.2d 718 (1969); and *Poole* v. *United States,* 438 F.2d 325 (8th Cir. 1971); and *Slawek* v. *United States,* 413 F.2d 957 (8th Cir. 1969). The strategy and tactics used during a trial involve the elements of trial counsel's discretion and judgment, which very well might be such that skilled and experienced counsel would honestly disagree. *Johnson* v. *State, supra.*

In the case at bar, we cannot say that the appellant, through his counsel, could have been unaware of the possible enhancement of his sentence by the use of a firearm which was alleged in the information. Neither can we say confidently that the failure of appellant's counsel to object to the additional punishment for the use of the firearm demonstrated a farce and a mockery of justice. It could very well be, inasmuch as the jury had imposed the maximum sentence for robbery, that the strategy and judgment of appellant's counsel was dictated by the belief the trial court would, most likely, be more lenient in the imposition of a sentence for the use of a firearm than would the jury. Certainly, it is not for us to say this was improvident strategy.

Appellant urges us to abandon our standard or test of competence of counsel and adopt the "reasonably competent" attorney standard which a few other jurisdictions, the cases from which are cited, follow. This we decline to do. If we should do so, we think it would result in disrupting the established function of a trial judge. The lawyer's part in a trial is adversary advocacy. The part of the judge is impartiality to insure fairness and delineate the law. "It is no part of the judge's function to evaluate the relative efficacy of trial tactics" which "would destroy the concept of an impartial judge, a concept basic to our system." *Mitchell* v. *United States,* 104 U.S. App. D.C. 57, 259 F.2d 787 (1957), cert. denied, 358 U.S. 850, 79 S.Ct. 81, 3 L.Ed.2d 86 (1958). There it was recognized the supervision by a judge of trial counsel's judgment upon tactical problems could very well invade the accused's constitutional right to the assistance of counsel. To the same effect is *Leasure* v. *State, supra.* Suffice it to say,

however, that under either standard, in the case at bar, we cannot say that appellant was denied effective assistance of counsel.

Affirmed.

SMITH, BROWN, and BYRD, JJ., concur.

GEORGE ROSE SMITH, Justice, concurring. Owing to the absence of proper objections in the trial court I concur in the result, but I do not agree with the majority's conclusion that the information was sufficient to charge the offense of robbery with a firearm. The majority have not quoted the charging sentence of the information, by which the prosecuting attorney accused "Curtis Haynie of the crime of robbery committed as follows. . ." The word "firearm" was not used at all, which distinguishes this case from *Redding* v. *State,* where the defendant was accused of "the crime of robbery with the use of a firearm."

In the case at bar the information, in giving the details of the crime, did state that the defendant was armed with a pistol. That detail was not an essential part of the information. In fact, in *Ridgeway* v. *State,* 251 Ark. 157, 472 S.W. 2d 108 (1971), the information, in charging an assault with intent to kill, stated that the assault had been made with a deadly weapon, namely, a knife. The proof, however, showed that the defendant had committed the assault by shooting the prosecuting witness twice with a pistol. We affirmed the conviction, rejecting the argument that there was a fatal variance between the information and the proof. Hence in the case at bar the prosecution could have obtained a conviction by showing that the robbery was committed with a knife or even with no weapon at all.

If the State intends to subject the accused to the possibility of fifteen years' additional confinement because a firearm was used, the information ought to be explicit in making that intention clear. That is, the information ought to charge robbery committed with the use of a firearm. Certainly a rule to that effect would impose no burden whatever upon the prosecuting attorney, but it would unmistakably in-

form the accused of the precise offense being charged. Surely that is the minimum to which he is entitled.

Billy Nathan NORTHERN, Jr. *v.*
STATE of Arkansas

CR 74-134 518 S.W. 2d 482

Opinion delivered February 3, 1975

Rubens & Rubens, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Sam I. Bratton Jr.,* Asst. Atty. Gen., for appellee.

CARLETON HARRIS, Chief Justice. Appellant, Billy Nathan Northern, Jr., was charged by felony information with the crime of robbery with a firearm. On trial, after the jury had been instructed on the various degrees of the crime, it returned a verdict of guilty of the misdemeanor crime of petit larceny and assessed Northern's punishment at one year in the county jail. From the judgment entered in accordance with the verdict, appellant brings this appeal. For reversal, four points are asserted, *viz.*,

"I.

THE COURT ERRED IN ADMITTING APPELLANT'S STATEMENT WHEN THE STATE FAILED TO SATISFACTORILY EXPLAIN THE ABSENCE OF RAYMOND GAIA.

II.

THE COURT ERRED IN ALLOWING THE PROSECUTING ATTORNEY TO QUESTION DEFENDANT ABOUT THE VARIOUS CRIMES FOR WHICH HE WAS CHARGED.

III.

THE COURT ERRED IN NOT ALLOWING DEFENDANT'S ATTORNEY TO VOIR DIRE THE JURY ON THE SECOND DAY OF THE TRIAL AFTER IT WAS LEARNED THAT LOCAL PAPERS HAD PRINTED ARTICLES WHICH WERE READ BY SOME OF THE JURORS WHICH STATED THAT DEFENDANT WAS CHARGED WITH FOUR FELONIES.

IV.

IN THE EVENT THAT THE LOWER COURT'S JUDGMENT IS AFFIRMED, APPELLANT SHOULD BE GIVEN CREDIT FOR THE TIME HE REMAINED IN JAIL AWAITING TRIAL."

We proceed to discuss these points in the order listed.

I.

Appellant specifically objected to the introduction of his confession wherein the robbery was admitted, but the objection was overruled. Appellant, a diabetic, contended he was not involved and that he only confessed after he was denied his insulin for a great period of time. According to appellant, after he was arrested by West Memphis police officers, he was taken to the police headquarters in West Memphis and questioned by Officers R. G. Martin and Raymond Gaia. During the in-chambers hearing on the voluntariness of the confession, Northern stated, *inter alia,* that he was denied the use of a telephone to call a lawyer, missed breakfast because of being fingerprinted, and was thereafter questioned relative to the robbery. He said that he asked Martin to obtain his insulin for him because he was getting sick, and needed something to eat, but the officer replied that he (appellant) had to "go to the lineup first". He was then taken to Marion to the county jail for the lineup, after which he asked Detective Captain Gaia if he could have his insulin, but was advised that he could not until the investigation was over. Appellant was then taken back to the police station and the interrogation relative to the robbery was resumed. He said that he reached for a telephone to call a lawyer and also to call his father to obtain his insulin, but Gaia "slapped my hand down." According to his testimony, he was taken back to his cell, was getting very sick, "puking", and shaking; Gaia called him back and took him to his office; Gaia was the only person present at that time. Northern was again questioned, told that in order to get his insulin, obtain a lower bond, and make it easier on himself, he had best cooperate. He said he vomited in the bathroom, was sick at his stomach, dizzy, and completely exhausted. Appellant stated that he decided the only way he would get out was to write a statement as requested.

Northern said that he wrote on the paper as dictated by Officer Gaia, but that what he wrote was not true.

Donald Glover Sharp, who was being held in the jail at

Marion on a charge of possession of marijuana and no driver's license, testified that he was in the lineup with Northern and heard the latter ask Gaia if he could make a phone call because he needed his "shot" and that Gaia replied, "After the investigation."

Sergeant Martin testified that appellant was questioned by himself and Captain Gaia at the same time and that, to his knowledge, Gaia never talked to Northern by himself. He stated that Northern did not try to use the phone and was not mistreated in any manner, nor promised any reward or leniency in return for a confession. The officer said that he learned Northern was a diabetic when the latter commenced writing his statement and at that time the prisoner stated, "Excuse me. I am a diabetic, and I am nervous." Martin said that Gaia asked appellant if he wanted to call somebody and received the reply, "No, I can wait until I get to Marion." The court held the confession to be voluntary and accordingly admissible. Officer Martin then reiterated this testimony before the jury, reciting that both he and Captain Gaia were present the entire time, and that Northern was never present with just Gaia. Gaia did not testify.

Counsel for appellant contended, and contends here, that in order to establish the voluntariness of the confession, it was essential for the state to either place Gaia on the witness stand, or give a satisfactory reason why he was not testifying. The court asked counsel if he (defense counsel) had subpoenaed Gaia, stating that defense counsel had the same right as the state, and if he wanted the testimony, he could have taken the deposition. Counsel contended that it was up to the state to produce the witness, and not the defendant. Appellant was correct. In *Smith* v. *State*, 254 Ark. 538, 494 S.W. 2d 489, we pointed out that under our case law, there is a presumption that an in-custody confession is involuntary and the burden is on the state to show the statement to have been voluntary, i.e., freely and understandably made without hope of reward or fear of punishment. See also *Mitchell* v. *Bishop, Supt.*, 248 Ark. 427, 452 S.W. 2d 340. In *Smith* v. *State*, 256 Ark. 67, 505 S.W. 2d 504 (1974), we stated that whenever an accused offers testimony that his confession was induced by violence, threats, coercion or offers of reward,

the burden is on the state to produce all material witnesses who were connected with the controverted confession or give adequate explanation for their absence. Accordingly, in the case before us, under the testimony of Northern, it was necessary that the state offer Gaia as a witness or give an adequate explanation for his not being present. We do not think this was done. Martin testified that Captain Gaia was no longer with the West Memphis Police Department, having resigned two or three months earlier. He said that Gaia was still in town two weeks after he resigned, and that he understood that Gaia was in Crystal Springs, Florida, but did not know exactly where Gaia could be located. The state's attorney, at the time of defense counsel's objection, stated that the state could bring witnesses to testify that efforts had been made to locate Gaia if the court deemed it necessary; further, that the state had an affidavit from Gaia's wife to the effect that she didn't know where he could be found, and had no means of locating him. From other remarks between counsel at the time, it is apparent that appellant's counsel had already indicated to the state that Gaia's testimony would be important.

While counsel for the state said that he could bring witnesses into court to testify to efforts made to locate Gaia, this was not done; nor was the affidavit from the wife filed with the court. In addition, the record reflects that no subpoena was issued for Gaia, although in another criminal case against another defendant, set for the next day, a subpoena had been issued for Gaia. Accordingly, as far as Gaia's whereabouts are concerned, the record only reflects that he might be located in Crystal Springs, Florida, and there is nothing in this record (except the statements of the state's attorneys) to indicate whether the state had made an effort to locate this witness. Of course, the fact that Gaia had been subpoenaed in another case for the very next day but was not subpoenaed in the Northern case indicates that the state never had any intention of using Gaia in the case presently before us.

Under the holdings in the two *Smith* cases, the Crittenden County Circuit Court committed error, and this error will necessitate a reversal.

II.

The questions asked by the prosecution, to which the appellant objected, did not refer to any charge against Northern; rather, appellant was simply asked if he had robbed certain persons on particular dates. The answer in each instance was in the negative. No error was committed. See *Moore* v. *State*, 256 Ark. (April 8, 1974), 507 S.W. 2d 711, and cases cited therein.

III.

This point is not likely to arise on a re-trial and accordingly there is no need for discussion.

IV.

Since appellant's conviction is being reversed, this point becomes moot and requires no discussion.

Because of the error set out under Point I, the judgment is reversed and the cause remanded.

Iris CORISTO & Don CORISTO *v.* THE TWIN CITY BANK, Melvin L. HUFFMAN, Individually and as Executor of the Estate of Gladys CLEMENTS, deceased

74-183 520 S.W. 2d 218

Opinion delivered February 3, 1975
[Supplemental opinion on Denial of Rehearing April 14, 1975, p. 563-A.]

Ray & Donovan, for appellants.

Wallace, Hilburn & Wilson, Ltd. and *E. L. Schieffler* and *Harvey L. Yates*, for appellees.

JOHN A. FOGLEMAN, Justice. This appeal involves the question whether a certain bank savings passbook account designated as a joint account with right of survivorship could be withdrawn by one of the depositors. The chancery court held that it could, under the circumstances prevailing in this case. We agree.

The account had its inception in the deposit of $10,000 of the proceeds of a policy of life insurance of which Gladys Clements was the beneficiary. Mrs. Clements endorsed the insurance company check for $12,000 and turned it over to her daughter Iris Coristo, who took it to The Twin City Bank on November 7, 1969, and made the deposit, after having deposited $2,000 of the proceeds in her own checking account to apply toward the cost of adding a bedroom to the Coristo dwelling house to provide living quarters for Mrs. Clements. Mrs. Coristo took the signature card for the account to her home after having made the deposit. There Mrs. Clements and Mrs. Coristo's husband, Don, signed the card and it was returned to the bank. On the face of the card there were stamped these words:

> Receipt is hereby acknowledged of Pass Book 49 Rules and Regulations, the terms of which are agreed to.

The account designation read, "Gladys Clements or Don Coristo or Iris Coristo". Upon this designation, of course, it was clear that any of the parties might have made withdrawals from the account unless a written notice restricting that right was given or unless the passbook terms prevented this being done.

Mrs. Clements did go to the bank on August 30, 1971,

and withdraw the entire account and place it in an account designated as "Mrs. Gladys Clements (only)". On February 24, 1972, she executed a signature card endorsed "Change my (savings) account to a joint account with right of survivorship styled 'Gladys Clements or Melvin L. Huffman'. On that card the account designation was "Gladys Clements or Melvin L. Huffman". The bank changed the account as designated and assigned the same number to it as that previously assigned to the joint account with the Coristos. The money was on deposit in this account when Mrs. Clements died.

Appellants assert four points for reversal. They are:

I

The trial court erred in refusing to enforce the contract between the joint depositors and the bank which required presentation of the passbook before the joint account could be withdrawn by either depositor.

II

The trial court erred by holding that the money in dispute was not a gift to Iris Coristo from Gladys Clements prior to November 7, 1969.

III

The trial court erred in failing to hold that the defendants were estopped by their contract to deny that the funds in dispute could not be withdrawn unless the passbook is presented.

IV

The trial court erred in not reforming the passbook by inserting the names of Don Coristo or Iris Coristo.

We shall treat them in order.

I

Appellants argue that Mrs. Clements had no right to

withdraw the money in the first account without presenting the passbook. The evidence disclosed that this passbook was never out of the possession of Iris Coristo. The only evidence that it was ever seen by Mrs. Clements was the testimony of Mrs. Coristo that she showed it to her mother before putting it in the daughter's cedar chest. On the first page of the passbook, the name of the depositor was shown as "Gladys Clements". Directly following the name and address of the bank these words appear: "This book must be presented when money is deposited or withdrawn. This account is not subject to check." Appellants contend that these words are a part of the "Rules and Regulations" to which Mrs. Clements agreed and that they constitute a contract among the bank and the individual joint holders of the account designated on the signature card. They rely heavily upon *The Keokuk Savings Bank & Trust Co.* v. *Desvaux,* 259 Iowa 387, 143 N.W. 2d 296 (1966); *Welch* v. *North Hills Bank,* 442 S.W. 2d 98, (Mo. App. 1969); and *Badders* v. *Peoples Trust Co.,* 236 Ind. 357, 140 N.E. 2d 235, 62 ALR 2d 1103 (1957). Assuming, without deciding that, as held in *Badders,* the passbook does constitute a contract between the depositors as well as between the depositors and the bank, we do not agree that this contract prevented the withdrawal made by Mrs. Clements.

The parties clearly agreed that they would be bound by the terms of the passbook rules and regulations. We do not consider the requirement that the passbook be presented to be a part of those rules and regulatons. In the back of the passbook, rules are printed under the title "Terms and Conditions Applicable to TCB Passbook 49 Savings Account". These are numbered from one to ten. There is nothing whatever in these terms and conditions to prevent withdrawals without presentation of the passbook. The first is entitled "Establish Accounts". The next three relate to deposits. Only items five and seven have any bearing on this issue at all. Because we consider them as governing the question we reproduce them in full, viz:

5. WITHDRAWAL OF DEPOSITS

Funds on deposit during the entire 90 day period will be eligible for withdrawal without notice during the first

ten days following the 90 day period and each subsequent 90 day period. Funds on deposit may also be withdrawn at other times upon not less than 90 days written notice to the bank signed by the depositor, designating the date on which withdrawal is to be made, in which case interest will be paid to the date of withdrawal stated in the notice. No interest will accrue on the funds to be withdrawn under a "notice to withdraw" after the designated withdrawal date. Funds on deposit subject to a notice of withdrawl will not be eligible for withdrawal during the 10 days following the 90 day interest period. All withdrawals will be made only upon presentation by the depositor of appropriate account information and proper identification.

7. JOINT DEPOSITS

When two or more persons are named as depositors in form indicating that it is payable to any one of them, or the survivor or survivors of them, notice of redemption may be given to, payment of principal and interest may be made to, and notice of withdrawal may be signed by any one of the parties during the lifetime of all, or any survivor or survivors, after the death of one or more of them.

It will be readily seen that there is no requirement in these "terms" that the passbook must be presented when a withdrawal was made by any of those otherwise authorized to make it. Furthermore, there is no reference to the statement on the first page of the passbook relating to its presentation. It is clear to us that these "terms and conditions," and not the statement on the first page of the passbook, constitute the "terms" to which Mrs. Clements agreed and are the rules and regulations constituting the contract between the depositor and the bank. In this respect, this case differs from *Keokuk Savings Bank & Trust Co* v. *Desvaux*, 259 Iowa 387, 143 N.W. 2d 296 (1966), where the requirement of presentation of the passbook was clearly a part of the rules of the bank assented to by the parties. If there was any doubt about the governing rule, it seems to have been dispelled by Bernice Orisini, operations officer at the bank. She testified that Item

7 quoted above was a part of the "passbook" rules and regulations and that, while normal procedures of the bank were to ask for the passbook when a withdrawal was made, that the presentation of the book was not a binding requirement and a withdrawal without it was possible. Although she testified that everything in the passbook was a part of the rules and regulations of the bank, when asked by the court to state the purpose of the passbook requirement, Ms. Orsini explained that treatment of passbooks had undergone a change in banking, because before bank statements were rendered to depositors, the passbook was the only record of the account. She stated a withdrawal without the passbook was possible and one of the specific circumstances under which an account could be withdrawn without the passbook was a "change of beneficiary".

Appellants also rely heavily upon *Welch* v. *North Hills Bank*, 442 S.W. 2d 98 (Mo. App., 1969); *Badders* v. *Peoples Trust Co.*, 236 Ind. 357, 140 N.E. 2d 235, 62 ALR 2d 1103 (1957), and *Davis* v. *Chittenden County Trust Co.*, 115 Vt. 349, 61 A. 2d 553 (1948)[1]. But in those cases neither the existence of a rule requiring presentation of the passbook for withdrawals nor its incorporation into the contract between the bank and the depositor was subject to question, as it is here. We deem the terms and conditions hereinabove quoted to be the only contractual terms relating to withdrawal.

It has been held that a requirement that the passbook be presented at the time of withdrawal is for identification of the depositor and for the convenience and protection of the bank and, as such, may be waived by the bank. *Mathey* v. *Central National Bank*, 179 Kan. 291, 293 P. 2d 1012 (1956); In Re Blose's Estate, 374 Pa. 100, 97 A. 2d 358 (1953); 9 CJS 1424, Banks and Banking, § 1002. We have no quarrel with the authorities holding that such a requirement may be incorporated into the agreement between the bank and the holder of a joint account so that it may not be waived without the concurrence of all of them. We simply do not agree that this requirement became a part of the contract here. The location of the passbook requirement and its separation from the

[1]Cf. *Speasl* v. *National Bank of Decatur*, 37 Ill. App. 2d 384, 186 N.E. 2d 84 (1962).

"terms and conditions" which do not mention it, when considered along with the testimony of Ms. Orsini, is clearly indicative that it was inserted and intended to be for the bank's benefit only, and subject to waiver by it. To say the least, we cannot say that the chancellor's finding in this regard is clearly against the preponderance of the evidence.

II

Appellants also argue that the money deposited was a completed gift by Mrs. Clements to Iris and Don Coristo. The chancellor held that the money on deposit in the joint account to which all were parties was not such a gift. Appellants base their argument upon evidence showing that upon receipt of the check for $12,000 Mrs. Clements endorsed the check in blank and delivered it to her daughter Iris, who deposited $2,000 from it in an account in her own name and the remaining $10,000 in the joint account, retaining the possession of the passbook at all times thereafter. They also rely upon the testimony of the daughter that her mother gave her the money, told her to do with it as she pleased, tried to get her to put it in a trust for the Coristo boys and encouraged her to buy anything she wanted because she had the money.

All elements of a completed gift inter vivos must be shown by clear and convincing evidence. *Porterfield* v. *Porterfield*, 253 Ark. 1073, 491 S.W. 2d 48. In *Porterfield* we reiterated the oft-expressed view that, in order to constitute such a completed gift, there must be an actual delivery of the subject matter of the gift to the donee with a clear intent to make an immediate, present and final gift beyond recall, accompanied with an unconditional release of all future dominion and control by the donor over the property delivered. We also said that the "clear and convincing" rule meant that the gift must be established so definitely as to put the matter beyond any reasonable doubt.

Of course, the opening of this account did vest an interest in appellants under Ark. Stat. Ann. § 67-552 (Repl. 1966), whether Iris Coristo or Mrs. Clements be considered as the "person opening such account," because the signature

card itself constituted a designation "in writing to the banking institution that the account . . . . be held in joint tenancy with right of survivorship". The account became the property of the three as joint tenants with right of survivorship. See *Cook* v. *Bevill*, 246 Ark. 805, 440 S.W. 2d 570; *Willey* v. *Murphy*, 247 Ark. 839, 448 S.W. 2d 341. But we are not able to say that the chancellor was in error in holding that neither the entire $12,000 check nor the $10,000 deposit was a gift by Mrs. Clements to appellants, or either of them. Mrs. Clements moved into the Coristo home about a week after her husband's death, under an arrangement whereby the Coristos built an addition to their dwelling house, for which Mrs. Clements was to, and did, pay, in order to have room for her. When the insurance company check was delivered to Iris Coristo, she told her mother she intended to put $2,000 of the money in her own account for the building of the addition. Iris Coristo testified on direct examination that her mother gave no instructions and there was no other discussion at the time of the delivery of the check. It was on cross-examination that she said that her mother gave her the money. Mrs. Coristo admitted that her mother was upset over her husband's death at the time. The evidence does not disclose that Mrs. Clements ever went to the bank while she lived with appellants, except on August 30, 1971, and the only testimony that Mrs. Clements ever saw the passbook was that of Mrs. Coristo. Mrs. Clements did sign the signature card, but there was no discussion of the designation of the account at that time. The bank had designated the account as joint upon the instructions of Iris Coristo and Iris Coristo testified that there was no discussion with the bank personnel about her right to deposit the $2,000 in her own account. The passbook showed the savings account to be in the name of "Gladys Clements" only. Iris Coristo doubted that she noticed this until it was called to her attention by an officer of the bank when she presented the passbook in February 1972 to obtain a loan, even though she jealously guarded her possession of it, taking it out of her cedar chest only when she presented it to the bank for posting of accrued interest on one or two occasions. The application for the loan and the loan were made after Mrs. Clements had withdrawn the money from the joint account. Iris Coristo testified that she wanted the money to care for her mother. It is quite significant that

the interest on this account was not reported on the income tax returns of appellants. The excuse for doing this, given by Iris Coristo, was that their tax accountant advised them not to do so because her mother's income, which otherwise consisted only of rent and social security payments, should be permitted to "absorb it". The signature card, and bank rules, as well as § 67-552 clearly recognized that any one of the three joint tenants could withdraw any or all of the money from the account, and there was never any contrary written designation given to the bank.

We cannot say that there was no reasonable doubt about the making of a completed gift by Mrs. Clements or that there was a clear intent on the part of Mrs. Clements to put the money beyond her own recall or to release the money from all future dominion and control by her. Thus, we cannot say that the chancellor erred in this finding.

III

Appellants also argue that both the bank and Mrs. Clements' executor are estopped by their contract to deny that the funds in dispute could not be withdrawn unless the passbook was presented. As hereinbefore pointed out, Mrs. Coristo's testimony is the only evidence that Mrs. Clements ever saw the passbook which Mrs. Coristo said was carefully secreted by her after she took it home. If Mrs. Clements did see the passbook requirement she must also have noted that her name alone was shown above it as the depositor. Since estoppel bars truth to the contrary, the party asserting it must prove it strictly, there must be certainty to every intent, the facts constituting it must not be taken by argument or inference and nothing can be supplied by intendment. *Wheeless* v. *Eudora Bank*, 256 Ark. 644, 509 S.W. 2d 532 (1974). We cannot say that there was a clear preponderance of evidence to establish estoppel. Appellants, in making their argument on estoppel, make much of the fact that after having first deposited this money in a savings account in her own name, Mrs. Clements, on February 24, 1972, deposited it in a joint account with her son, Melvin L. Huffman, and that appellee bank assigned to it the same account number previously assigned to the joint account with appellants. Appellants say

that this amounted to a redeposit in the original account. We cannot attach such significance to this circumstance.

IV

In view of what we have said, we find no basis for the reformation of the passbook sought by appellants.

The decree is affirmed.

Supplemental Opinion on Denial of Rehearing
delivered April 14, 1975
522 S. W. 2d 417

JOHN A. FOGLEMAN, Justice. By petition for rehearing, appellants assert that we failed to consider their argument that the Twin City Bank is estopped by the passbook statement. Although we made particular application of the rules relating to estoppel to facts particularly pertinent to the estate of Gladys Clement, we unintentionally failed to extend our treatment to the position of the bank. The evidence in support of an estoppel is perhaps stronger in the case of the bank than it was as to Mrs. Clement. The bank obviously did know that the notation as to presentation was on the first page of the passbook. But, as we have pointed out, the bank viewed it as a measure for its own protection and not for the benefit of the depositor, and never represented to Mrs. Coristo that it was for her protection or that it afforded her any protection.

The chancellor did not find that there was a basis for es-

toppel, and, in view of the burden of proof in such cases, we cannot say that he was in error. Mrs. Coristo drew her own inference to arrive at her conclusion. Since an estoppel bars the truth to the contrary, the party asserting it must prove it strictly. We cannot say that estoppel as to the bank has been shown strictly or to the degree of certainty required. Usually, estoppel can only be predicated upon a statement made with the intention to mislead the party asserting it or that it be acted upon by the party to whom it was made. *Union Indemnity Co.* v. *Benton County Lumber Co.*, 179 Ark. 752, 18 S.W. 2d 327. It must be clearly established that there was such intention or that there was negligence so gross as to be culpable. *Hope Lumber Co.* v. *Foster & Logan Hardware Co.*, 53 Ark. 196, 13 S.W. 731. Gross negligence falls just short of that reckless disregard of probable consequences as is equivalent to a wilful and intentional wrong, and the distinction is said to be so slight as to seem somewhat artificial. *Edwards* v. *Jeffers*, 204 Ark. 400, 162 S.W. 2d 472; *Splawn, Adm'x.* v. *Wright*, 198 Ark. 197, 128 S.W. 2d 248.

We do not think that an estoppel barring the truth as to the bank was shown by a preponderance of the evidence.

BYRD, J., concurs in denial of the rehearing but dissents from this opinion.

Joseph Allen MAGNESS *v.* STATE of Arkansas

CR 74-125 518 S.W. 2d 479

Opinion delivered February 3, 1975

Don Langston, Public Defender, and *Hubert Graves*, Dep. Public Defender, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Alston Jennings Jr.*, Asst. Atty. Gen., for appellee.

J. FRED JONES, Justice. Joseph Allen Magness was convicted in the Sebastian County Circuit Court on the charge of possession of contraband substances with the intent to deliver. He was sentenced to five years in the penitentiary with two years suspended. Magness was represented at his trial by employed counsel, but is represented on this appeal by the Public Defender.

On appeal to this court Magness contends that the trial court erred in refusing to quash the information filed against him, and in ruling that he (Magness) "did not come within Ark. Stat. 82-2621 and 43-1224.1 through 43-1224.4. . . ."

Ark. Stat. Ann. § 82-2621 (Supp. 1973) reads as follows:

> "Foreign conviction. — If a violation of this Act [§§ 82-2601 — 82-2638] is a violation of a Federal law or the law of another State, a conviction or acquittal under Federal law or the law of another State for the same act is a bar to prosecution in this State."

Ark. Stat. Ann. § 43-1224.1 through § 43-1224.4 (Supp.

1973) read as follows:

"43-1224.1. Acquittal or conviction as bar — Offense against United States or another state. — When a person has been either acquitted or convicted, on the merits, of an offense against the United States or against another state or territory thereof, the acquittal or conviction is a bar to prosecution for an offense against this State, or any governmental subdivision thereof, when the two [2] offenses were committed in the same course of conduct and are of the same character.

43-1224.2. 'Same character' defined. — For purposes of this act [§§ 43-1224.1 — 43-1224.4] two [2] offenses are of the same character when the elements which must be proved to obtain a conviction of one offense are not substantially different from the elements which must be proved to obtain a conviction of the other. In determining whether such elements are not substantially different, the court shall compare the respective purposes of the laws defining the two [2] offenses, as such purposes relate to the particular course of conduct of the defendant. Provided, however, that

(a) Differences attributable solely to the fact that the defendant's conduct affected, in the same manner, the person or property of two [2] or more individuals, and

(b) Differences consisting of elements necessary merely to establish subject matter jurisdiction, shall not be considered in deciding whether the two [2] offenses are of the same character.

43-1224.3. 'Acquittal' and 'conviction' defined. — (1) There is an acquittal on the merits if the prosecution resulted in a finding of not guilty by the trier of fact, or in a determination that there was insufficient evidence to warrant a conviction.

(2) There is a conviction if the prosecution resulted in a judgment of conviction which has not been reversed or vacated, a verdict of guilty which has not been set aside

and which is capable of supporting a judgment, or a plea of guilty accepted by the court.

43-1224.4. Application — Time to plead. — (1) This act [§§ 43-1224.1 — 43-1224.4] does not apply to pending prosecutions.

(2) The time for pleading the bar to prosecution provided for herein, in prosecutions commenced after the effective date hereof, shall be at the regular time for pleading double jeopardy under Arkansas Constitution Article II, Section 8."

We agree with the trial court that Magness presents an ingenious argument, but neither do we find merit in his contentions.

The pertinent facts are briefly these: Magness was arrested in Oklahoma for public drunkenness and a search of his automobile revealed some contraband drugs concealed in the steering column of his automobile. A drugstore at Hartford near Fort Smith had been burglarized and some drugs had been taken therefrom. Magness maintained a rented apartment in Fort Smith and in the process of investigating the drugstore burglary, the Arkansas police officers searched the apartment under a valid search warrant and found a quantity of controlled drugs in a paper bag.

The Arkansas officers took the paper bag containing the drugs to Oklahoma; confronted Magness with the bag and contents and questioned him concerning the burglary at Hartford. Magness denied any knowledge of the burglary but readily admitted ownership of the drugs found in his apartment.

Magness was charged in Oklahoma with possession of drugs with intent to sell under the laws of that state, but the charge in Oklahoma was subsequently reduced to mere possession. Magness pleaded guilty to the reduced charge in Oklahoma and was sentenced to six months in jail on the reduced charge. In the meantime, Magness was charged in Arkansas, as already stated, and upon release from jail in

Oklahoma, he waived extradition and was returned to Arkansas for trial. Magness filed a motion to quash the information filed against him in Arkansas contending that he had already been convicted of the same offense in Oklahoma. The trial court denied the motion to quash; a jury trial was waived and trial before the court sitting as a jury resulted in the conviction and judgment from whence comes this appeal.

Magness readily admitted that he owned the drugs found in his Fort Smith apartment and taken to Oklahoma by the Arkansas officers. He said the Arkansas officers confronted him with the drugs from his apartment while questioning him in Oklahoma about the Arkansas burglary. He said he was never confronted with the drugs taken from the steering column of his automobile in Oklahoma, and he thought he was pleading guilty in Oklahoma to possessing the drugs in Arkansas. He argues that, in any event, before he left Fort Smith to go to Oklahoma, he took some of the drugs from the paper bag in his apartment and, not wanting to carry the drugs on his person, he placed them in a cigarette package and then placed the package in the steering column of his automobile. He said he only possessed the drugs in Oklahoma for his own private use. He argues that the drugs found in the steering column of his automobile in Oklahoma were a part of the same drugs found in his apartment in Arkansas, and that his plea of guilty to possession in Oklahoma precluded a trial in Arkansas for possession in Arkansas with intent to deliver.

We are of the opinion that the trial court did not err in denying the motion to quash the information. The Oklahoma Court record is not before us nor do we have jurisdiction of the Oklahoma proceedings. We are, therefore, unable to say what drugs Magness was confronted with in Oklahoma, or whether a confrontation was necessary to his conviction on plea of guilty under the Oklahoma law and procedure. Certainly there is nothing in the record before us indicating that Magness was charged and convicted in Oklahoma with possessing the controlled substances in Arkansas. If Magness was charged and convicted in Oklahoma of possessing drugs in Arkansas, it would appear that an assignment of error should have been addressed to the Oklahoma Courts for cor-

rection. It would appear that the Oklahoma Court may have accepted Magness's explanation that he had the drugs in the steering column of his automobile for his own use and not for sale, and that was the reason the court reduced the charge to possession only and accepted Magness's plea of guilty to possession.

There is no evidence that the drugs found in Magness's apartment in Fort Smith ever left the possession of the Arkansas officers while interviewing Magness in Oklahoma and, certainly there is no evidence that Magness ever came into possession of the drugs from his Arkansas apartment while the Arkansas officers had the drugs in Oklahoma.

We are not called on to determine in this case what the situation would have been if Magness had taken all of his drugs to Oklahoma and had been convicted of possession with intent to sell in that state and then subsequently been charged with possession with intent to sell the same drugs in Arkansas. We are not called on to interpret and define §§ 43-1224.1 — 43-1224.4, *supra,* because the offenses in the case at bar were not committed in the same course of conduct, and are not of the same character as the misdemeanor to which Magness pleaded guilty in Oklahoma.

There was evidence that some of the drugs in the paper bag found in Magness's Fort Smith apartment were different from the kind he possessed in Oklahoma. In the case of *Bins* v. *United States,* 331 F. 2d 390 (1964), the court said:

> "[I]t is well settled that the test for determining whether several offenses are involved is whether identical evidence will support each of them, and if any dissimilar facts must be proved, there is more than one offense. Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932); Morgan v. Devine, 237 U.S. 632, 35 S.Ct. 712, 59 L.Ed. 1153 (1915)."

See also *Velasquez* v. *United States,* 244 F.2d 416; *Wilburn* v. *United States,* 326 F.2d 903 (1964).

The judgment is affirmed.

Millard RUSSEY and Willie WAY Jr.
v. STATE of Arkansas

CR 74-118 519 S.W. 2d 751

Opinion delivered February 3, 1975
[Rehearing denied March 10, 1975.]

Acchione & King and *McArthur & Lofton,* for appellants.

Jim Guy Tucker, Atty. Gen., by: *Gary Isbell,* Asst. Atty. Gen., for appellee.

FRANK HOLT, Justice. The appellants were found guilty of murder in the first degree by a jury which assessed their punishment at life imprisonment in the Department of Correction. We first consider Russey's appeal. He contends for reversal that it was error to admit his confession into evidence because it was secured by coercion and duress and, therefore, was involuntary. He also argues that the state failed to produce all material witnesses connected with the asserted involuntary confession.

Appellant Russey was arrested on January 2, 1974, at 3 p.m. on a burglary charge. At the *Denno* hearing Russey testified that later that evening, detectives Sparr and Rounsavall took him from the jail to locate the stolen property. Russey testified that afterwards Rounsavall and Sparr took him to a cemetery and physically beat him. According to Russey, one of the officers put a pistol in his mouth and told him "he had just shot a boy over in that cemetery a couple of days ago, and asked me did I want to be the next one?" Appellant testified that he was told to cooperate with them and was told that he killed Carter. Russey further testified that a tooth was loosened from a blow administered in the cemetery and Sparr, in the presence of Rounsavall, knocked it out the next day before he signed a confession. Russey was 18 years old and had a 10th grade education. He testified he was terrified from the first day's experience and did not relate the statement which Sparr brought in for him to sign. Russey

testified that during this time he was not allowed to use the phone and was unable to secure an attorney until January 5, 1974. On that date he retracted his statement.

Detectives Best and Vandiver were the only police officers who testified at the *Denno* hearing. They testified no other officer was present at the time appellant gave his statement dated January 3, at 6:40 p.m. They saw no swelling of appellant's face and appellant did not complain about any physical abuse. To their knowledge, no threats, coercion or physical abuse ever occurred. Both officers testified that appellant was given the *Miranda* warning, fully understood his rights and waived them as evidenced by his signing a waiver of rights form preceding his statement. At appellant's request, Best wrote the statement which Russey then signed. Best and Vandiver testified that Russey did not request to use the phone or talk to anyone. Best was unaware that Sparr and Rounsavall took appellant from the jail in a patrol car the night before appellant was interrogated by Best in Vandiver's presence.

At the *Denno* hearing, the trial court ruled the statement voluntary without the state producing either Sparr or Rounsavall as witnesses. At trial, however, after the statement was read to the jury, Sparr was called as a rebuttal witness. Rounsavall never testified. The sole explanation for his absence was that he was off duty. Suffice it to say that it is manifest that the state did not meet the burden of proof as is required in *Smith* v. *State,* 254 Ark. 538, 494 S.W. 2d 489 (1973). There we held:

> Whenever the accused offers testimony that his confession was induced by violence, threats, coercion, or offers of reward then the burden is upon the state to produce all material witnesses who were connected with the controverted confession or give adequate explanation for their absence.

In the case at bar, the accused offered testimony that his confession was induced by violence, threats and coercion by the officers. Two of these officers, Sparr and Rounsavall, did not testify at the *Denno* hearing. Therefore, as to them, his

testimony stands uncontradicted. The burden was upon the state to produce these material witnesses or give adequate explanation for their absence. Sparr testified at the trial subsequent to the *Denno* hearing. However, the trial court must first find at a *Denno* hearing that a statement is voluntary before it is admissible. Ark. Stat. Ann. § 43-2105 (Supp. 1973). Rounsavall, whom appellant Russey said he particularly feared, never testified. The fact that he was "off duty" the day of the trial is not "adequate explanation." *Smith* v. *State, supra.*

The state "notes" that appellant did not object to the absence of Rounsavall. However, appellant's objection to the confession as being involuntary was sufficient. In *Smith* v. *State*, 256 Ark. 67, 505 S.W. 2d 504 (1974), we said:

> Nowhere in *Smith* does it appear that, in making an objection based upon a contention the state has failed to show a statement is involuntary, a defendant must point out, in precise words, that a material witness was not called.

Consequently, in the case at bar, it was necessary in determining the voluntariness of the confession that all material witnesses be presented or an "adequate explanation" of absence be given. Since neither occurred, we must hold it was prejudicial error to admit his confession into evidence.

We next consider Way's appeal. He contends the court erred in allowing three photographs into evidence which were unnecessary since the identification of the deceased was not in issue and the photographs served no purpose other than inflaming the minds of the jurors. Four photographs were excluded by the trial court. One of those admitted showed the victim where he fell in the living quarters of the store after being shot. The other two photographs depicted his wounds.

In *Milam* v. *State*, 253 Ark. 651, 488 S.W. 2d 16 (1972), we said:

> Photographs may be introduced to describe and identify the premises, to establish the corpus delicti, to disclose

> the environment of the crime, and to corroborate testimony. **** When photographs are otherwise properly admitted it is not a valid objection that they tend to prejudice the jury.

The photograph of the victim on the floor corroborated testimony that the victim ran from his assailant in the business area of the building into the living area where he was found fatally wounded. The two other photographs supported the medical testimony as to the nature, location and extent of the wounds. We hold there was no abuse of discretion by the trial court.

Neither can we agree with appellant Way that the trial court erred in denying his motion for a directed verdict. Two witnesses at the scene of the crime could not positively identify Russey or Way. However, one testified that appellants "looked like the boys." It is argued by Way that the evidence is insufficient because Johnny Stewart, a witness for the state, was an accomplice as a matter of law and the court erred in not so ruling and refusing their instruction to that effect. The court submitted the issue to the jury that Johnny Stewart's interest and participation was a question of fact and not one of law. Stewart, 15 years of age, testified that he knew the appellants. On the day of the robbery-murder, he first saw them in a pool hall and rode around with them and a Ricky Griffin. Russey, who was driving, stopped the car at Carter's Grocery. Russey and Way got out of the car, each holding a pistol. Shortly they returned with the pistols and a brown paper sack. He did not hear any shots, see any money and no one gave him any. No one discussed a robbery with him and he was driven home. His version was not tested by cross-examination.

In *Froman and Sanders* v. *State,* 232 Ark. 697, 339 S.W. 2d 601 (1960), we quoted with approval:

> The burden is on the defendant to show that the witness for the state is an accomplice. This is usually determined by the court as a question of law. But if the evidence is conflicting as to the participation of the witness in the commission of the crime, the matter

> should be left to the jury under proper instructions as to intent and participation.

In the case at bar, we agree with the trial court that Stewart was not an accomplice as a matter of law and the court, by correct instructions, properly submitted the issue to the jury as a fact question. To the same effect are *Austin* v. *State,* 254 Ark. 496, 494 S.W. 2d 472 (1972); *Satterfield* v. *State,* 245 Ark. 337, 432 S.W.2d 472 (1968); and *Rogers* v. *State,* 136 Ark. 161, 206 S.W. 152 (1918). Furthermore, in *Fields* v. *State,* 213 Ark. 899, 214 S.W. 2d 230 (1949), we said:

> The mere passive failure to disclose the commission of the crime would not make one an accessory under our statute. There must be some affirmative act tending toward the concealment of its commission or a refusal to give knowledge of the commission of the crime, when same is sought for by the officials of the person having such knowledge.

See also *Satterfield* v. *State, supra.* In the case at bar, it appears that Stewart never, by any affirmative act, sought to conceal the commission of the crime.

Appellant Way further contends the trial court erred in denying appellant's motion for a mistrial. The prosecutor, while cross-examining Russey, referred to Way being in jail at the same time as Russey. Way argues that a "broad field of speculation as to his character and possibly his criminal record" was presented to the jury. We agree with the state that this contention is speculative. A motion for a mistrial is "an extraordinary action and this motion should only be granted where it is obvious that any possible prejudice cannot be removed by an admonition." *Hathcock* v. *State,* 256 Ark. 707, 510 S.W. 2d 276 (1974). In the case at bar there was no request for any admonition. Furthermore, it appears that no prejudice could result since there was no objection by appellant when Detective Best testified that the appellants were incarcerated at the same time during the investigation.

Neither can we agree that the trial court erred in refusing to instruct the jury that appellant Russey, a co-defendant, is an accomplice as a matter of law. When this instruction

was offered by appellant Way and its propriety was being discusssed, his then trial counsel stated that Russey's involvement "would be a question of fact for the jury." Moreover, Russey testified and denied complicity in the alleged offense. He, also, offered an alibi which was corroborated by his employer.

Affirmed as to Way and reversed and remanded as to Russey.

Mary Delia PRATHER et al *v.* Joe MARTIN, Sheriff and Collector

74-239 519 S.W. 2d 72

Opinion delivered February 10, 1975

Clark, McNeil & Watson, for appellants.

Alex G. Streett and *Tom Donovan,* for appellee.

GEORGE ROSE SMITH, Justice. The appellants brought these two suits, consolidated below, to enjoin the Faulkner County Collector from collecting real estate taxes attributable to increases in assessed valuations that were assertedly made without notice to the complaining landowners. The trial judge, finding that "the receipt of notice makes no difference," dismissed the complaints for want of equity.

Both cases involve a tract-by-tract reassessment that was undertaken in 1972. That procedure was discussed in detail in *Dierks Forests* v. *Shell,* 240 Ark. 966, 403 S.W. 2d 83 (1966), where we pointed out that notice to the property owner and an opportunity to be heard are constitutionally essential to such a proceeding. The statute requires the assessor to give that notice and to inform the landowner of his right to apply to the equalization board for a review of the increased assessment. Ark. Stat. Ann. § 84-437 (Repl. 1960).

We first consider the Prather appeal, for there is no substantial dispute about the facts in that case. After the reassessment had been completed in July or August of 1972, the county clerk assumed the responsibility of sending out the required notices to landowners whose assessments had been increased. Mrs. Prather was living in Little Rock and her co-owner in Arkadelphia, but the county clerk was unable even by diligent efforts to ascertain either address. Consequently the notice, although prepared, was never mailed and was still in the county clerk's files when the case was tried. Thus it is undisputed that the required statutory notice of the increase in the Prather assessment was not given.

The appellee argues, however, that no notice was necessary, because the landowners had an adequate opportunity to apply for a judicial review of the assessment when they first learned of the increase almost a year later, in August of 1973. Here counsel rely upon that provision of the statute which permits a landowner to appeal to the county

court without having first exhausted his remedy before the equalization board in all cases "where the petitioner shall have had no opportunity to appear before said board." Section 84-708. Counsel contend that no matter when these landowners learned of the increase — even a year later — the ten-day period for an appeal to the county court then began to run. Section 84-718.

That contention is unsound. Section 84-437, *supra,* perhaps goes beyond the minimum constitutional standard by requiring the assessor not only to give the landowner notice of the increase but also to inform him of his right to apply to the equalization board for a review. The appellee's argument would effectively nullify the protection which the legislature intended for the landowner to have, because he would have to appeal to the county court within ten days after learning of the increase and without having received any information about his remedy. We are not convinced that the legislature, in enacting Section 84-708, meant to destroy the protection that it had carefully provided in Section 84-437. Instead, as we indicated in *Jones* v. *Crouch,* 231 Ark. 720, 332 S.W. 2d 238 (1960), the proviso permitting an appeal by a landowner who has had no opportunity to appear before the equalization board is a safeguard against a contingency such as the board's having so many appeals that they cannot all be heard within the time allowed. We accordingly hold that the chancellor erred in denying relief in the Prather case.

In the second case, involving the Ramada Inn property, a question of fact was presented. Kathy Barrett, a deputy county clerk, testified positively that she remembered the Ramada Inn notice, because it was so high. She testified that the notice was actually prepared and put in the hands of L. J. Merritt, the county clerk, for mailing. Merritt testified that a notice was prepared on every parcel and that he picked up the notices daily and mailed them at the postoffice. Some of the notices were returned, but Kathy Barrett stated that the Ramada Inn notice was not in the return files. On the opposite side, Charlotte Wonn, the manager of the Inn, testified that she alone opened the mail and that no notice of the increased assessment was received.

There being evidence that the notice was mailed, the chancellor was right in holding that proof of its receipt was not essential. Due process requires that notice be given, but it may be by publication or by posting notices in public places. *Londoner* v. *Denver*, 210 U.S. 373 (1908); *Glidden* v. *Harrington*, 189 U.S. 255 (1903). The chancellor's conclusion that notice was given in the Ramada Inn case is not clearly against the weight of the evidence.

Affirmed as to the Ramada Inn property, reversed as to the Prather property.

Harold Dean HEWITT & SPRINGDALE LIQUORS, Inc. *v.* Thelma GAGE

74-247 519 S.W. 2d 749

Opinion delivered February 10, 1975

[Rehearing denied March 17, 1975.]

Stubblefield & Matthews, by: *Charles D. Matthews,* for appellants.

Crouch, Blair, Cypert & Waters, by: *H. Franklin Waters,* for appellee.

LYLE BROWN, Justice. Harold Dean Hewitt is the principal owner of Springdale Liquors, Inc., which operates seven retail liquor outlets in the city of Springdale. Appellee Thelma Gage is the only other owner and operator of a liquor store in that city. One of Hewitt's outlets was located at 610 West Emma Street. The Alcoholic Beverage Control Commission (ABC) authorized the transfer of the liquor permit covering that location to 2100 West Sunset. The latter address appears to be approximately across the street from Ms. Gage's operation. Ms. Gage petitioned the circuit court to invalidate the ABC order and was granted a summary judgment. Hewitt and Springdale Liquors appeal.

Appellee's motion for summary judgment was submitted upon her complaint and admissions of fact executed by appellant Harold Hewitt. It was revealed by those documents that Hewitt owned an interest in more than one retail liquor permit. On the basis of that undisputed fact the court granted summary judgment, citing Ark. Stat. Ann. § 48-310.2 (Supp. 1973) which was enacted in 1971, Act 106:

> No retail liquor permit shall hereafter be issued, either as a new permit or as a replacement of an existing permit, to any person, firm or corporation, if such person, firm or corporation has any interest in another retail liquor permit, regardless of the degree of such interest.

We think the summary judgment was appropriate. The clear effect of the ABC order was to replace a permit previously issued for 610 West Emma Street with one covering the premises at 2100 West Sunset. And, as we have said, Hewitt, at the time of the replacement, owned an interest in several other stores. Appellants adroitly argue that the only thing which took place was the ABC inter-office "transfer" of a permit from one address to another. We cannot agree; in

fact we can conceive of no clearer example of the replacement of a liquor license and we unhesitatingly conclude that the statute was written to cover just such a situation.

Appellants devote a considerable portion of their brief to the proposition that Ark. Stat. Ann. § 48-312 (Repl. 1964) has been repealed by implication. It reads:

> A permit issued to any person, pursuant to this section, for any premises shall not be transferable to any other person or to any other premises or to any other part of the building containing the permitted premises. It shall be available only to the person therein specified, and only for the premises permitted and no other. [Acts 1935, No. 108].

The quoted statute is not pertinent to a resolution of the case at bar. In awarding the summary judgment the trial court did not pass judgment on the repeal or non-repeal of Section 48-312. Even if that section has been repealed (which issue we do not reach) appellants are still faced with the prohibition set forth in Section 48-310.2 supra.

Appellants contend that the entry of a summary judgment was an abuse of discretion. It is asserted (1) that without the record made before the ABC being furnished the trial court, the latter could not determine whether a new permit or a replacement permit was issued Hewitt. The argument is without merit. The admission of facts specifically states that the ABC transferred the liquor business operated at 610 West Emma to 2100 West Sunset. It is significant that appellants filed no counter-affidavits to the motion for summary judgment. Then (2) appellants say that it was error to determine that only one conclusion could be drawn from the facts. We find no merit in the argument and mention it only to inform appellants that we have not overlooked it.

Finally, appellants argue that their motion to dismiss appellee's petition to the circuit court should have been granted. The argument is based on the fact that appellee did not file in the circuit court a copy of the proceedings before the ABC. That was not necessary. Acts of 1973, Act No. 189

is compiled as § 48-311 (Supp. 1973). Paragraph (E) provides that an appeal from any order of the ABC shall be taken to the circuit court and tried de novo. Appellee pleaded that she be granted a trial de novo. Hence the record made before the ABC became immaterial. Furthermore, had the appeal been taken under the provisions of the Administrative Procedure Act it would have been the duty of the ABC — not the aggrieved party — to "transmit to the reviewing court the original or a certified copy of the entire record of the proceeding under review". Ark. Stat. Ann. § 5-713 (Supp. 1973). The ABC was fully aware of appellee's petition because the individual members were served with summons.

Affirmed.

Benny WEST *v.* STATE of Arkansas

CR 74-156 518 S.W. 2d 497

Opinion delivered February 10, 1975

Robert A. Newcomb, Atty. for Inmates, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Gary Isbell*, Asst. Atty. Gen., for appellee.

JOHN A. FOGLEMAN, Justice. Benny West was charged with first degree murder and held without bail from November 7, 1970 to April 1972, at which time bail was set at $50,000. Bail was reduced to $25,000 in July 1972, and on August 3, 1972, he was released on bail. A jury found him guilty of second degree murder on June 5, 1973, and he was sentenced to 21 years. O January 14, 1974, he filed a motion for modification of his sentence by crediting him with his pretrial confinement. On November 4, 1974, the circuit judge granted his motion by reducing the sentence in the judgment entered to a sentence of 19 years, 3 months and 5 days, after finding that pretrial incarceration amounted to 1 year, 8 months and 25 days. This was not a suspension of part of the sentence, as appellant suggests.

Appellant contends that this action was not in accordance with Ark. Stat. Ann. § 43-2813 (Supp. 1973). We do not agree.

It is appellant's contention that the court should have directed that appellant's sentence start on a date 1 year, 8 months and 25 days prior to the date of the jury verdict. We are unable to see how this result is dictated by § 43-2813. That section reads:

> Computation of Sentence. Time served shall be

> deemed to begin on the day sentence is imposed, not on the day a prisoner is received by the Department of Correction and shall continue only during the time or times in which a prisoner is actually confined in a county jail or other local place of lawful confinement or while under the custody and supervision of the Department of Correction; provided, however, that the sentencing judge may in his discretion direct, when he imposes sentence, that time already served by the defendant in jail or other place of detention, shall be credited against the sentence.

It seems to us that the trial judge's action is exactly in accord with the statutes. Nothing whatever in the language of the statute directs or permits the judge to make the sentence effective retroactively, and we are aware of nothing that would make the statute or its application by the trial judge in this case run afoul of "equal protection" guarantees. Appellant cited no authority for his argument that the procedure deprives him of Fourteenth Amendment equal protection.

He has presented an ingenious argument that he is discriminated against by reason of the fact that under Ark. Stat. Ann. § 43-2807 (c) (Supp. 1973) one who was sentenced to 21 years who had not been incarcerated prior to trial would be eligible for parole after seven years, while he would have served 6 years, 5 months and 2 days in the Department of Correction, and 1 year, 8 months and 25 days in pretrial jail confinement, or a total of 8 years, 1 month and 27 days. Assuming that each started receiving maximum "good time" credit from the beginning of his sentence, the difference, according to appellant, would be 3 years and 6 months, as against 3 years, 2 months and 16 days plus his pretrial jail time for a total of 4 years, 11 months and 11 days. The disparity in "good time" credit clearly does not deny Fourteenth Amendment equal protection to appellant. *McGinnis* v. *Royster,* 410 U.S. 263, 93 S. Ct. 1055, 35 L. Ed. 2d 282 (1973).

The rationale of *Royster* is also applicable to the disparity in minimum parole eligibility time. In *McGinnis* the court passed on a New York statute which, in effect, denied "good

time" credit for presentence incarceration in county jails. Under the statute "good time" was awarded for good behavior and efficient performance of duties during incarceration. Minimum parole date was calculated by subtracting the greatest amount of good time that could be earned from the minimum sentence of an indeterminate term, and the statutory release date, by subtracting the greatest amount of good time that could be earned from the maximum sentence of an indeterminate term. The statute came into play in *McGinnis* because it explicitly forbade any "good time" credit for time spent in jail in calculating the minimum parole dates. If the appellees in *McGinnis* had been entitled to "good time" credit for their presentence confinement they would have been entitled to appear before the parole board at least three months earlier than they would otherwise. Insofar as the end result is concerned, the problem here and the principle involved are essentially the same. The mere fact that the court acted in strict compliance with a statute that makes no reference to "good time" credit, and *McGinnis* involved a statute that made the distinction makes no real difference. The court in *McGinnis* held there was no denial of equal protection because the distinction, having arisen in the course of the state's sensitive and difficult effort to encourage for its prisoners constructive future citizenship while avoiding the danger of releasing them prematurely upon society, called for classifications to meet a practical problem of government, which need only be upon a rational basis, even though they may actually result in rough accommodations. The important question is whether the challenged distinction rationally furthers some legitimate, articulated state purpose. The legitimate purpose in *McGinnis* was found in the different purposes, usages and facilities in state prisons and county jails. On the one hand there is, whatever deficiencies there may be, a rehabilitative program and objective in state prisons, but none in county jails, which are designed as places of detention only. See Ark. Stat. Ann. § 46-100, 103, 107, 116, 117 (Supp. 1973). There are laws and regulations which require the state to evaluate an inmate's progress toward rehabilitation in a state prison by observation and evaluation of conduct and performance in determining parole eligibility, but none in county jails. See Ark. Stat. Ann. §§ 43-2806 — 9, 46-103, 116, 117, 120, 120.1, 120.2, 120.3. And, as pointed out

by Mr. Justice Powell in speaking for the U.S. Supreme Court in *McGinnis,* it would hardly be appropriate to undertake rehabilitation of one held in pretrial detention who was still cloaked with the presumption of innocence. These differences furnish a rational justification both there and here for the distinction made in promoting a legitimate state purpose to afford adequate observation of an inmate's conduct and rehabilitative progress before he is considered for parole.

We note that, in entering its order, the trial court appended a direction that the Arkansas Board of Corrections give no credit to appellant for the time of pretrial confinement in determining parole eligibility. This portion of the order is not attacked on appeal, probably because the court's action without this direction would likely produce the same result. Suffice it to say that we do not think the court had the discretion and power to direct the board's action in this respect under existing law, even though it may once have had. See Ark. Stat. Ann. § 43-2807 (Supp. 1973). We consider it only to constitute a recognition by that court of the underlying reasons for the distinction of which appellant is complaining. Be that as it may, the significant questions before us are whether the court followed the dictates of the statute covering "jail time" credit, whether he abused his discretion in doing so, and whether the statute, as written or applied, violates equal protection requirements. Our answer is in the negative to all except the first, so the judgment is affirmed.

MOHAWK TIRE & RUBBER Company et al
v. E. T. BRIDER

74-242 518 S.W. 2d 499

Opinion delivered February 10, 1975

Wright, Lindsey & Jennings, for appellants.

Mike J. Etoch Jr., for appellee.

J. FRED JONES, Justice. This is a workmen's compensation case in which the employer, Mohawk Tire & Rubber

Company, and its compensation carrier, Travelers Insurance Company, appeal from a circuit court judgment affirming an award of compensation benefits to the appellee-claimant, employee E. T. Brider.

The appellants have designated the points they rely on for reversal as follows:

> "There is no substantial evidence in the record that appellee sustained an accidental injury arising out of and in the course of his employment.
>
> There is no substantial evidence in the record that appellee sustained any temporary or permanent disability.
>
> Appellee's claim is barred by the statute of limitations."

We find no merit in the appellants' first two points.

The appellee Brider's testimony as to working conditions and the onset of his physical condition is not contradicted to any substantial degree. According to Brider's testimony, he was employed by Mohawk in 1957, and for about 12 years he experienced no difficulty in unloading trucks and boxcars on a ramp outside the building where tires were manufactured. In April, 1969, he was transferred, at his request, to a better paying job inside the building where he was given the job of "post inflator." This job consisted of removing hot tires from a conveyor belt as they came from the molding machine. According to Brider, the tires were hot and still smoking as they came from the molds and the air surrounding the area was heavily impregnated with smoke, dust and chemical fumes from the hot tires. Brider said that on the third or fourth day he worked as post inflator he suffered chest congestion, shortness of breath and he started coughing. On the fifth day he worked the cough became so severe it caused blackouts and was attended by shortness of breath and wheezing, so he took off from work and went to the company doctor, Dr. McCarty. He stayed off from work for about a week and when he returned, he again experienced the same difficulty. He went back to Dr. McCar-

ty and was admitted to the Helena Hospital where he stayed for one week. Dr. McCarty then referred him to Dr. Milnor in Memphis who had him admitted to the Baptist Hospital in Memphis. He said he stayed in the Baptist Hospital for a week under the care of Dr. Milnor, and upon his return to Helena, Dr. McCarty requested Mohawk to remove him from the job as post inflator.

Brider said when he returned to work, he was assigned the duties of "green tire inspector," but that it was in the same area about seven or eight feet distance from where he worked as post inflator. He said that while working as green tire inspector, he experienced the same trouble of chest congestion, shortness of breath, coughing, wheezing and blackouts. He said he reported his condition this time to supervisor Blackmon and went to see Dr. Daniel Tonymon who gave him a letter addressed to Mohawk advising that he could not work because of his condition. He said he delivered the letter to Mohawk officials and they sent him to another company doctor, Dr. Barnard Copes in West Helena. He said he continued to see Dr. Tonymon for over a year and a half while he was still working off and on at Mohawk. He said Dr. Capes sent him to Dr. Reynolds in Memphis and that he continued trying to work while an outpatient under Dr. Capes at the hospital in Memphis. He said that each time he returned to work, he would experience the same chest congestion, shortness of breath, coughing, wheezing and blackouts; that sometime he would work only one, two or three days before he would have to leave because of the attacks. He said that after working for about two weeks while an outpatient, Dr. Reynolds put him in the Baptist Hospital and performed an operation on July 14, 1971. He said part of his lung was removed in this operation and that following surgery he was off work until March 3, 1972. He said he knew the supervisors at Mohawk knew he was going to Dr. Reynolds because he had been "getting benefits" in the amount of $85 per week from Mohawk, and these benefits ran out in January, 1972. He said he was discharged by Dr. Reynolds on March 3, 1972, whereupon he reported back to Mohawk and was assigned a janitorial job in the same work area of his previous difficulties.

Brider said that while engaged in the janitorial work he again experienced the same difficulty as before and after working about seven days, he had to be off again for a couple of weeks. He then returned to work at the janitorial job but only worked an hour when he again experienced the chest congestion, shortness of breath, coughing, wheezing and blackouts, and that on this occasion he reported his condition to his supervisor and had a guard call his wife who took him to a doctor. He said this time he went to a Dr. Miller because he did not feel he could "make it" to Dr. Tonymon. He said Dr. Miller put him in the hospital at Helena and that his employment was terminated on May 4, 1972. He said the company told him it would assume no further responsibility for medical bills and if he was going to another doctor, he would have to pay for it himself. He said Dr. Miller had made arrangements for his admission to the University Medical Center in Little Rock on May 18, but that he was terminated from employment before that date.

On cross-examination Brider said the last day he worked was April 4, 1972, and that he had not worked any at all for the past five months. He said he was still under the care of Dr. Miller and taking medicine prescribed by him. He said while working as post inflator, he devised a cloth mask he attempted to wear over his mouth and nose but when he was transferred to green tire inspection, the company furnished him a mask and he wore it upon the company's recommendations.

The evidence is rather clear that Brider experienced a violent allergic reaction in his bronchial and respiratory passages while in contact with the smoke and fumes in the tire manufacturing process, but there is a conflict in the medical opinion testimony as to causation and extent of his disability. Brider underwent extensive medical examinations including a lung biopsy and pulmonary function studies. We deem it unnecessary to set out and compare all the medical evidence because we do not weigh the evidence in determining where the preponderance lies in law and compensation cases. In compensation, as in law, cases, we are confined to the record on appeal and if there is any substantial evidence to sustain the findings and award of the Commis-

sion, or jury, we must affirm. This rule is so well established citation is not necessary.

Dr. Daniel Tonymon said he had treated Brider on 53 occasions. He said in his opinion Brider was totally disabled because of the asthmatic attacks and shortness of breath, and Dr. Tonymon was of the opinion the disability was connected to the initial and subsequent exposure to something in the Mohawk plant. None of the chemicals used in the manufacture of the tires was identified except a few of the basic ones identified by a former fellow-employee of Brider. Dr. Robert Dan Miller, Jr., said he first saw Brider for treatment on March 18, 1972, and saw him 32 times between March 18, 1972, and July 31, 1973. He testified substantially as did Dr. Tonymon.

We are of the opinion there was substantial evidence that Brider was partially disabled because of spasmatic bronchial or asthmatic attacks in the presence of various substances, including chemical substances in the air inside the Mohawk plant, and that his contact and initial attack at the plant set his allergic reaction in motion.

The appellants' third point on statute of limitations presents some difficulty. Ark. Stat. Ann. § 81-1318 (Supp. 1973) provides as follows:

> "Filing of claims. — (a) Time for filing. (1) A claim for compensation for disability on account of an injury (other than an occupational disease and occupational infection) shall be barred unless filed with the Commission within two [2] years from the date of the injury. * * *"

Ark. Stat. Ann. § 81-1302 (i) (Repl. 1960) defines "compensation" as follows:

> " 'Compensation' means the money allowance payable to the employee or to his dependents, and includes the allowances provided for in section 11 [§ 81-1311], and funeral expense."[1]

[1]Ark. Stat. Ann. § 81-1311 (Repl. 1960) provides for medical payments.

Ark. Stat. Ann. § 81-1318 (b) (Supp. 1973) reads as follows:

> "(b) Additional compensation. In cases where compensation for disability has been paid on account of injury, a claim for additional compensation shall be barred unless filed with the Commission within one [1] year from the date of the last payment of compensation, or two [2] years from the date of injury, whichever is greater. The time limitations of this subsection shall not apply to claims for replacement of medicine, crutches, artificial limbs and other apparatus permanently or indefinitely required as the result of a compensable injury, where the employer or carrier previously furnished such medical supplies."

On July 24, 1971, Dr. Leslie B. Reynolds, Jr., reported on Travelers Insurance Company (group insurance) form as follows:

> "undiagnosed lung disease manifested by restrictive ventilatory impairment and intermittent bronchospasm. * * * Patient to be hospitalized for rib and lung biopsy. . . ."

On August 13, 1971, Dr. J. C. Lougheed reported on a similar form as follows:

> "Pulmonary insufficiency and infiltration — cause undetermined. Dense pulmonary adhesions."

Both of these reports state that Brider was disabled to work and would be so disabled for an undetermined period of time.

On August 20, 1971, Dr. Reynolds reported on Travelers form as follows:

> "Pulmonary fibrosis with intermittent bronchospasm. * * * Lung biopsy 7-6-71 showed slight pleural and parenchymal fibrosis and anisotropic crystals *presumably from inhaled material.* Sample sent to Armed Forces Institute of Pathology, Washington, D.C. for analysis.

Patient showing only minor improvement with corticort therapy and must still be considered disabled." (Our emphasis).

On February 7, 1972, Dr. Reynolds submitted a letter-report reading in part as follows:

"The patient still has a restrictive ventilatory defect, which would limit his activity. This is probably permanent. Until the nature of the inhaled material is determined, it cannot be positively established whether this is responsible for his disability. We are making every effort to obtain these data. I feel some sort of rehabilitation is in order, however, and believe Mr. Brider should attempt to return to light work on a gradual basis. Should he have attacks of bronchospasm as has been demonstrated before, certainly he cannot work. However, based on the data we have, I feel Mr. Brider can resume limited activity on a gradual basis. He should be watched by your plant physician, with whom I would be glad to discuss his care in greater detail.

I am submitting our statement with this letter."

On February 28, 1972, Dr. Reynolds wrote a letter to Mohawk as follows:

Mr. Brider called me today and stated that, in the absence of a specific statement from us, he is unable to obtain employment of any type. I have gone over our records and have discussed this matter in some detail with Dr. Lougheed, the surgeon who did the lung biopsy on Mr. Brider, with reference to his probable capacity to work and, while we have not defined Mr. Brider's ability to work, we can only restate that he has distinct lung pathology. Pulmonary functions show he has a mild, restrictive ventilatory defect. Periodically, he has attacks of bronchospasm characterized by a severe obstructive ventilatory defect and a decreased amount of oxygen in his blood. We have not established the cause of these attacks of bronchospasm but *we suspect they may be related to inhaled material seen as microscopic refractile bodies in sections of his lung.*

> Apparently, the distinct statement relative to the weight Mr. Brider can carry is required by both your institution and the union. After extensive consultation, Dr. Lougheed and I agree that the following statement can be made: Attempts should be made to give Mr. Brider employment which would involve light work. We assess that he may carry 20 to 25 pounds without too much difficulty; however, he should not attempt to carry more than 75 pounds *Between these limits, working conditions such as the presence of dust, or other materials which may cause his attacks of bronchospasm would change the picture.* It is expected that with a gradual increase in work load, Mr. Brider should gradually increase his work capacity." (Our emphasis).

Brider first inhaled the fumes and experienced his first difficulty during the week between April 21 and April 28, 1969. He was sent to the doctor on April 22, 1969. The last injurious exposure to the chemical fumes at Mohawk occurred on March 10, 1972, and Brider filed his claim with the Commission on April 12, 1972. It was Brider's first contention that his bronchial condition was an occupational disease or infection and the statute of limitations did not commence running on his claim until March 10, 1972, the date of his last exposure. The occupational diseases are set out in Ark. Stat. Ann. § 81-1314 (Supp. 1973) but asthmatic conditions or pulmonary allergic reactions to chemicals, fumes or substances (not resulting in dermatitis) are not among the diseases so listed, and this court is without authority to add to the list. *Barentine* v. *Gleghorn Oil Co.*, 254 Ark. 182, 492 S.W. 2d 242.

Brider's second contention was that he had been paid compensation in the amount of $85 per week and also medical benefits from January 18, 1970, to January 18, 1972, and that he filed his claim within one year of the last payment as permitted under § 81-1318 (b), *supra*. Mohawk contended that the $85 per week paid to Brider was under an entirely separate nonoccupational insurance policy and did not constitute the payment of workmen's compensation in any sense of the word.

In awarding compensation benefits the Commission found as follows:

> "The claimant suffered an injury, notified his supervisor, and the respondents provided medical care and paid him $6,784.66 in weekly compensation benefits under a company health and accident insurance policy.
>
> The claimant's claim was filed within a year of receiving medical benefits (compensation) and therefore, his claim is not barred by the Statute of Limitations (81-1318 [b]), *Reynolds Metals Company* v. *Brumley,* 226 Ark. 388.
>
> It is further the opinion of the Commission that the actions of the respondents have estopped them from pleading the Statute of Limitations."

We are of the opinion the statute was tolled in favor of Brider in this particular case. Mohawk had procured workmen's compensation insurance coverage from the coappellant, Travelers Insurance Company and, in carrying out its employment contract with Brider and other employees through their labor union, Mohawk also procured from Travelers a group policy providing accident and sickness benefits for employees as follows:

> "Section C — Accident and Sickness Benefits
> Effective November 1, 1970, and for the duration of this Agreement thereafter, the Employer will provide the following plan of accident and sickness benefits for all Employees.
>
> 1. Accident and Sickness Benefits for Employees
> a. General — Benefits will be paid because of a disabling accident or sickness while under the care of a doctor licensed to practice medicine.
> Benefits will be payable from the first day of disability *due to accident or occupational illness,* the eighth day of disability due to non-occupational sickness or the first day of hospital confinement if occurring prior to the eighth day. Benefits will be paid for the duration of the disabili-

ty not to exceed 52 weeks for each period of disability. * * *

b. Benefits — The amount of weekly benefit will be $85.00. The amount of weekly accident and sickness benefits otherwise payable will be reduced for each week in excess of 26 weeks of benefits during any one continuous period of disability. * * *

2. Deduction for Workmen's Compensation Benefits
In the event that an Employee received weekly compensation under a Workmen's Compensation Act for any period with respect to which he is also entitled to weekly benefits under Paragraph 1 of this Section C, the amount of such weekly compensation payable under such Act shall be deducted from the amount of the weekly benefit otherwise payable to such Employee under said Paragraph 1." (Our emphasis).

As already pointed out, the appellant Travelers Insurance Company had both compensation and group coverage on Mohawk employees. The group policy was payable from the first day of disability due to accident or occupational illness and provided for payments in the amount of $85 per week. The weekly payments were larger but of shorter duration than compensation payments under the workmen's compensation coverage.

Brider started drawing disability payments under the group policy October 27, 1970, and was paid intermittently through January 18, 1972. These payments were made on the basis of the company physician's diagnosis of "bronchial trouble." The payments were apparently made following execution of "claim statement" and "release of medical information" forms by the claimant-employee and the attending physician. Only one set of these completed forms appears in the record. There is no evidence as to who actually filled out the forms but on the *claim statement* form dated October 31, 1970, and signed by attending physician C. P. McCarty, the cause of disability was designated "bronchial trouble," and the question as to whether the disability was due to accident, was answered "no." This form was signed by E. T. Brider

but there is a handwritten "X" preceding his signature incidating that someone other than Brider filled out the form and designated the place where Brider was supposed to sign. This form is in the record as "respondent's exhibit No. 3" and attached thereto is "release of medical information" form dated April 3, 1970, signed by Brider. Part "B" of this form is designated "attending physician's statement." Dr. Daniel Tonymon signed this form under date of April 6, 1970, and under "Diagnosis and Concurrent Conditions" he stated:

> "Chronic *allergic* bronchitis complicated by bronchial vascular congestion and spasm." (Our emphasis).

The Commission found that all medical treatment to date of the hearing had been paid by Travelers, and that the claim for medical treatment had not been controverted in this case. Under our statute Ark. Stat. Ann. § 81-1302 (i) (Repl. 1960), *supra,* compensation means the money allowance payable to the employee or his dependents *and includes medical payments.* We have held that the furnishing of medical services constitutes payment of compensation and is a waiver or suspends the running of the statute of limitations. *Reynolds Metal Co.* v. *Brumley,* 226 Ark. 388, 290 SW. 2d 211. In such cases the statute of limitations runs from the date of the last treatment. *McFall* v. *U.S. Tobacco Co.,* 246 Ark. 43, 436 S.W. 2d 838; *Heflin* v. *Pepsi Cola,* 244 Ark. 195, 424 S.W. 2d 365.

As already stated, § 81-1302, *supra,* defines "compensation" as meaning "the money allowance payable to the employee or to his dependents . . ." and we have held that compensation refers to money benefits paid to the injured employee for disability. *Brooks* v. *Ark. Best Freight,* 247 Ark. 61, 444 S.W. 2d 246. In the case at bar, as already stated, the appellant insurance carrier had both the compensation and group insurance coverage for Mohawk. The group coverage benefits were also payable for disability due to accident or occupational illness and were in excess of the amount payable under the workmen's compensation coverage required by law. In Larson, Workmen's Compensation Law, § 78.43 (a) is found the following:

> "When payment of either income or medical benefits has been made by a private employer-employee benefit association or insurance plan, this has usually been held to toll the statute."

We deem it unnecessary to discuss this case from the viewpoint of whether the statute runs from date of accident or from date of injury (as amended in 1948), or whether our statute is purely a statute of limitations or repose and goes to the remedy rather than the right; for, we conclude that the statute of limitations in this case was tolled by the payment of compensation in the form of medical benefits, if not included in the $85 weekly payments credited by Travelers to its group coverage. We further conclude that the Commission did not err in holding that the respondent insurance company was estopped from pleading the statute.

The judgment is affirmed.

FOGLEMAN, J., dissents.

FIRST STATE BUILDING AND LOAN ASSOCIATION, Mountain Home, Arkansas *v.* ARKANSAS SAVINGS AND LOAN BOARD and HOME SAVINGS AND LOAN ASSOCIATION

74-244 518 S.W. 2d 507

Opinion delivered February 10, 1975

Roy E. Danuser and *Catlett & Henderson*, for appellant.

Lester & Shults and *Kelly & Luffman*, for appellees.

JOE D. WOODWARD, Special Justice. On December 26, 1973, the Appellee, Arkansas Savings and Loan Board, granted the application of Home Savings and Loan Association to begin business as a savings and loan association in the City of Mountain Home.

The Appellant, First State Building and Loan Association of Mountain Home was a protestant to the application and appealed the finding of the Board to the Pulaski Circuit Court under the provisions of the Administrative Procedures Act.

The Circuit Court remanded the matter on April 3, 1974, to the Board for the Board to incorporate in its order "finding of fact and conclusions of law, separately stated" upon which the Order of the Board was based.

Thereafter on April 8, 1974, the Board issued a new Order which was affirmed by the Circuit Court.

The Appellant relies on two points for reversal. The first is that the findings of fact made by the Board in its Order of April 8, 1974, *again* failed to meet the requirements of Ark. Stat. Ann. Sec. 5-710, Supp. 1973.

The second point is that the Order of the Board approving Appellee's application was not supported by substantial evidence of record.

The record in this case is voluminous. The Hearing before the Board was protracted. Many detailed and complicated exhibits are in the record. The testimony of some eighty-seven witnesses is spread out through several volumes of testimony.

This Court has recognized that a threshold question exists in cases brought here from administrative agencies and that question is: "Has the agency followed the dictates of Ark. Stat. Ann., Sec. 510 (Supp. 1973) by providing the concise and explicit findings of fact and conclusions of law separately stated in its Order."

Professor Davis, in his Administrative Law Treatise (1968, Sec. 16.05) summarizes the reasoning underlying the law which requires explicit and concise findings of fact in administrative agency orders:

> "The reasons have to do with facilitating judicial review, avoiding judicial usurpation of administrative functions, assuring more careful administrative consideration,helping parties plan for rehearings and judicial review and keeping agencies within their jurisdiction."

The Board in this case did not state the underlying facts

upon which the Order was based in a concise and explicit manner at the first Hearing (December 26, 1973) nor did they do so at the second Hearing (April 8, 1974). The Board simply based its first Order on the statutory language of Ark. Stat. Ann., Sec. 67-1824 (Repl. 1966) and merely rearranged that wording in its second Order (April 8, 1974). We do not know, from the Order, what specific facts the Board relied upon in granting the application and we will not attempt to supply the deficiencies in an administrative Order by weighing evidence which is the responsibility of the administrative agencies.

The Appellee argues that Appellant should have come forward after the Circuit Court remanded the Order on April 3, 1974, to assist in rewriting the Order or to make its objections known at that time. The Appellee contends that having not done so, the Appellant waived the matter.

This Court held in *Arkansas Savings and Loan Board et al* v. *Central Arkansas Savings and Loan,* 256 Ark. 846 (1974) that the requirements of Ark. Stat. Ann., Sec. 5-710, Supp. 1973 are primarily for the benefit of the reviewing Court and cannot be waived by the parties.

We are, therefore, unable to answer the threshold question in the affirmative and need not reach the second question of whether the Order was based upon substantial evidence at this time.

The judgment is reversed and the cause remanded through the Circuit Court to the Board for such further proceedings as may be necessary.

CONLEY BYRD, J., not participating.

Kenneth SNELLING *v.* STATE of Arkansas

CR 74-131 519 S.W. 2d 52

February 10, 1975

PER CURIAM

The appellant, Kenneth Snelling, was identified by police Officer Sparks as the one who sold and delivered to him controlled substance in violation of Act 590 of 1971 (Uniform Controlled Substance Act).

The appellant's brother Garry, testified that one Steve Welton had the drugs in his apartment; that he and the appellant took Officer Sparks to Steve's apartment; that Steve was "barbed out" and at Steve's request, the appellant got the drugs for Sparks and delivered the drugs to him. He said he saw the appellant hand the money to Steve.

The appellant testified that the transaction was actually between Officer Sparks and Steve and that fifty cents per capsule was agreed upon through price negotiation for large quantities. He said that Steve was pretty high on the drug and that Steve asked him to get the drugs and give them to Sparks. He said he did get the drugs and give them to Officer Sparks and that he took $12.50 for the drugs and gave it to Steve.

The appellant was represented by the Public Defender at the trial and was sentenced to three years in the penitentiary.

On appeal to this court the Public Defender has made a motion pursuant to *Anders* v. *California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967) that the appeal to this court has no merit. The Attorney General has submitted a brief and agrees with the Public Defender. We agree with both of them and affirm the conviction.

The judgment is affirmed.

Rosemary LOCKLEY *v.* David Orr LOCKLEY

74-243 519 S.W. 2d 52

Opinion delivered February 17, 1975

Burk Dabney, for appellant.

Giles Dearing, for appellee.

CARLETON HARRIS, Chief Justice. This is a divorce case between Rosemary Lockley, appellant herein, and David Orr Lockley, appellee. Questions presented are the validity of property transactions between the two; the jurisdiction of the trial court in entering an *in rem* order as to title to lands located in another state; the granting of a divorce to appellee, and the refusal to grant appellant a divorce on her counterclaim.

Appellee was formerly married to Sedella Lockley (according to the complaint, for more than 40 years)[1], sister of appellant, such marriage being terminated by the death of Sedella on August 17, 1972. There were no living children of the marriage, the only child having died as a baby. Appellant came down for the funeral and returned to her home in Michigan. In January, 1973, appellee went to Leslie Michigan to get appellant who returned to Arkansas with him for the purpose, according to appellant, of helping him take care of his income tax. Rosemary brought with her her 13-year-old daughter, Beverly. Appellant's five other children were left with an older married son.[2] The two were married in

[1]The record is confusing in this respect. Appellee testified that he was 55 years of age at the time of trial and that he was married to Sedella for more than 40 years. This, of course, would mean that he was 14 or 15 years of age at the time of this marriage. According to the marriage license, appellee was 60 years of age at the time of his marriage to Rosemary.

[2]Appellant had seven children by her first marriage to Charles Beegle, from whom she was divorced.

February, 1973. Prior to the marriage, two of the younger children came to Arkansas. According to Rosemary, they first separated about two months after the marriage.[3]. She remained away four or five days, but returned at the behest of Mr. Lockley. Thereafter, she again left appellee and on that occasion instituted suit for divorce in the Cross County Chancery Court. Complaint was filed on May 22, 1973. She apparently remained away for about a week before returning to the Lockley home. Lockley owned a farm in Cross County, on which the home is located and on May 31, 1973, this property was conveyed by Lockley to himself and Rosemary as tenants by the entirety. Subsequently, on June 15, 1973, a house was purchased in Leslie, Michigan, the property being conveyed to appellee and appellant as tenants by the entirety. After making the purchase, the parties returned to Arkansas, and Rosemary, after remaining at the Arkansas home for only a few days, left, and returned to Leslie. Thereafter, Lockley instituted the present suit for divorce.[4] Appellant counter-claimed, seeking a divorce and property rights. On trial, after the taking of testimony, the court rendered rather comprehensive findings in which it awarded a divorce to Mr. Lockley on grounds of indignities, rejected the charges (hereinafter discussed) made by Rosemary against appellee, found that appellant had deliberately induced Lockley to place the title to the Cross County property in the parties as tenants by the entirety; found that the same situation existed as to the Michigan property, and the court, in its order, set aside the deed from Lockley to himself and Rosemary to the Cross County property, and vested the title to the home in Michigan in Lockley alone. The court, however, apparently recognized that this last action was of doubtful validity and accordingly an alternative order was also entered giving Lockley a lien against the Michigan property to the full extent of the purchase price. As to personal property, a new automobile, which had been given to Rosemary soon after the marriage, was given to appellant, and appellee was ordered to pay to her the sum of $5,000 in cash. From the decree so entered, appellant brings this appeal. For reversal, four

[3]The record in this case is very difficult to follow. Different dates and different months are mentioned as the time of the separation.

[4]Appellant's suit for divorce was dismissed on June 11, four days before the Michigan property was acquired.

points are asserted which we proceed to discuss in the order listed.

"I.

THE TRIAL COURT ERRED IN SETTING ASIDE THE DEED FROM THE APPELLEE-HUSBAND TO THE APPELLEE AND THE APPELLANT-WIFE AS AN ESTATE BY THE ENTIRETY TO PROPERTY LOCATED IN CROSS COUNTY, ARKANSAS."

The court rendered its Finding No. 1 as follows:

"1. This case is an outstanding example of the folly of quick marriages, and particularly those which occur shortly after the death of the spouse to whom one of the parties has been married many years. The plaintiff and his former wife had lived together many years, and apparently happily. Shortly after she died, the plaintiff and the sister of the deceased, Rosemary, the defendant herein, established contact, and their marriage took place on February 17, 1973. It was only a short time before Rosemary left, and filed suit for divorce. After persuasion she came back for a short time. During this time she persuaded the plaintiff to place the title to his Cross County farm, which included his home, in both their names. She also persuaded him to withdraw cash from bank accounts in Arkansas, and to purchase with those funds a home in Michigan, title being taken in both their names. Also, the plaintiff bought the defendant a car during this period, as well as gave her cash monies."

Mr. Lockley, who can neither read nor write, other than print his name, testified that appellant was dissatisfied and that she said if the property were placed in their joint names, she could "do better." Appellee stated that his wife said she could handle the business better than he could because of his lack of education; that he realized that he needed help, and he believed what appellant said and relied upon it. He also said that Rosemary told him that the title in both names

would be beneficial as to inheritance tax in that money would be saved and that he believed her and relied upon such information. Mrs. Lockley said that she originally came to Arkansas to help appellee with his income tax, testifying that he stated he would pay her to render such aid. She said that she wrote all the checks for purchases made, and that appellee had total bank accounts of about $68,000 in three different banks; that there were 120 acres in the home property valued at approximately $300.00 per acre, a well-furnished three bedroom brick house with modern conveniences; that the house would be valued at $35,000 or $40,000. Admittedly, all the money mentioned had been acquired by Mr. Lockley. Appellant said she filed the divorce complaint about the time she talked to her daughter Beverly about the actions of Mr. Lockley. According to her testimony, appellee had been making advances toward this 13-year-old girl and he had made various purchases of personal items for the daughter.[5] She said that she had seen him kissing the daughter on the neck but that her husband said "I love her just like a daddy", but this statement did not conform to her daughter's comments. Appellant stated that after talking with Beverly she left her husband and went to her brother's home; that he came and talked with her several times endeavoring to get her to come back to him; that he said if she would come back "he would change everything over." She said that she finally agreed to return, but set out certain conditions.[6] Appellant added that

[5]From the record:

"Before we got married everything — he told me we would stay and he would will the house to Beverly, he would give Beverly the house, everything would go to Beverly. I told him I didn't want it, so it was Beverly. Everywhere he went he took Beverly. He never asked me to go, it was always Beverly and he loved Banana cake and he would come in and ask her first to bake one, he never asked me to. I would go to cook and he would come in and take over. It wasn't because I didn't want to cook, he didn't want me to cook, if he wanted anything done he asked Beverly. He bought for Beverly, he didn't buy for me. Well, I wasn't jealous but it hurt me to think he would do that on her birthday he bought her a cake and an eighty-eight dollar ($88.00) bicycle. When mine came around he bought me a 39¢ pair of house shoes and a box of powder."

[6]From the record:

"Anyway, my agreement when I went back to him was that I had lost all respect for him. 'I don't think I can live with you as a wife because of what you have done.' I said, 'I have not got a cent, I have got no

he told her that he didn't want his people to have the property, "When I die I want you to have it." Within a few days, the deed to the Cross County property was executed.

Appellant's brother, a resident of Cross County, also testified but his testimony added but little to the question now under discussion.

Certainly, we cannot say that the chancellor's finding was against the preponderance of the evidence. It is very apparent that Lockley was almost totally uneducated; that he knew little of business matters; that he recognized and believed his wife was better able to handle such transactions as evidenced by the fact that admittedly she wrote all checks. The testimony from both parties makes it clear that he wanted her to return to live with him. In *Harbour* v. *Harbour*, 103 Ark. 273, 146 S.W. 867, this court stated:

> "If it be true that she married and started in with the deliberate intention to simulate an affection she did not feel for a man much older than herself in order that she might acquire the title to his property and despoil him of it and drive him from the home he had purchased and conveyed to her in his utter reliance upon her affection, loyalty and faithfulness to him, or if she later formed such a design and pursued it with such intention to the consummation proved herein, we do not see why it was not such a fraud against his rights that equity should relieve against it."

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place to go, I'll come back and I will try but I will be watching every move you make and you know that I will.' I said, 'You are to stay away from Beverly, you are to treat Clark [a son] right and I wlll do my part, I will make you a wife if you will let me.' He said, 'I know we have never been man and wife but we will this time, I'll do anything for you if you will come back,' so I went back.

***

"He immediately demanded I start sleeping with him and I told him I couldn't, every time I look at you, I know you know that I know what you have done. I said, 'when I look at you I think of that and I can't respect you and I can't respect you and I can't sleep with you until I respect you. You've got to take me back on them terms', and he said he would. I said that maybe later on I could grow to feel like I did at first, that I would want you as a husband. He said, 'I will stay with you under any circumstances.'"

Further, quoting from an Oklahoma case,[7] we added:

"The majority of cases between man and wife where questions arising out of constructive fraud, undue influence, or a violation of confidence reposed are involved are generally those wherein the wife sues to secure relief from contracts, gifts, and transactions entered into under the influence of the husband; the cases quoted from above, however, and some others cited are those where the husband was the victim. The principle controlling the rule for relief under either situation is the same. It is that influence has been acquired and abused; confidence reposed and betrayed. It is of no consequence that the one deceived is a man, and the other party a woman. Difference in sex does not create the equities, nor alter the rule. It is the confidential relationship existing between the parties and the fact that the acts done spring from it which create the equities. In the case at bar it appears that the sole consideration for the transfer of this property from the husband to the wife was the affection and confidence which he had in her as his wife. She was not a stranger to him, nor did she pay him any valuable consideration for the property. As he doubtless viewed it, their relationship made them virtually one person, and it was probably a matter of indifference to him whether the title to the property was in her or himself. They were to jointly use it as a continuing, harmonious family. He did not give it to her, nor did she receive it, in contemplation of divorce and separation; the transaction had its life and being in the sacred relationship of husband and wife. Without this it would never have taken place."

In its Finding No. 5, the court stated:

"The court finds that Rosemary deliberately induced Mr. Lockley to place the title to the Cross County property in their names as tenants by the entirety, with the knowledge that she did intend [8] to continue to live

[7] *Thomas* v. *Thomas,* 27 Okla. 784, 109 Pac. 825.

[8] It is not clear from this language whether the court meant that Lockley changed the title because he thought his wife intended to continue to live with him, or whether the language has reference to Mrs. Lockley. If the latter is true, it is obvious from the findings in the case that the sentence "That she did intend" was a mistake and meant "that she did *not* intend".

with him as man and wife. The court further finds that the same state of affairs is true as to the home in Michigan. Rosemary should not be permitted to profit by these unconscionable actions. Therefore, the court finds that the deed from Mr. Lockley to himself and Rosemary will be set aside."

A circumstance that seems indeed pertinent in determining this litigation is that appellant agreed to go back to Lockley, even though her daughter told her that he had made improper sexual advances to her; still further, appellant testified that appellee had abused her (appellant) sexually, stating that he "mutilated" her. Now, if these things had happened, particularly the former, the love of a parent for a child being what it is, it is difficult to see how appellant could have resumed her relationship with appellee, and the fact that she subsequently left him a third time permanently, within three weeks after this deed was executed, is a potent circumstance indicative of the fact that she set out to acquire whatever property rights could be cajoled out of Mr. Lockley. We find no error in the ruling as to the Cross County property.

"II.

THE TRIAL COURT ERRED IN ENTERING AN IN REM ORDER OPERATING DIRECTLY UPON THE TITLE TO LANDS LYING IN THE STATE OF MICHIGAN BY REFORMING A DEED VESTING TITLE IN APPELLEE-HUSBAND ALONE OR IN GIVING HIM A LIEN AGAINST SUCH PROPERTY LOCATED IN THE STATE OF MICHIGAN."

The facts leading to the purchase of the property in Michigan are pretty well covered in the discussion under the preceding point. At the same time that Mr. Lockley was endeavoring to persuade appellant to return to him and discussed with his wife the Cross County property, he also agreed to purchase property in Leslie, Michigan. Appellant stated that Lockley told her he knew what it would take to make her happy, and that would be to return to Michigan;

that they went to Leslie, Michigan for the purpose of buying a home. She said that appellee had never been in Michigan except when he drove there to get her and take her back to Arkansas. The two looked at a house, liked it, and made the purchase for the sum of $34,000 which was drawn from Mr. Lockley's bank accounts. This purchase took place on June 15, 1973, and the parties after staying there for a day or two, returned to Arkansas.

Lockley stated that his wife wanted to buy property in Michigan since some of her children were going to school there, and that she said they would live there for about three years until the children were out of school and that they would then return to Arkansas to live. Lockley said that he believed her and they made the trip, found the property that she liked and purchased it as she desired, i.e., "She wanted it in mine and her name and I put it there." While, as previously stated, this record is most confusing, it does appear that they stayed in Michigan for one or two nights, returned to Arkansas and, according to Lockley, appellant left the day after they arrived in Arkansas. At any rate, only a few days elapsed. Again, we do not find, for the same reasons enumerated under the preceding point, that the chancellor's finding should be overturned. However, the court erred in its disposition of the property. The finding was as follows:

> "The court finds that, from an equitable standpoint, title to the home in Michigan is vested in Mr. Lockley alone, and the deed to it should be reformed to that effect. In the alternative, if this cannot be accomplished, then Mr. Lockley is given a lien against the Michigan home in dollars to the full extent of the purchase price."

This transfer of title cannot be accomplished under the method employed by the chancery court. As stated by Dr. Robert A. Leflar, distinguished professor of law, in American Conflicts Law, § 173, p. 427:

> "The only state which can, by operation of law and apart from the act of the parties, transfer title in land out of one person and into another is the state where the land lies."

In § 174, p. 428, it is stated:

> "Although the courts of one state are without power to issue any judgment or decree directly affecting title to land in another state, it is permissible for them to issue in personam judgments and decrees in suits involving foreign land. *** The court's decree for the plaintiff is good so long as it merely orders the defendant to execute conveyance, and does not purport to pass the title in the extrastate land. The conveyance executed under the legal duress of such a decree is recognized as valid. A court's power to issue decrees for conveyance of foreign land is not limited to suits on contracts, but may be exercised in any case in which an in personam right to have conveyance is discoverable."

In our own case of *Tolley* v. *Tolley*, 210 Ark. 144, 194 S.W. 2d 687, the court held that a Kansas divorce decree awarding certain Arkansas realty to the wife involved an attempt by the Kansas court directly to adjudicate title to property outside the jurisdiction of Kansas, and was not effective in this state. The Kansas decree awarded the land to the wife, "free and clear of all claims and liens of the defendant." In discussing the case, this court said:

> "The judgment of the District Court of Wyandotte county, Kansas, contained this language: 'It is further ordered and decreed that plaintiff be and she is hereby awarded the following described real estate, to-wit: The southeast quarter (¼) of the southeast quarter (¼) of section ten (10), township seven (7) north, range five (5) west, consisting of forty (40) acres of land, more or less, in White County, Arkansas, free and clear of all claims and liens of the defendant.' This was a decree *in rem* by the Kansas court, attempting to settle title to real estate in Arkansas by operating directly on the title. The full faith and credit clause of the United States Constitution does not afford any sanctity or force in the State of Arkansas to such judgment of the Kansas court, because the Kansas court was without jurisdiction to vest title to Arkansas real estate in the form in which this judgment was rendered. *Fall* v. *Eastin*, 215 U.S. 1, 30 S. Ct. 3, 54 L.

Ed. 65, 23 L.R.A., N.S., 924, 17 Ann. Cas. 853. In that case just cited, Mr. Justice McKenna, speaking for the United States Supreme Court, quoted from the earlier case of *Watts* v. *Waddle*, 6 Pet. 389, 8 L. Ed. 437: 'It is not in the power of one state to prescribe the mode by which real property shall be conveyed in another. This principle is too clear to admit of doubt.' In speaking of the full faith and credit clause, Mr. Justice McKenna said: 'This provision does not extend the jurisdiction of the courts of one state to property situated in another . . .' ***

"In 27 C.J.S. 1287 the rule is stated: 'since jurisdiction to render a judgment *in rem* inheres only in the courts of the state which is the situs of the *res*, a divorce decree which attempts to settle the title to lands in another state, by operating directly on the title, and not by compelling the holder of the title to convey, is void and not *res adjudicata* of the same claim in an action between the same parties and involving the same land.'

"And in 17 Am. Juris. 369 this appears: 'The rule is well established that in divorce proceedings the courts of one state cannot, by their decree, directly affect the legal title to land situated in another state, . . .'

"And in Leflar on 'Conflict of Laws,' § 119, the rule is stated: 'The only state which can, by operation of law and apart from the act of the parties, transfer title in land out of one person and into another is the state where the land lies.'"

See also *Kendall* v. *Crenshaw*, 116 Ark. 427, 173 S.W. 393. In the Michigan case of *Parkinson* v. *Guilloz*, et al, 231 N.W. 89, the Supreme Court of Michigan said:

"The evidence consisted of plaintiff's testimony, taken by deposition, and the introduction of records and opinions of the California courts, which are claimed to be res adjudicata. In Guilloz v. Parkinson, 204 Cal. 441, 268 P. 635, the court held that plaintiff did not hold the lots in trust for defendant. The decision authorized a

personal decree, but expressly recognized that the title to the lots was determinable only by the courts of this state. The decision is not res adjudicata here."

Here, Mrs. Lockley was not directed to execute a deed to Mr. Lockley conveying the Michigan property; rather, the court itself divested Mrs. Lockley of title, and it was without authority to do so. Of course, the alternative set out by the court was also beyond its authority. It follows that this portion of the decree will have to be reversed.

"III.

THE DIVORCE GRANTED TO APPELLEE-HUSBAND ON HIS COMPLAINT IS NOT SUPPORTED BY A PREPONDERANCE OF THE EVIDENCE."

The trial court found as follows:

"3. The court finds that a divorce should be awarded to Mr. Lockley on the grounds of indignities. While the corroboration of Mr. Lockley's testimony is rather slight, this court cannot be blind to the circumstantial evidence set out above. When all of the testimony of all of the witnesses, including Rosemary herself, is put together with the actual facts and circumstances, this court must conclude that Mr. Lockley is entitled to a divorce.

"4. The court rejects the charges made by Rosemary against Mr. Lockley."

We agree that the corroborating evidence offered by Mr. Lockley was slight,[9] but we are also of the opinion that considering the findings of the court, and the circumstances reflected by the evidence, we cannot say that his decision in

[9]One rather puzzling fact was not developed. The evidence reflects that Mr. Beegle, the former husband of appellant, stayed in the same house with Mrs. Lockley overnight (in the home of appellant's sister), though not in the same room, but there is no evidence of any illicit conduct. There is no explanation of why Mr. Beegle was in Arkansas. The record indicates that this occurred after appellant left the Lockley home for the second time.

granting a divorce was erroneous. Of course, we have said numerous times, so numerous as to require no citation of authority, that corroboration in contested divorces need only be slight. What are the circumstances in the present case? First, let it be pointed out that the court specifically rejected the charges made by appellant against appellee. Let it be remembered that the chancellor heard and saw all of these witnesses, an advantage we did not have, and his rejection of the accusations made by Mrs. Lockley is quite significant, for if the charge made by appellant to Mr. Lockley that he was making improper advances to her daughter was not true, this was an extreme indignity that would "cut to the quick". That we consider there was excellent reason for the chancellor to disbelieve this testimony, has already been indicated in our earlier discussion pointing out that it is unusual for a woman to return to her husband if such abuse of a child has taken place. Strongly indicating her feelings toward this husband, even though she returned to his abode, was her statement in court, "I would have rather been dead than live with him." Of course, we daresay most any husband denied the conjugal relationship, would consider this a gross indignity. Her testimony, throughout the evidence definitely leaves the impression that she looked upon him with loathing, and held him in complete contempt. Of course, leaving him, and returning soon thereafter, as well as instituting suit against him, were indignities if there was no just cause for the leaving and the institution of the suit. The fact that she returned on these occasions, and dismissed her complaint, denotes that these actions were perhaps not justified. At any rate, we are unable to say that the chancellor's findings were against the preponderance of the evidence on this point.

"IV.

THE TRIAL COURT ERRED IN REFUSING TO GRANT APPELLANT-WIFE A DIVORCE ON HER COUNTERCLAIM."

Of course, under the finding in Point III, there is really no need to discuss this contention, for if Mr. Lockley was entitled to a divorce because of indignities, it necessarily follows that Mrs. Lockley was not so entitled. Beverly Beegle, the

daughter, sustained her Mother's allegations to a degree, stating that Lockley pinched her between the legs and on her breast, and that he had put his hands under her blouse touching her breasts. It has already been pointed out that the court did not accept testimony relative to this charge and we certainly cannot say, from the printed record, that it should have been accepted. Of course, though denying the divorce, the court did find:

> "Mr. Lockley did marry Rosemary, although foolishly, and she did live with him for a short time. Therefore, he should not be permitted to escape unscathed. Therefore, the court will permit Rosemary to retain the automobile, and any household belongings purchased while they were married which are presently in her possession. Any belongings which she took with her which belonged to Mr. Lockley and/or his former wife should be returned to Mr. Lockley. In addition, Mr. Lockley will be ordered to pay Rosemary the sum of $5,000.00 in cash."

For the reasons set forth under Point II, that portion of the decree is reversed and the cause remanded for further orders or proceedings; furthermore, because of our reversal on this point, the chancellor may, if he deems it proper, reconsider the distribution of assets.

It is so ordered.

ARKANSAS STATE HIGHWAY COMMISSION *v.*
Carlton A. SMITH et ux

74-260 519 S.W. 2d 64

Opinion delivered February 17, 1975

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

Douglas Bradley and *Jon R. Coleman*, for appellees.

GEORGE ROSE SMITH, Justice. In this condemnation case the Highway Commission appeals from a verdict and judgment fixing the landowners' compensation at $4,000. The testimony of the landowners' expert witness, a professional appraiser with 44 years' experience, amply supports the verdict. Nor was there any error in the court's refusal to strike the "before" value testimony of Carlton A. Smith, one of the owners. He had lived in the community for 27 years and had watched the sales of land in the area through the years. He valued his farm at $2,000 an acre and stated on cross-examination, without objection, that he had been offered that amount for his land. Such an offer, like hearsay, is not admissible as proof of value, but we have held that hearsay testimony, if not objected to, may support a verdict. *Ark. State Highway Commn.* v. *Bradford*, 252 Ark. 1037, 482 S.W. 2d 107 (1972). An offer falls in the same category. It was not shown that the offer in question was not an adequate basis for Smith's opinion.

Affirmed.

THE STANDARD OF AMERICA LIFE INSURANCE COMPANY *v.* Mrs. Vanelane HUMPHREYS

74-250 519 S.W. 2d 64

Opinion delivered February 17, 1975

Bridges, Young, Matthews & Davis, for appellant.

Gibson & Gibson, P.A., for appellee.

LYLE BROWN, Justice. The trial court awarded $7,000 to appellee for the death of her husband. The award was based on group insurance coverage issued by appellant. The sole issue was whether the insurance covered death suffered while the deceased, James C. Humphreys, was on the job. The appellant contends that only non-occupational death was covered.

The Holland Company, employer, made application to appellant for group coverage on its employees. Policy GC-1788 was issued on the basis of Holland's application for non-occupational death and dismemberment. The maximum

coverage was $7,000. Appellant explains that no coverage was provided for occupational death since that loss was covered by workmen's compensation insurance and the non-occupational benefit carried a much lower rate. Mr. Humphreys was killed in an on-the-job accident when a hydraulic drill press exploded. The appellee, widow, filed claim under the policy for $7,000 and the company denied liability because death resulted from Mr. Humphreys' employment.

Among other insurance requested, Holland's application contained this recital:

"(5) COVERAGE DESIRED:

XX Accidental Death & Dismemberment Benefits"

Holland then executed Schedule of Benefits (A), Accidental Death and Dismemberment Benefits. That application had this recitation: "AD&D Benefits for Insured shall be XX Non-Occupational"

Finally, the application states: "It is understood that this application and each of the applicable Schedules indicated in (5) above shall be attached to and become a part of the Policy or Policies issued by the Company."

The application was attached to the master policy. The policy provides:

"LIMITATIONS. The Insurance with respect to Accidental Death and Dismemberment Benefits does not cover loss caused or contributed to by:

> (E) any act or thing pertaining to any occupation or employment for wage or profit if only non-occupational coverage is to be provided as specified in the Schedule of Benefits for Accidental Death and Dismemberment Benefits."

The certificate of insurance issued by appellant and

possessed by James C. Humphreys at the time of his death was dated March 1, 1972 and the schedule of benefits included "Accidental Death and Dismemberment $7,000". The certificate recites that the schedule of benefits was "subject to the provisions and limitations of the master policy" issued to Holland Company. Then it provided that "This individual Certificate is furnished in accordance with and subject to the terms of said group policies and is merely evidence of insurance provided under said group policies . . . ." The schedule of benefits contained on the certificate has this wording:

"LIMITATIONS. The Insurance with respect to Accidental Death and Dismemberment Benefits does not cover loss caused or contributed to by:

> (E) any act or thing pertaining to any occupation or employment for wage or profit if only non-occupational coverage is to be provided as specified in the Schedule of Benefits."

Based on the great weight of authority the appellee cannot prevail in this case.

> It is generally held that an employee's contract of insurance under the group plan consists of the policy issued by the insurer to the employer, the individual certificate delivered by the employer to the employee being no part of such contract, but only an instrument reciting the employee's right to protection under the terms of the group policy so long as there is a compliance with the conditions of the policy. 44 Am. Jur. 2d, Insurance § 1870.

* * *

> The insured may have actual knowledge of the contents of the master policy, but in any case he will be deemed to have constructive knowledge of its provisions either on the theory that the employer is his agent, and that knowledge of the employer of the terms of the master policy is to be imputed to the employee, or because the

> certificate which the employee receives expressly states that it is subject to the terms of the master policy, which are incorporated into the certificate by reference. Couch on Insurance, Group Insurance § 82:13.

We have held that the employer is the employee's agent in connection with a group insurance policy. *Metropolitan Life Insurance Company* v. *Thompson,* 203 Ark. 1103, 160 S.W. 2d 852 (1942).

Appleman agrees with the text authorities we have cited:

> In construing the rights of any insured, the court will look first to the terms of the master policy. The rights and obligations of all parties are measured by the terms of the master policy, it being considered that an employee accepting the group insurance contract made between the employer and insurer is bound by the terms thereof. * * * * Some courts have held that if there is a conflict between the terms of the certificate and the master policy that the certificate will control, although the majority of courts have, partly upon the basis of the contractual expressions, reached a contrary conclusion. 13 Appleman Ins. L. & P., § 7528.

The certificate in the case at bar does not contain, as does the master policy, the statement that the insurance covers only non-occupational hazards; however, as we have pointed out, the certificate issued to the employee recites that the certificate is subject to the terms and limitations of the master policy; recites that the certificate is mere evidence of insurance provided by the master policy; and refers to the master policy's provision for non-occupational coverage. Therefore, those expressions in the certificate were sufficient to make the certificate subject to the terms and conditions of the master policy. On the question of conflict between the master policy and the certificate see *General American Life Insurance Co.* v. *Yarbrough,* 360 F. 2d 562 (1966). *Yarbrough* is an Arkansas case and the decision was based on the circuit court's interpretation of Arkansas law.

Reversed and dismissed.

HARRIS, C.J., not participating

HOLT, J., not participating

Raymond TIPPS *v.* L. C. MULLIS

74-234 519 S.W. 2d 67

Opinion delivered February 17, 1975

Charles S. Gibson, for appellant.

Gill, Clayton & Johnson, for appellee.

J. FRED JONES, Justice. This is an appeal by Raymond Tipps from a summary judgment for $1,425 rendered by the circuit court as rental money due under a lease entered into by Tipps as lessee and the appellee, L.C. Mullis, as lessor.

The facts appear as follows: Tipps and Mullis entered into a written lease agreement under which Tipps leased a store building in McGehee, Arkansas, from Mullis at $75 per month for a period of five years ending on June 30, 1973. Tipps vacated the premises in December, 1971, and Mullis filed suit seeking a declaratory judgment adjudicating the rights of the parties and for judgment of amounts due under the lease.

The case was tried before a jury and at the conclusion of the evidence Mullis moved for a directed verdict and the motion was denied. The jury was unable to reach a verdict and the trial court declared a mistrial. Before the case was reset for a new trial, Mullis filed a motion for summary judgment to which the appellant responded. The trial court granted appellee Mullis's motion and awarded summary judgment in his favor in the amount of $1,425, together with interest and costs.

The appellant Tipps has designated the following points he relies on for reversal:

> "The trial court erred in allowing appellee to move the court for summary judgment after the court had already denied appellee's motion for directed verdict.
>
> The court erred in granting appellee's motion for summary judgment because:
>
> A. Factual issues existed which should have been resolved by a jury trial, and;
>
> B. The court, by construction, varied the literal and express language of the parties' lease."

We find no merit in appellant's first assignment. It is a matter of common judicial knowledge that in many instances motions for directed verdicts are denied and then judgment entered on motion notwithstanding the verdict of a jury. The propriety of the trial court in discharging the jury in this case is not questioned. (Ark. Stat. Ann. § 27-1735 [Repl. 1962]). Under Ark. Stat. Ann. § 27-1736 (Repl. 1962) the case stands ready for a new trial following the discharge of a jury. This section reads as follows:

> "In all cases where the jury are discharged during the trial, or after the cause is submitted to them, it may be tried again immediately or at a future time, as the court may direct."

This section does not mean that the case may or may not be tried again, it means that the trial court can direct *when* the cause is to be tried, immediately or at a future date, not *whether* it can be tried. *Gregory* v. *Colvin, Judge*, 235 Ark. 1007, 363 S.W.2d 539 (1963). We are of the opinion that the trial judge found and properly applied the law as to the appellant's first point. We quote from the trial court's opinion and adopt his language as our own. In the trial court's written opinion he says:

> "What then is the status of a case after a hung jury? In C.J.S., Volume 89, at paragraph 482, citing as authority City of Woodward v. Caldwell C.C.A. Okla. 86 F. 2d 567, it is said:
>
> 'After the jury have been discharged for failure to agree, the case is terminated with no issue determined and stands as if no trial had been had, *and is ready for retrial immediately or at a future time as directed by the court.*' That which I have underlined is almost identical language employed in 27-1736 Arkansas Statutes Annotated. Further, 'a mistrial is often defined as being equivalent to no trial, certainly there has been no final determination of petitioner's cause of action.' Gregory v. Colvin, 363 S.W. 2d 539."

We hold, therefore, that when the trial court properly dis-

charges a jury because of its inability to agree on a verdict, the same case stands ready for a completely new trial on all issues and subject to the same motions and procedure as if no trial had ever been had.

The conclusion we have reached on the appellant's first point disposes of the question of the propriety of the trial court in *entertaining* the appellee's motion for summary judgment, and we are of the opinion that the trial court did not err in *granting* the motion for summary judgment in this case.

The summary judgment procedure under Ark. Stat. Ann. § 29-211 (Repl. 1962) is now so well established in Arkansas little time need be devoted to it here. It is an adoption of Rule 56 of the Federal Rules of Civil Procedure and provides as follows:

> "A party seeking to recover upon a claim, counterclaim, or crossclaim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits, for a summary judgment in his favor upon all or any part thereof."

We do not agree with the appellant's contention that factual issues existed which should have been resolved by a jury trial, and that the trial court varied the express language of the lease by erroneous construction. The appellee pled the lease agreement between the parties and alleged that appellant had abandoned the leased premises and refused to pay the monthly rental. He sought a declaratory judgment adjudicating the respective rights of the parties under the lease, and prayed judgment for the amount due under the terms of the lease. The appellant answered that the leased premises had become untenable and unfit for occupancy; that appellant was well aware of the condition of the premises and had refused to place such premises in tenable condition. The appellant relied upon the following portion of the lease agreement:

> "DESTRUCTION OF PREMISES: In the event that the building or premises herein leased shall, during the

term of this lease, become destroyed or injured by fire *or any other cause* or casualty *so as to be rendered untenable,* and such injury shall not be repaired by Lessor within sixty days thereafter, it shall be optional with either party hereto to cancel this agreement and terminate this lease, and in such case such cancellation shall be in writing, and the rents shall be paid to the date of such fire or casualty. . . ." (Our emphasis).

The appellant in his answer only alleged that the appellee permitted the leased premises to become untenable. He argues that the phrase "any other cause" in the lease contract includes ordinary deterioration of the building. We agree with the trial court's interpretation of the lease in that the above italicized portion related to becoming destroyed or injured by fire or any other cause or casualty so as to be rendered untenable, did not relate to untenability because of normal wear and tear.

The lease in the case at bar contained a provision pertaining to repairs as follows:

"REPAIRS AND NOTICE: The said Lessee agrees to quit and deliver up the said premises to Lessor peaceably and quietly at the end of the aforesaid term, or at any previous termination of this lease for any cause, in as good order and condition and state of repair, reasonable wear and tear alone excepted, as the same now is or may be placed or put into by Lessor. Lessor agrees to make all necessary repairs to the roof and the exterior of said building, excluding damage to any windows or doors, whether by breakage or otherwise. Lessee agrees to make all minor repairs becoming necessary on account of the use of said premises to the interior of said leased premises, and to make all necessary repairs for damage, by breakage or otherwise, to all windows and doors in said building. The repairs by Lessor, if necessary, shall be made upon notice in writing by Lessee of any such repairs required and Lessor agrees to have same fixed and repaired within seven days from the receipt of said notice or Lessee may have same repaired and deduct the cost of

> having same repaired from the rent. Lessor is not to be responsible for any damage from any faulty or leaky roof."

In the appellant's response to the motion for summary judgment, he concludes with a paragraph as follows:

> "Defendant states that affirmative defenses to Plaintiff's Complaint have been raised joining issues of fact as a matter of law. Specifically the Defendant has stated by answer that the premises were untenable and unfit for occupation. This is a defense to Plaintiff's cause according to the terms of the lease."

The appellant admitted that he gave no written notice of needed repairs to the building under this provision of the lease agreement, and certainly the lessor would have been entitled to sufficient time to make repairs after such notice. See *Tedstrom* v. *Puddephatt,* 99 Ark. 193, 137 S.W. 816. Furthermore, this provision of the lease only gave the lessee the right to make repairs and charge them against rent. It did not give him the right to terminate the lease agreement.

The judgment is affirmed.

Sherry WHITE *v.* Kenneth O. HUGHES

74-258 519 S.W. 2d 70

Opinion delivered February 17, 1975

McMath, Leatherman & Woods, for appellant.

Laser, Sharp, Haley, Young & Boswell, P.A., for appellee.

CONLEY BYRD, Justice. The appellant, Sherry White, a high school cheerleader, beauty queen and model, was a guest in an automobile driven by her boy friend, the appellee Kenneth O. Hughes when a collision occured with an automobile parked partly on and partly off the freeway. The trial court submitted the issues to the jury in accordance with our guest statute, Ark. Stat. Ann. § 75-913 (Repl. 1957), which denies a recovery to a guest except for willful and wanton negligence. The jury found the issues in favor of appellee. For reversal appellant contends only that the guest statute, *supra,* is unconstitutional, being in violation of article 2, § 18 of the Arkansas Constitution and the equal protection clause of the United States Constitution.

The constitutionality of our guest statute was upheld in *Roberson* v. *Roberson,* 193 Ark. 669, 101 S.W. 2d 961 (1937), as against the argument that it contravened article 2, § 18 of the Arkansas Constitution. A similar statute has been upheld as against the equal protection clause of the United States Constitution in *Silver* v. *Silver,* 280 U.S. 117, 50 S. Ct. 57, 74 L. Ed. 221 (1919). Appellant recognizes the foregoing authorities, but as predicted by the case notes in 49 Notre Dame Law 446 and 48 Tul. L. Rev. 419, she suggests we should follow the lead of the Supreme Court of California in *Brown* v. *Merlo,* 8 Cal. 3d 855, 106 Cal. Rptr. 388, 506 P. 2d 212 (1973), and reconsider the inequities and hardships imposed upon innocent victims by the guest statute. In the *Merlo* case, *supra,* the California guest statute was held in violation of the equal protection clause. The Texas Court of Civil Appeals in *Tisko* v. *Harrison,* 500 S.W. 2d 565 (Tex. Civ. App. 1973), after criticizing the *Merlo* case, *supra,* concluded that the Texas guest statute did not violate the equal protection clause. The Supreme Courts of Kansas, *Henry* v. *Bauder,* 213 Kan. 751, 518 P. 2d 362 (1974), Utah, *Cannon* v. *Oviatt,* —Utah —, 520 P. 2d 883 (1974), Idaho, *Thompson* v. *Hagan,* 96 Idaho 19, 523 P. 2d 1365 (1974) and North Dakota, *Johnson* v. *Hassett,* 217 N.W. 2d 771 (N.D. 1974), followed *Merlo, supra,* in striking down their guest statutes. The Supreme

Courts of Iowa, *Keasling* v. *Thompson,* — Iowa — , 217 N.W. 2d 687 (1974), Colorado, *Richardson* v. *Hansen,* —, Colo. — 527 P. 2d 536 (1974), Oregon, *Duerst* v. *Limbocker,* — Or. — , 525 P. 2d 99 (1974) and Delaware, *Justice* v. *Gatchell,* —Del. —, 325 A. 2d 97 (1974), followed the Texas Court in *Tisko* v. *Harrison, supra,* in upholding their guest statutes.

Upon the authorities cited we cannot say that the guest statute, *supra,* has no fair and rational relation to the legislative objectives sought to be controlled and like the Delaware Court, *Justice* v. *Gatchell, supra,* we take the view that if the rule of *Silver* v. *Silver, supra,* the highest authority on the equal protection clause, "is to be changed and the strictures of the Fourteenth Amendment extended in this area of the law, we shall await the views of the United State Supreme Court on the subject."

Affirmed.

ARKANSAS KRAFT CORPORATION *v.*
Kathy JOHNSON, Administratrix of the Estate of
Ben JOHNSON

74-210 519 S.W. 2d 74

Opinion delivered February 24, 1975

Laser, Sharp, Haley, Young & Boswell, P.A., for appellant.

Smith, Williams, Friday, Eldredge & Clark, by: *William H. Sutton* and *Frederick S. Ursery*, for appellee.

CARLETON HARRIS, Chief Justice. Kathy Johnson, Administratrix of the Estate of her husband, Ben Johnson, instituted suit in the Pulaski County Circuit Court against

Arkansas Kraft Corporation, hereafter called Kraft, appellant herein, alleging that on September 1, 1970, the deceased, an employee of Chicago, Rock Island & Pacific Railroad Company, hereafter called Railroad, was killed when he was struck by pulpwood logs which fell from a railroad car; further, that the pulpwood had been loaded on the train by Kraft employees who had been negligent in the loading operation in such a manner that the pulpwood had fallen from the car. Recovery was sought on behalf of the estate, appellee's widow, and one minor child, in the total amount of $601,936.32. Kraft answered, subsequently amending its answer, denying each and every material allegation except that the accident did occur, pleaded that the injuries resulting in Johnson's death were caused or contributed to by his own negligence and that, in the alternative, the injuries resulted from a risk or risks which Johnson assumed. On trial, the jury rendered a judgment in the amount of $35,000 for the widow, $45,000 for the daughter, and $1,960.00 for the estate, a total of $81,960.00. The court entered a total judgment for $81,936.32,[1] and from such judgment comes this appeal. For reversal, four points are alleged which we proceed to discuss in the order listed.

"I.

THE COURT ERRED IN ALLOWING PLAINTIFF TO ADVISE THE JURY THAT A PRIOR SETTLEMENT HAD BEEN REACHED BETWEEN PLAINTIFF AND A THIRD PARTY, CHICAGO ROCK-ISLAND & PACIFIC RAILROAD COMPANY."

Since Ben Johnson was an employee of a railroad company, his personal representative had a cause of action against the railroad under the Federal Employer's Liability Act for negligence resulting in the death of the decedent. Such an action was filed (prior to the litigation now before us) in Federal District Court under which an FELA recovery was sought. However, prior to trial of that case,

[1]It was agreed that the jury's award on behalf of the estate was in excess of the damages proven and the amount was reduced by agreement.

appellee and the railroad settled for a total of $79,500.00. Prior to trial of the instant litigation, counsel for appellee disclosed an intention to inform the jury that the appellee had filed a separate suit against the railroad which had been settled for $79,500.00, and this was done over the objections of the appellant.[2] It is argued that the court's action in permitting the amount of this settlement to be disclosed to the jury constituted error, appellant asserting that the proper procedure was for the jury not to be apprised of the settlement, but instead, the court should credit the amount of any judgment against Kraft with the settlement amount. As authority for this position, Kraft relies upon *Walton* v. *Tull*, 234 Ark. 882, 356 S.W. 2d 20. There, Tull had sued several alleged tortfeasors for personal injuries arising out of an automobile accident but prior to trial, Tull settled his cause with one of the defendants. Subsequently, one of the defendants attempted to introduce the settlement to the jury which the trial court did not permit. On appeal, we upheld this action pointing out that though in *Giem* v. *Williams*, 215 Ark. 705, 222 S.W. 2d 800, the payment by one joint tortfeasor was considered by the jury, we did not hold that procedure to be proper in all cases. In affirming, we stated:

"The fact of settlement might have had some slight

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[2]From the record:

"ATTORNEY FOR DEFENDANT:

In Chambers and prior to the commencement of the trial, the defendant objects generally and specifically to any and all statements, testimony and references to any settlement between plaintiff and the deceased employer railroad company arising out of the Federal Court lawsuit brought about as a result of the accident giving rise to this litigation for the reason that same would be prejudicial to the defendant's position in this cause.

"ATTORNEY FOR PLAINTIFF:

The plaintiff would like to have the record reflect that its intentions to announce the settlement and the amount of it to the jury is in response to defendant's contention that it is entitled to a credit for the settlement.

"ATTORNEY FOR DEFENDANT:

I would contend the proper handling would be for no mention to be made with respect to settlement and the Trial Court to simply credit it on any amount returned by the jury.

"THE COURT:

Objection overruled."

bearing upon Tull's credibility, but this reason for admitting the proof is outweighed by the arguments for its exclusion. The evidence would have informed the jury that one of the defendants had admitted liability and might also have been used as a basis for an argument that Tull had accepted the amounts of the settlement as fair compensation for his injuries. The Uniform Contribution Among Tortfeasors Act contemplates that each tortfeasor will be credited with amounts paid by other joint tortfeasors, Ark. Stat. 34-1004, but the statute is silent about how the matter is to be handled."

In *Giem*, mentioned in the previous citation, the administratrix brought suit against Giem, a general contractor, and suit was also filed against a subcontractor. The subcontractor (Tune) was dismissed as a defendant prior to the trial following his payment to the administratrix of the sum of $4,000 in return for a covenant not to sue. At the trial, Giem introduced into evidence the settlement between the subcontractor and the plaintiff. When the jury awarded the plaintiff a verdict in the amount of $8,500, Giem moved the court to credit the verdict with the $4,000 which the subcontractor had paid in settlement. The motion was denied and on appeal we affirmed, stating:

"Appellants had the right, under Section 34-1007, Ark. Stats. of 1947, to make Tune a third-party defendant, even after the appellee had dismissed as to him. But, instead of availing themselves of the said section, appellants evidently decided to proceed under Section 34-1004, Ark. Stats. of 1947, which reads: 'Release of one tortfeasor — effect on injured person's claim — A release by the injured person of one joint tortfeasor, whether before or after judgment, does not discharge the other tortfeasors unless the release so provides; but reduces the claim against the other tortfeasors in the amount of the consideration paid for the release, or in any amount or proportion by which the release provides that the total claim shall be reduced, if greater than the consideration paid.'

> "At all events, as between appellants and appellee, appellants in the trial of the case before the jury obtained the full benefit of the above-quoted section by introducing into evidence, proof as to the amount of money that appellee received from Tune. Certainly, in such circumstances, appellants were not entitled to have the court — after the verdict — make the allowance again."

In *Woodard* v. *Holliday*, 235 Ark. 744, 361 S.W. 2d 744, West Bend, a joint tortfeasor, settled with the plaintiffs and a covenant not to sue was executed. On appeal, this court cited the provisions of Section 4 of the Uniform Contribution Among Tortfeasors Act, Ark. Stat. Ann. § 34-1004 (Repl. 1962), and then stated:

> "This statute was approved by this court in *Giem* v. *Williams*, 215 Ark. 705, 222 S.W. 2d 800. In that case evidence as to the amount paid by one of the joint tortfeasors was introduced into evidence at the trial of the other tortfeasor. *After the verdict, the court correctly refused to reduce the amount of the verdict by the amount paid by the other tortfeasor prior to trial, since the jury was advised of the settlement and the amount prior to reaching its verdict.* [Our emphasis]. As the court said in that opinion:
>
> 'At all events, as between appellants and appellee, appellants in the trial of the case before the jury obtained the full benefit of the above-quoted section by introducing into evidence, proof as to the amount of money that appellee received from Tune. Certainly, in such circumstances, appellants were not entitled to have the court — after the verdict — make the allowance *again.*' (Emphasis ours.)
>
> "In the instant case, the trial court refused appellant permission to introduce evidence of West Bend's settlement payment to appellees, but after verdict the trial court, under the theory that the law of joint tortfeasors applied, correctly credited the judgment with the $5,000 payment, *since the jury had no*

knowledge of the West Bend settlement and therefore assessed the total damages of appellees." [Our emphasis].

Appellant argues that *Walton* v. *Tull, supra,* prohibits the disclosure of the Rock Island settlement to the jury, apparently contending that since *Walton* was handed down subsequent to *Giem,* the latter is controlling. We do not agree. In the first place, there is nothing in *Walton* which overrules *Giem.* The court only commented that we did not hold that the *Giem* procedure was proper in all cases. *Walton* v. *Tull, supra,* was handed down on March 26, 1962 (rehearing denied April 30, 1962), and the fact that *Giem* was not overruled is emphasized by *Woodard* (handed down on November 19, 1962) in the just quoted language from that case. Furthermore, in *Bailey* v. *Stewart,* 236 Ark. 80, 364 S.W. 2d 662 (February 11, 1963), the language of the opinion clearly denotes that *Giem* has not been overruled, though the point there in issue was not affected by either *Giem* or *Walton.* We said:

> "The *Giem* case and the *Walton* case, relied upon by the trial judge, do not quite reach the point at issue. In the former we held that where the jury had been informed of a compromise payment made by another tortfeasor its amount should not have been subtracted from the verdict, as the jury had already taken it into consideration. In the *Walton* case we indicated (and later declared, after the trial below, in *Woodard* v. *Holliday,* 235 Ark. 744, 361 S.W. 2d 744) that such a deduction would be proper where the jury had not been told about the settlement made by the other tortfeasor."

Actually, this court has never reversed a judgment on either basis, i.e., the jury was told, or not told, about settlement with another tortfeasor.

Appellant asserts that it was particularly prejudiced because, when the settlement was disclosed, it tended to negate in the jury's mind the validity of two defenses it had raised, *viz.,* contributory negligence and assumption of risk. Appellant says that the jury, having been apprised

that the railroad had admitted liability, obviously concluded that the railroad did not believe the deceased was contributorily negligent or had assumed the risk of riding next to an overloaded freight car. It is alleged that the defense of assumption of risk was particularly weakened since under FELA (45 USC Section 54), the defense of assumption of risk was not available to the railroad; also, that under FELA, contributory negligence does not bar recovery of one who is more than 50% negligent but only diminishes it in proportion to his negligence. We are not impressed with this argument. The comment under Arkansas Model Jury Instructions - Civil - § 1921 (1974) points out that the joinder of an FELA action with a common law action has been repeatedly sustained. Kraft offered instructions as to the railroad's duty of care which were given by the court, and there was nothing to prevent additional instructions advising the jury of the law under FELA, had it so desired. Appellant was not deprived of these defenses and it certainly cannot be assumed that the jury ignored the instructions on contributory negligence and assumption of risk.

On the whole, we fail to see how prejudice occurred. Let it be remembered that Kraft could have made the railroad a third party defendant as it was entitled to do even though appellee had settled with the railroad. This, Kraft chose not to do, but instead desired to follow the strategy that as long as the settlement was not in evidence, it could argue that the railroad was the negligent party in the case and should have been sued instead of appellant. However, with the settlement being shown, appellant was still in a position to argue that it was not liable for it could point out to the jury that the railroad had already admitted that it was responsible for Johnson's death; that it had paid $79,500 because it was liable, and certainly it could argue that the railroad would not have paid had some other company been the responsible party. In fact, this would seem to be a stronger argument than the argument appellant was deprived of making.

Be that as it may, comparatively speaking (as between appellant and appellee), the injustice to appellee would have been much more pronounced (than to appellant) had the jury

not received the information about the settlement, for if the jury had not been so informed after its verdict had been reached, appellant would have asked that the amount of settlement with the railroad be credited on the amount of the judgment obtained against it. Under *Woodard,* this would have been proper and appellee would have wound up with an approximate $500 judgment against Kraft (for herself and daughter), or a total judgment of $80,000. This certainly would have been more unjust to appellee than any prejudice claimed by appellant, for Johnson was a 25-year-old brakeman, with an excellent work record, who had just been promoted to conductor, and with a life expectancy of 44 years.

Mr. Joseph A. Krenz, Jr., an actuary, using a 5% interest rate, testified that, considering expected earnings per annum of $13,000 to $17,000, and considering contribution to his family each year in the amount of $9,000, the amount (present value) that would have been contributed to his family over the period of his life expectancy, would be $158,964.84. It is interesting to note that this amount is within less than $2,500 of the total amounts received by appellee from the railroad settlement and the judgment against Kraft, the latter judgment also including $1,936.82 for the estate. This seems to be a clear and decisive indication that the jury, in fixing damages against Kraft, took into full consideration the settlement with Rock Island.

Though not argued by appellant, it has been suggested in conference that the court did not specifically tell the jury that the plaintiff was only entitled to one recovery of total damages and that in reaching the determination of total damages, the jury should keep in mind the $79,500 settlement with the railroad, and that total damages would include this settlement figure. The short answer to this suggestion is that there is no contention by appellant that such an instruction should have been given,[3] or that any more comprehen-

[3]The court gave the following instruction:

"If you decide for the administration [rix] on the question of liability against Arkansas Kraft Corporation, you must fix the amount of money which will reasonably and fairly compensate the wife, child and estate for those elements of *damages which you find were proximately caused by the negligence of Arkansas Kraft Corporation.*" [Our emphasis].

sive wording should have been used when the jury was informed of the settlement. Nowhere in appellant's brief is such an argument presented. In other words, such a position was neither taken at the trial court level nor is it set forth here. No citation of authority is necessary in saying that, aside from jurisdiction, we do not reverse cases on theories not presented by appellant to either the trial court or this court. For that matter, the fact that appellant made no motion to credit the judgment for appellee with the amount of the railroad's settlement (see footnote 2) reveals Kraft knew the jury fully understood that any verdict reached for appellee should be in addition to the railroad compromise. Certainly, the motion would otherwise have been made.

Be that as it may, it is evident that the jury knew exactly the purpose of acquainting it with the railroad settlement.

Under the facts mentioned, considering the overall picture, we hold that no error was committed.

II.

In making this argument, appellant assumes, for purposes of argument, that it was negligent in loading the railroad car by stacking the pulpwood above the bulkheads. It is then asserted that the act of the railroad, in accepting this car, constituted the efficient intervening cause of the decedent's death. The principal case relied upon is *Cowart, Administratrix* v. *Casey Jones Contractor, Inc.*, 250 Ark. 881, 467 S.W. 2d 710. There, an action for wrongful death was instituted by the widow of a deceased employee of Bechtel Corporation, a building contractor. Recovery was sought against Casey Jones Contractor, Inc., that company supplying heavy duty lifting cranes to contractors. It was asserted that the defendant company had leased a dangerous and defective crane to Bechtel, the crane not being equipped with certain safety devices designed to prevent the mechanism from spinning during lifting operations. The Bechtel employee was killed when such spinning occurred, knocking him from the crane to the ground. We held that the actions of decedent's employer (Bechtel) constituted an efficient, independent, and intervening proximate cause which superseded or broke the

causal connection of the negligence, if any, of appellee. However, the facts there were far different from those at hand. The opinion sets out those facts.

> "In the case at bar it is undisputed that the crane had been on the job site and out of the appellee lessor's control for at least three to four weeks; that the crane was assembled on the job site and operated by the decedent's employer, during which time the appellee exercised no control over the crane's operation. Further, that decedent's employer was aware during this three to four weeks of use that the two safety devices were not on this crane; that, knowing this, decedent's employer directed him to work with or about this crane in the lifting of heavy structural steel which, according to the record, is the only time during the three to four weeks it had been so used; and that decedent's employer admitted that it was customary, in the absence of these safety devices, to take 'the back lay out of the cable' before it is sent up."

In the case before us, the railroad car had only been in possession of the railroad for a few hours, and there was no proof that employees of the railroad were aware, before the accident, that the car was improperly loaded.

It appears to us that if the car was negligently loaded by Kraft, the railroad's negligence was its failure to discover the negligence of Kraft. We like the reasoning of the Supreme Court of Ohio in *Pennsylvania Railroad Company* v. *Snyder*, 45 N.E. 559, where a switchman (Jesse Snyder) was an employee for the Lake Shore and Michigan Southern Railway Company. Snyder was injured when he fell from a boxcar and it developed that the handhold on the ladder which was attached to the side of the car was missing. Because of this defect, he lost his balance and fell. This railway car had been furnished to Lake Shore by the Pennsylvania Railroad Company, the owner of the car. The Pennsylvania Railroad appealed a judgment against it obtained by Snyder, contending that its negligence in furnishing a defective car was not the proximate cause of Snyder's injury for the reason that the causal connection was broken by the interven-

ing negligence of Lake Shore in failing to inspect the car and discover the defect. On appeal, the court said that Lake Shore Railroad was clearly negligent, but it then continued as follows:

> "But it does not follow that, because the Lake Shore Company is liable for the damages sustained by the plaintiff below, the plaintiff in error may not be also. To relieve the latter from the consequences of its negligence, it is not enough that the act of the Lake Shore Company was nearest in the order of events to the injury, nor that, without it, the injury would not have occurred. To have that effect it must have been the efficient, independent, and self-producing cause, disconnected from the negligence of the plaintiff in error. The causal connection is not broken 'if the intervening event is one which might in the natural course of things be anticipated as not entirely improbable, and the defendant's negligence is an essential link in the chain of causation.' It is not essential to the liability of the plaintiff in error that its negligence should be the sole cause of the injury; but if that result was produced by the negligence of both companies, each contributing a necessary condition to the result, either or both might be held responsible at the election of the party injured. Neither could claim exoneration on account of the fault of the other. The negligence of the plaintiff in error was undoubtedly the primary cause. If it had not furnished the defective car, the injury could not have occurred."

An instruction on intervening cause was properly given to the jury, and certainly we cannot say, as a matter of law, that there was no jury question on this issue.

III.

It is contended that the court should have directed a verdict on grounds of the deceased's contributory negligence and assumption of risk. It is argued that the condition of the flat car (loaded with pulpwood), which contained two vertical bulkheads, one at each end of the car, was such that Johnson either knew of the height of the pulpwood in relation to the

bulkheads, or should have known. All of the evidence in the case was circumstantial evidence, as will be discussed under Point IV, and while, pershaps, there were some circumstances that favor appellant's position, they certainly were not such as to justify a directed verdict. Let it be remembered that the defense of contributory negligence, like assumption of risk, is an affirmative defense, and the burden of proof is upon the defendant. *Aluminum Company of North America* v. *Ramsey*, 89 Ark. 522, 117 S.W. 568. Also, as stated in *McDonald* v. *Hickman*, 252 Ark. 300, 478 S.W. 2d 753,' "It is not our province to compare the negligence of the litigants when fair-minded men might reach different conclusions in the matter."

As to assumption of risk, we find no evidence in the record that Johnson was actually aware of the dangerous condition of the cars, and without such knowledge, the doctrine cannot apply. In *McDonald* v. *Hickman*, *supra*, this court said:

> "Assumption of risk, a harsh doctrine, depends upon actual knowledge and appreciation of the danger. As Prosser puts it: "Knowledge of the risk is the watchword of assumption of risk" Under ordinary circumstances the plaintiff will not be taken to to assume any risk of either activities or conditions of which he is ignorant. Furthermore, he must not only know of the facts which create the danger, but he must comprehend and appreciate the danger itself.' Prosser on Torts, § 68 (4th ed., 1971). See also the Restatement of Torts (2d), § 496 D (1965), where it is stated: 'The standard to be applied is a subjective one, of what the particular plaintiff in fact sees, knows, understands and appreciates. In this it differs from the objective standard which is applied to contributory negligence.' "

The court instructed the jury on comparative negligence and assumption of risk and these issues were accordingly before that body in its deliberations. We cannot agree that a directed verdict should have been granted on the basis of these defenses.

IV.

Finally, it is contended that there was no substantial

evidence that Johnson's death was caused by any act of appellant, and it is asserted that appellee's case rests entirely upon conjecture and speculation. It is true that no one saw a falling log strike Johnson, nor that anyone observed him fall from the train. It is asserted that though there was evidence that there was a pile of pulpwood in the area where drag marks left by the deceased began (Johnson was dragged approximately 423 ft. after hitting the ground), this condition was commonly found as a result of the switching operations of the various trains using the depot and there was no direct proof that these logs had fallen from this particular train; furthermore, that during the backing up of the train (while Johnson was still alive) some pulpwood had fallen from one of the cars in the same area where the fallen pulpwood was found.

Of course, as pointed out in *Arkmo Lumber Company* v. *Luckett*, 201 Ark. 140, 143 S.W. 2d 1107, it is not necessary that an injury to established by direct proof, but if the circumstances are such to justify an inference on the part of the jury that the negligent conditions alleged produced the injury complained of, recovery can be had. We said, quoting an earlier case,[4] "It will be sufficient if the facts proved are of such a nature and are so connected and related to each other that the conclusion therefrom may be fairly inferred." There was evidence that Johnson fell from the stirrup located on the right front end of the air dump car on which he was riding, and evidence that the logs in the car directly in front of the air dump car were loaded well above the bulkhead.

Mike Lanahan, Manager of Safety for Rock Island Railroad, went to the scene of the accident within two hours and conducted an investigation. He testified that from the point of the first drag marks to the point where Johnson's body was found was approximately 423 ft.; that he saw a number of logs (pulpwood) on the right-of-way to the west of the area where the drag marks started. The witness stated that the center of the distribution of the area of the logs was between 12 ft. and 20 ft. west of the first sign of Johnson's body being dragged. The next day, Lanahan returned to the scene and examined the car from which the pulpwood had

[4]*St. Louis-San Francisco Ry. Co.* v. *Bishop*, 182 Ark. 763, 33 S.W. 2d 383.

allegedly fallen, the car being in the same location and in the same condition (except for the surfaces at the top of the bulkhead) that it was on the previous day immediately following the accident. "The day before when I climbed up on the car I noticed, oh, six or eight fragments of loose bark lying on top of that horizontal steel sheet next to the wood liner and on the top of the steel braces you see going to the right of the picture." Lanahan testified that if the bark had gotten on the bulkhead at the time the car was being loaded, it would have blown off prior to the accident due to the wind or vibrations from the movement of the train, and that such bark was gone the day after the accident. Lanahan said that the logs in the pulpwood car directly in front of the air dump car were loaded considerably above the bulkhead, and photographic exhibits likewise reveal that the pulpwood on this car was stacked above the bulkhead; it would appear that these logs would have been directly above Johnson who, as stated, was riding on the stirrup. Lanahan stated that in his nine years of investigating accidents, he had never seen a cluster of logs (approximately 13) deposited on the railroad right-of-way like the one under discussion, and he was very positive that the car was overloaded. Medical evidence reflected that a wound on the right side of decedent's head was consistent with his having been struck by a log, although it could also have occurred from the head bumping the crossties. In *Hawkins* v. *Missouri-Pacific Railroad Company, Thompson, Trustee*, 217 Ark. 42, 228 S.W. 2d 642, this court said:

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

Certainly, in line with *Hawkins*, we cannot say that this evidence was so insubstantial that reasonable men could not

possibly find the issues for the plaintiff. When all the circumstances are viewed, and giving appellee's evidence its highest probative value, we think, and hold that a jury question was presented.

Affirmed.

BYRD, J., not participating.

Herbert Ray TROGLIN *v.* STATE of Arkansas

CR 74-161 519 S.W. 2d 740

Opinion delivered February 24, 1975

[redacted]

Don Langston, Public Defender, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Gary Isbell,* Asst., for appellee.

LYLE BROWN, Justice. Appellant filed a petition pro se for a writ of error coram nobis seeking to set aside a felony plea of guilty entered in October 1952. The trial court examined its 1952 records and decided, without granting a formal hearing, that the petition had no merit. The single error advanced on appeal is that the trial court should have granted a hearing on the petition.

In his petition and supporting documents appellant contended (1) that the docket sheet was in error in reciting that he waived counsel; (2) that if the docket sheet is correct, he never voluntarily and knowingly entered such a plea; and (2) that the plea was coerced.

In the order denying the petition the trial court pointed out that the docket sheet showed that appellant had declined the offer of counsel. The court also noted the long delay of some twenty-two years between the plea and the filing of the petition and concluded that the petition was untimely; the court also concluded that the petition and supporting documents "were ineffective to accomplish the purposes intended." We perceive the recited defect in the documents to refer to the fact that they stated bare conclusions.

We hold that the court's refusal to grant the writ was correct because of the untimely delay and the insufficiency of the allegations. We wholeheartedly approve of the guidelines set out in *People* v. *Maston,* 48 Cal. Rptr. 439 (1965), *cert. denied* 86 S. Ct. 917 (1966). They may be fairly paraphrased as follows:

> (1) The function of the writ of coram nobis is to secure relief from a judgment rendered while there existed some fact which would have prevented its rendition

if it had been known to the trial court and which, through no negligence or fault of the defendant, was not brought forward before rendition of judgment;

(2) Coram nobis proceedings are attended by a strong presumption that the judgment of conviction is valid. The court is not required to accept at face value the allegations of the petition;

(3) Due diligence is required in making application for relief, and, in the absence of a valid excuse for delay, the petition will be denied; and,

(4) The mere naked allegation that a constitutional right has been invaded will not suffice. The application should make a full disclosure of specific facts relied upon and not merely state conslusions as to the nature of such facts.

The documents and actions of appellant substantially violate all four of the enumerated guidelines. As has been pointed out, he waited some twenty-two years to file his petition; also the filing was over eleven years after *Gideon* v. *Wainwright*, 372 U.S. 335 (1963). Additionally, since statehood, we have required appointment of counsel for indigent defendants in felony cases. Ark. Stat. Ann. § 43-1203 (Repl. 1964). Furthermore, there is no disclosure of specific facts upon which he relies — nothing but naked conclusions.

Affirmed.

AMERICAN RED CROSS AND
TRAVELERS INSURANCE COMPANY *v.*
Billie C. WILSON

74-261 519 S.W. 2d 60

Opinion delivered February 24, 1975

Wright, Lindsey & Jennings, for appellants.

Spencer and *Spencer*, for appellee.

JOHN A. FOGLEMAN, Justice. Mrs. Billie C. Wilson had been executive director of the Union county chapter of the American Red Cross for 28 years preceding December 12, 1971. Part of her duties included taking emergency calls at her home after usual working hours. She was also charged with the sole responsibility for providing Christmas decorations to various nursing homes in the El Dorado area. On December 12, 1971, Mrs. Wilson was in her attic, where the Christmas decorations were customarily stored, when her telephone rang. When she heard it, she gathered up a bundle of the decorations and proceeded down the attic stairway and, on her way down, she slipped and fell and suffered serious injuries. Upon her claim for Workmen's Compensation benefits, the Commission awarded her permanent and total disability. The award was affirmed by the trial court. On appeal, the only contention made by appellants is that there was no substantial evidence to support the award. We find that there was and affirm.

Mrs. Wilson testified that just before the telephone rang she was in the process of gathering the decorations stored there for the purpose of taking them, on the following day, to the Red Cross office at the El Dorado City Hall for making an inventory of them, in order to ascertain what purchases were needed for that year, as she did every year. Before the telephone rang, she had not taken any of the decorations downstairs. Mrs. Wilson had no way of knowing or showing whether the phone call she never answered was a personal one or a Red Cross emergency call. The Commission found that the evidence was clear that appellee was engaged in duties required of her by the American Red Cross at the time

of her injury and that her injury arose out of and in the course of her employment.

Appellants argue that, since it was not shown and was impossible to know, that the telephone call pertained to appellee's duties, the evidence suppporting this finding of the Commission is not substantial. They say her carrying the bundle of decorations downstairs was merely incidental to the primary purpose of answering the telephone.

We agree with appellants that a claimant bears the burden of proving that his injury was the result of an accident that arose in the course of his employment, and that it grew out of, or resulted from the employment. We do not agree, however, with their argument that the Workmen's Compensation Act does not mandate that the Commission view the evidence liberally in favor of the claimant. To the contrary, the Commission, in considering a claim, must follow a liberal approach and draw all reasonable inferences favorably to the claimant. *Holland* v. *Malvern Sand & Gravel Co.*, 237 Ark. 635, 374 S.W. 2d 822. It was the duty of the Commission to draw every legitimate inference possible in favor of the claimant and to give her the benefit of the doubt in making the factual determination. *Brower Manufacturing Co.* v. *Willis*, 252 Ark. 755, 480 S.W. 2d 950; *Herman Wilson Lumber Co.* v. *Hughes*, 245 Ark. 168, 431 S.W. 2d 487. The same rules apply, of course, in determining whether the accident grew out of and occurred within the course of the employment. *Brooks* v. *Wage*, 242 Ark. 486, 414 S.W. 2d 100.

The question, on appeal to the courts, remains the same as on other questions, i.e., was there any substantial evidence upon which the Commission could reasonably make the factual determination. We have said that an injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury, and that it is enough if there be a substantially contributory causal connection between the injury and the business in which the employer employs the claimant, but it need not be the sole or proximate cause. *Simmons National Bank* v. *Brown*, 210 Ark. 311, 195 S.W. 2d 539.

Mrs. Wilson's presence in her attic was attributable to the performance of her duties. The decorations had to be carried downstairs by her at some time. She did pick up some of them to take down when the phone rang and did proceed down the stairway carrying them. Under these circumstances, it is of little consequence whether the nature of the telephone call was personal or business. This court is committed to a view of the term "arising out of and in the course of the employment" which requires a liberal application to allow compensation. *Tinsman Manufacturing Co.* v. *Sparks*, 211 Ark. 554, 201 S.W. 2d 573. In *Tinsman*, we held that slight deviations from the duties of employment do not remove employees from coverage of the act. See also *Cox Bros. Lumber Co.* v. *Jones*, 220 Ark. 431, 248 S.W. 2d 91; *Williams* v. *Gifford-Hill & Co.*, 227 Ark. 340, 298 S.W. 2d 323. Language in these opinions seems to make the consent or acquiescence of the employer a controlling factor in reaching a conclusion that the deviation does not eliminate coverage, in spite of the fact that in *Cox Bros. Lumber* v. *Jones*, the acquiescence was only evidenced by the employer's testimony that the employer had no objection to the employee's crossing the railroad tracks on which he was killed for anything he needed.

There is respectable authority holding that an injury to one, whose duties include answering telephone calls, by falling downstairs while answering a personal private telephone call, is not prevented from "arising out of and in the course of his employment." *In Re Cox*, 225 Mass. 220, 114 N.E. 281 (1916). Of the same tenor are *Kent* v. *Kent*, 202 Iowa 1044, 208 N.W. 709 (1926) and *Holland-St. Louis Sugar Co.* v. *Shraluka*, 64 Ind. App. 545, 116 N.E. 330 (1917) where the same liberal view entertained by this court is emphasized; *Adams* v. *Colonial Colliery Co.*, 104 Pa. Super. 187, 158 A. 183 (1932) where the "slight deviation" test was applied; and *Parisi* v. *City of Niagra Falls*, 245 App. Div. 884, 282 N.Y.S. 310 (1935) where the consent or acquiescence of the employer was given significance.

We find it unnecessary to decide, in this case, whether, under the authority of our cases, a deviation from the regular course of employment must necessarily be with the consent and acquiescence of the employer to be so slight as to be con-

sidered incidental to the employment. In this case the duty of answering telephone calls was imposed upon appellee. Neither she, nor any other such person should be expected to have the prescience which would be necessary to discriminate between personal calls and business emergency calls in determining whether to answer. The duty imposed upon her was, to say the least, evidence of acquiescence in her answering her telephone, even if she had to go down the stairway from her attic to do so. When this evidence is coupled with the fact that appellee did carry with her a part of the decorations she had to take downstairs sometime that day, we find very substantial evidentiary support for the award.

The judgment is affirmed.

ARKANSAS RAILWAY EQUIPMENT COMPANY *v.* Richard R. HEATH, Director, DEPARTMENT OF FINANCE AND ADMINISTRATION

74-202 519 S.W. 2d 45

Opinion delivered February 24, 1975

Rose, Nash, Williamson, Carroll and *Clay*, by: *James H. Wilkins, Jr.*, for appellant.

Karl Glass and *Harlin R. Hodnett*, for appellee.

CONLEY BYRD, Justice. At issue here is whether appellant Arkansas Railway Equipment Company is entitled to a use tax exemption pursuant to Ark. Stat. Ann. § 84-3106 (D) (2) (Supp. 1973), upon the purchase of two diesel locomotive cranes and a 72 inch Ohio magnet. The trial court denied appellant's claimed exemption on the basis that it had failed to clearly show that:

> "A. Such equipment is used in producing, manufacturing, fabricating, assembling, processing, finishing or packaging of articles of commerce.
>
> "B. Such equipment is not transportation equipment."

To sustain the action of the trial court, appellee Richard R. Heath, Director, Department of Finance and Administration, State of Arkansas, contends:

1. The appellant's operation is not "manufacturing." It is commonly understood as, and falls precisely within the definition of a "salvage" operation. Nor does the appellant assemble or fabricate a finished product from "raw or semi-fnished materials."

2. The machinery and equipment is not used "directly" within a manufacturing process. The word "directly" means that the machine must fabricate or assemble a new product from raw or semi-fnished materials. Since there are no raw or

semi-finished materials, only an old railroad tank car, used in the appellants' operation, it is impossible for the appellant to meet this statutory requirement.

3. Additionally, the cranes and magnet are used only to "transport" the metal tank from one work site to another. The Arkansas Compensating Tax Act specifically excludes such equipment from use tax exemption.

The record shows that appellant through its processing of old railroad tank cars makes and sells culverts fabricated therefrom in competition with manufacturers of corrugated metal culverts. The nature of appellants' business operations and the facts and circumstances which gave rise to this litigation were stipulated in the trial court as follows:

> "a. In late 1970, the American Association of Railroads issued a ruling, effective January 1, 1971, requiring its members to remove from interchange service all railroad cars in excess of fifty years of age. This ruling went on to provide that, effective January 1, 1972, all railroad cars forty-nine and fifty years of age would be similarly retired, and each subsequent January 1, two more years of cars would be removed from service, until no cars in excess of forty years of age would remain in service. One result of the above ruling was to place a substantial number of railroad cars on the market for sale and the most significant purchasers of such railroad cars were salvage companies such as Arkansas Railway Equipment Company (hereinafter 'Plaintiff'). In early 1971, Plaintiff purchased 1,500 railroad tank cars. At that time, Plaintiff was one of the few operations in the United States with sufficient tract capacity to permit the storage of such a volume purchase. All of the 1,500 tank cars so purchased were being retired from service pursuant to the above-mentioned ruling of the American Association of Railroads.
>
> b. The tanks which are mounted on such railroad tank cars have capacities of from 8,000 to 10,000 gallons and are of four basic types:
>
> (1) insulated;

(2) insulated with heating coils;
(3) non-insulated; and
(4) non-insulated with heating coils.

For the most part, the tank cars purchased by Plaintiff were of types (2) and (3). The heating coils are a network of tubing inside the tank and are used to carry steam to soften heavy petroleum products in order to drain such products from the tanks. The insulation, of course, is for the purpose of heat retention in the draining process. Examples of such petroleum products include asphalt, paraffin and wax.

c. The most significant portion of Plaintiff's business in 1971 and 1972 was the production and sale of drainage culvert from these railroad tank cars. Because of the market conditions created by the abovementioned ruling, Plaintiff was able to produce a longer-lasting product than competing items, — corrugated culvert — while selling that product at a lower price than the competition. Plaintiff's principal customers for such culvert were local governments or road contractors who used the culvert for street and highway drainage and farmers who used such products for field drainage. The cranes and magnets which are the subject of this litigation were purchased by Plaintiff for the specific purpose of engaging in business of this nature.

d. In producing this culvert, the following operations are performed upon the railroad tank cars:

(1) The first step required is delivery of the cars to the work site. This is a switching operation which involved moving several cars simultaneously to the work site. The crane that is most conveniently located performs this function. The total time involved in such switching operation is approximately 30 minutes and, in the aggregate, amounts to approximately 5% of the cranes' work time.

(2) Upon arrival at the work site, the tank is cleaned to remove all residual hydrocarbons. This is a safety measure made necessary because subsequent operations

on the tank include the use of an acetylene torch which would render the operation hazardous because of fire, absent such cleaning.

(3) After the cleaning, the straps which secure the tank to the undercarriage of the railroad car are cut and the tank is lifted to the ground by the crane.

(4) In the case of an insulated tank, there is a thin metal shell which surrounds the tank and encases the insulation. An acetylene torch operator cuts the shell horizontally and the crane lays open, the two halves of the shell. Once open, one or more laborers scrape the insulation from the shell and pile it for disposal. The two shell halves are than removed from the work site by the crane and magnet and the shell is sold as scrap.

(5) The next step in converting the tank car into culvert consists of cutting the ends out of the tank, removing the coils, if any, and removing the dome of the tank. The crane is used to roll and reposition the tank to facilitate such cutting. The crane is also used in conjunction with the magnet or with cable in removing the coils.

(6) The crane then picks up the unprepared culvert and moves it to an area where a welder can repair and patch both the dome hole and the coil attachment hole. In some cases the crane is also used for positioning two prepared culverts so that they may be welded together, resulting in a culvert that is 60 feet long, rather than the conventional 30 feet.

(7) Finally, the crane is used to load the finished culvert aboard trucks for delivery.

e. During 1971 and 1972, approximately 80% of Plaintiff's business was performed substantially as described above. During late 1972 and early 1973, with the advent of the fuel shortage, some sales of tanks, adapted for stationary use, were made. In such cases, the dome was removed, the coils, if any, were removed

and the resulting holes in the tank were patched. Then the tank was adapted for conventional filling and emptying and sold for use as a storage facility for such products as gasoline, kerosene or diesel fuel. Of the 1,-924 tank cars purchased by Plaintiff, 71 were refurbished as above and sold as stationary tanks.

f. The balance of the 1,924 tank cars, when delivered to Plaintiff, were in such poor condition (752 cars) that Plaintiff either used them to patch the holes in tanks or culvert or Plaintiff cut them up for sale as scrap.

g. The primary purpose in Plaintiff's purchase of the cranes and magnets and the primary use of the same was the production of culvert from the tank cars, as described above. The loading of scrap and the switching of tank cars to the work area were incidental to the primary business of Plaintiff and incidental to the primary use of such equipment."

The statutory exemption here involved is set forth in Ark. Stat. Ann. § 84-3106 (D) (2) (Supp. 1973), as follows:

"*Exemptions.*—There are hereby specifically exempted from the taxes levied in this Act:

(D) (2) Machinery and equipment used directly in producing, manufacturing, fabricating, assembling, processing, finishing, or packaging of articles of commerce at manufacturing or processing plants or facilities in the State of Arkansas, but only to the extent that such machinery and equipment is purchased and used for the purposes set forth in this subsection.

(a) Such machinery and equipment will be exempt under this subsection if it is purchased and used to create new manufacturing or processing plants or facilities within this State or to expand existing manufacturing or processing plants or facilities within this State.

* * *

(c) It is the intent of this subsection to exempt only such machinery and equipment as shall be utilized directly in the actual manufacturing or processing operation at any time from the initial stage where actual manufacturing or processing begins through the completion of the finished article of commerce and the packaging of the finished end product. The term 'directly' as used in this Act is to limit the exemption to only the machinery and equipment used in actual production during processing, fabricating or assembling raw materials or semi-finished materials into the form in which such personal property is to be sold in the commercial market. Hand tools, buildings, transportation equipment, office machines and equipment, machinery and equipment used in administrative, accounting, sales or other such activities of the business involved and all other machinery and equipment not directly used in the manufacturing or processing operation are not included or classified as exempt.

* * *

(e) For the purposes of this subsection, the term 'manufacturing' and/or 'processing', as used herein, refer to and include those operations commonly understood within their ordinary meaning, and shall also include mining, quarrying, refining, extracting oil and gas, cotton ginning, and the drying of rice, soy beans and other grains."

POINT I. To deny the exemption the Director takes the position that an old railroad tank car is neither raw material nor semi-finished material within the meaning of the statute, *supra*, and furthermore, the appellant's operation is one which is commonly understood as a "salvage operation." We disagree with both contentions. In the first place the Director has given us no authority and we know of no authority that would exclude an old railroad tank car from being "raw or semi-finished materials" to a culvert manufacturer. In fact, in view of the ruling by the American Association of Railroads, the old tank cars would have been only so much scrap iron had not appellant through its ingenuity and labor fabricated

a cylinder therefrom that could be used as a culvert. Furthermore, appellant's operation is not the common or ordinary salvage operation where a product is disassembled and sold as used parts, for in this instance the appellant through its fabrication forms a culvert that actively competes in the market with culverts made from corrugated metal — the Director concedes that the persons engaged in the fabrication of corrugated metal culverts are engaged in the manufacturing process within the meaning of the exemption.

Consequently, we conclude that under the stipulated facts, appellant is a manufacturer of culverts within the meaning of the tax exemption, *supra*.

POINT II. The Director's contention that the locomotive cranes and the 72 inch magnet are not used "DIRECTLY" in manufacturing is contrary to the position we took in *Cheney, Commissioner* v. *Georgia-Pacific Paper Corp.*, 237 Ark. 161, 371 S.W. 2d 843 (1963). We there held that a piece of machinery was "directly" used in the manufacturing process when the item was an integral part of the plant and the removal of the item would stop the operation. The machinery here involved is not only an integral part of the operation but the operation in fact could not be performed without the use of the machinery.

POINT III. Finally the Director contends that the machinery here involved is not exempt because it is transportation equipment. In doing so he relies upon *Heath* v. *Midco Equipment Co.*, 256 Ark. 14, 505 S.W. 2d 739 (1974). In that case we held that dump trucks used to transport rock from the quarry site to the rock crusher were not exempt because they came under the classification of "transportation equipment" which was excluded by the last sentence in Ark. Stat. Ann. § 84-1904 (r) (2) (c) (Supp. 1973). Of course the dump trucks there could not have been classified as "only the machinery and equipment used in the actual production during processing, fabricating or assembling raw materials or semi-finished materials" because (1) they were not an integral part of the operation and (2) they were only used for the transportation of the rock from the quarry site to the processing site and during that time no processing or

fabricating occurred. Here however, the machines are used as tools not only to move but to hold and position the old railroad tank cars during the time that the culverts are being fabricated and as such tools the machines are a necessary and integral part of the operation. While "transportation equipment" is obviously a mode of conveyance it does not necessarily follow that every mode of conveyance is "transportation equipment" within the meaning of the statute. Thus we find from the stipulated facts that the trial court erred in classifying the machinery here involved as "transportation equipment."

Reversed and remanded.

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

ARKANSAS STATE HIGHWAY COMMISSION
v. M.E. WITKOWSKI et ux

74-236 519 S.W. 2d 743

Opinion delivered February 24, 1975
[Rehearing denied March 24, 1975.]

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

Howell, Price, Howell & Barron, for appellees.

CONLEY BYRD, Justice. The jury awarded compensation in this eminent domain proceeding in accordance with the testimony of C. V. Barnes, an expert witness called on behalf of appellees M. E. Witkowski, et ux. For reversal of the $155,-000 judgment the Arkansas State Highway Commission makes the following contentions:

> "I. The court erred in denying appellant's motion to strike the before value testimony of C. V. Barnes, expert witness for the landowners.
>
> II. The court erred in allowing appellees to establish in the presence of the jury that an appraiser who had made an appraisal of the subject property for appellant was not called to testify."

POINT I. The record shows that appellant condemned 79.35 acres which ran diagonally across appellees' ownership of 269 acres. C. V. Barnes testified for the landowner arriving at a total before valuation of $363,000 and an after valuation of $208,000. After testifying that he placed an assemblage value on the property, the record on direct examination shows:

> "Q. What is assemblage value, explain that to the jury, please, sir?
>
> A. Well, assemblage value can be made up of a number of things. First, assemblage primarily talks about size of Two Hundred Sixty Nine Acre parcel of ground such as the Witkowskis had is more flexible and conducive to development than like say a forty acre tract of ground because there are certain fixed expenses that have to be written off in any development and the larger the development, the more you have to write the fixed expenses off of. Also, when you have a development large enough to take advantage of multi-family and commercial use, why that goes into the element of assemblage.
>
> Q. So that . . .
>
> A. In a Forty acre tract, it would be very, very hard to

get commercial and multi-family and single family all on one tract of ground, so that when you get a large acreage that comprised of seven forty acre tracts, so to speak, you do have this capability.

Q. So the size of the property in other words, the size of this particular piece of property does increase its value in your opinion?

A. In my opinion, yes, sir."

On direct in showing how he arrived at his before value the witness testified as follows:

"Q. All right, sir, so in looking at the trend and using that as a factor in determining the fair market value of raw land in this area, particularly Mr. Witkowski's what did you come up with as to value per acre?

A. After making all of my studies and analysis, I came to the conclusion that Mr. Witkowski's property on the raw land basis and in let's say forty acre segments, more or less, had a value of a Thousand Dollars per acre.

Q. And you add to that, I believe you have already testified, you add to that . . .

A. Well, I didn't . . . let me back up and put it this way. I valued Mr. Witkowski's property before the taking at Thirteen Hundred and Fifty Dollars an acre, and as I just said, I felt like based on my study of the sales and there were no sales out there of Two Hundred and Sixty Nine acres, hunted all over that end of the world to find anything comparable in size, most of the market data was of the sizes that we have talked about, so I came to the conclusion that in small parcels or smaller parcels that the value of the property was a Thousand Dollars and that the fact that over a period of some four or five years, he had put this Two Hundred Sixty Nine acres together into one parcel, thereby increasing its potential and adaptability and all kinds of things, that it had an assemblage factor of Two Hundred Dollars per acre.

Q. Over and above the Thousand?

A. Over and above the Thousand, and that the improvements that had been constructed on the property made a contribution of a Hundred and Fifty Dollars per acre to the property and that's the way I got my Thirteen Hundred and Fifty Dollars per acre.

Q. Or Three Hundred and Sixty Three Thousand Dollars before market value.

A. That's correct."

On cross-examination the witness testified that the property remaining had a value of $1100 per acre. With reference to the assemblage value the record shows only the following:

"Q. I want to ask you about that assemblage business. How did you arrive at that Two Hundred Dollars an acre assemblage value?

A. Well, based on judgment and experience, I would say, and based on the fact that the, for example, let's just talk about the three sales that Mr. Witkowski . . .

Q. I want to talk about them, go ahead.

A. One of the sales, of course, the highest price sale was for Eight Hundred and some odd dollars per acre and it had access. The other two sales, one at Five Hundred and the other at Six Hundred and Fifty Dollars, if I remember my figures about right, didn't have access and so that right there would indicate to me that property with access was worth more than that without and when the last two sales, for example, were purchased, that increased their value because they then had the same access as all the rest of them, so that's one of the factors that go to make up the assemblage value. Now, another thing is that when you talk about a small tract of ground like the Curtis sale which was the forty acre tract, the only potential for it would be . . . well, let's put it this way, the potential for a forty acre tract is not as

great as Two Hundred and Sixty Nine acres, when you get to Two Hundred and Sixty Nine acres, you've got a big enough unit to start planning and relating commercial and multi-family uses on the property where you cannot do that on smaller tracts and thus commercial potential created by putting smaller pieces together into a big block enhances its value."

The witness' definition of "assemblage" corresponds generally to the definition of "plottage" as defined in Black's Law Dictionary 4th Ed. — *i.e.*, "A term used in appraising land values and particularly in eminent domain proceedings, to designate the additional value given to city lots by the fact that they are contiguous which enables the owner to utilize them as large blocks of land." However, this is a separate and distinct item from that which occurs when access is given to a landlocked tract because in the latter instance the enhancement in value accrues only to the landlocked portion whereas the enhancement from "assemblage" or "plottage" is to the whole property.

We readily recognize that "assemblage" or "plottage" is an element that may be taken into consideration in arriving at the valuation of property but like all other elements to which a damage factor is assigned an expert witness on cross-examination must demonstrate that he has some reasonable basis for assigning a particular amount of damage. In this instance the $200 figure comes to 20% of the value of the land and if we should accept his answer that the $200 figure is based ". . . on judgment and experience" then we know of no rationale that would prevent the same witness from using a $2000 figure.

However, at the outset we are confronted with the problem that the only motion to strike was made at the close of the direct examination of the witness. Of course, at that time the trial court properly refused the motion to strike, *Ark. State Highway Comm.* v. *Johns*, 236 Ark. 585, 367 S.W. 2d 436 (1963). The motion to strike was not renewed at the end of the cross-examination. Consequently, appellant is not in a position to claim error on the part of the trial court, *Mo-Pac R.R.* v. *McDaniel*, 252 Ark. 586, 483 S.W. 2d 569 (1972).

In its argument appellant proceeds on the theory that there is no substantial evidence to support the award but it cannot avail on this issue because at least one other expert arrived at a difference between a before and after value of $164,000 and it is not contended that he had no basis for his opinion.

POINT II. In accordance with our decision in *Arkansas State Highway Commission* v. *Phillips*, 252 Ark. 206, 478 S.W. 2d 27 (1972), the landowners submitted evidence to the jury to show that the Highway Commission had used a number of appraisers to appraise the property in question that were not called to testify. Admittedly this was done to raise the inference that the testimony of those witnesses would have been unfavorable to the condemnor. The Highway Commission recognizes the binding effect of the *Phillips'* case, *supra,* but requests that we reconsider the issue. While we cannot say that the trial court erred in following the *Phillips'* case, *supra,* we note that it was not a unanimous decision and that it is decidedly contrary to a majority of the other jurisdictions that have considered the issue — see *Boyles* v. *Houston Lighting and Power Company*, 464 S.W. 2d 359 (Tex. 1971); *Lutsko* v. *Commonwealth Department of Transp.*, 13 Pa. Comwlth. 150, 318 A. 2d 361 (1974); and *State Ex rel State Highway Com'n* v. *Texaco Inc.*, 502 S.W. 2d 284 (Mo. 1973). For cases involving related issues see *Logan* v. *Chatham County*, 113 Ga. App. 491, 148 S.E. 2d 471 (1966) and *Whitcomb* v. *Whitcomb*, 267 S.W. 2d 400 (Ky. 1954). Consequently, with respect to all cases being tried after the effective date of this opinion, we give the bench and bar notice that the issue involved in the *Phillips'* case, *supra*, will be reconsidered.

Affirmed.

FOGLEMAN and HOLT, JJ., concur.

JOHN A. FOGLEMAN, Justice, concurring. I concur in both the result and the majority opinion with reference to the testimony of the expert witness Barnes. I would affirm, however, even if a motion had been made to strike his testimony after cross-examination or at the conclusion of all his testimony.

I cannot, however, subscribe to the caveat that the evidentiary rule stated and applied in *Arkansas State Highway Commission* v. *Phillips*, 252 Ark. 206, 478 S.W. 2d 27, is subject to reconsideration less than three years later, during which time nothing has really changed. The discovery that the court was not unanimous certainly is not a recent or surprising one. The original ruling we approved in *Phillips* was made by one of the most eminent jurists ever gracing the trial bench in this state. It is supported by no less eminent authority than Professor Wigmore and for sound reasons. If there has been expert shopping by either a plaintiff or a defendant the jury has a right to know it, whether the case be in eminent domain, for personal injuries, or whatever. The question is not actually suppression of evidence. It is nonproduction.

The principle followed in *Phillips* was applied in *United States* v. *Certain Land in City of Fort Worth, Texas*, 414 F. 2d 1026 (5 Cir., 1969), where the court commented that the expert hired by the government but not called by it to testify was a recognized and qualified land appraiser.

It should be noted that in practically all those jurisdictions holding contrary to *Phillips*, the result is based to a great extent upon the premise that the expert witness is just as available to the adverse party as he is to the one by whom he was employed. Those cases cited in the majority opinion are: *Boyles* v. *Houston Lighting & Power Co.*, 464 S.W. 2d 359 (Tex. 1971); *Lutsko* v. *Commonwealth Department of Transp.*, 318 A. 2d 361 (Pa. Commonwealth, 1974); *Logan* v. *Chatham County*, 113 Ga. App. 491, 148 S.E. 2d 471 (1966); *Whitcomb* v. *Whitcomb*, 267 S.W. 2d 400 (Ky. 1954). Not cited there are *State Highway Commission* v. *Earl*, 82 S.D. 139, 143 N.W. 2d 88 (1966); *Department of Public Works and Buildings* v. *Guerine*, 19 Ill. App. 3d 509, 311 N.E. 2d 722 (1974). The validity of that premise is certainly subject to question. It does not prevail in favor of a private litigant in the majority of jurisdictions that have passed upon the question.

It is quite generally held that the state in the exercise of its sovereign power may compel a witness to testify as an expert in matters affecting the common welfare, particularly in criminal cases. 31 Am. Jur. 2d 504, Expert and Opinion

Evidence § 10; 97 C.J.S. 365, Witnesses, § 16. This rule has been recognized and applied in Arkansas but not extended to private litigants. See *St. Francis County* v. *Cummings*, 55 Ark. 419, 18 S.W. 461; *Flinn* v. *Prairie County*, 60 Ark. 204, 29 S.W. 459. As a matter of fact the language used in *Flinn* would seem to confine the rule to cases related to the enforcement of criminal laws. We said:

> . . . . It is the duty of every citizen to assist, within reasonable limits, in enforcing the criminal law of the state; and it is not unreasonable that he should be required, on behalf of the state, to give such information as he may possess towards the elucidation of any question arising in a criminal trial, whether that information be in the nature of expert evidence or not. He cannot be required to make any examination or preliminary preparation, nor can he be compelled to attend the trial, and listen to the testimony, that he may be better enabled to give his opinion as an expert. For any service of this kind he may demand extra compensation. But such information as he already possesses, that is pertinent to the issue, he can be made to give, whether such information is peculiar to his trade or profession, or not. There is very little probability of any great hardship being imposed on physicians by reason of this rule.

I submit that *State ex rel State Highway Commission* v. *Texaco, Inc.*, 502 S.W. 2d 284 (Mo. 1973), the only remaining case cited in the majority opinion, does not support the position contrary to that of *Phillips*. In the Missouri case, the landowner moved to strike the testimony of three expert valuation witnesses on the ground that the state withheld an appraisal by a fourth such expert more favorable to the landowner than the other three. The landowner sought to equate this action with that of the state in *Brady* v. *Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), where evidence favorable to the defendant was withheld by the state. Naturally the court held *Brady* inapplicable. Furthermore, there the landowner knew the value put on his land by this expert.

It is also generally held that an expert cannot be com-

pelled, if unwilling, to give opinion testimony at the request or for the benefit of a private litigant. *United States* v. *$5,608.30,* 326 F. 2d 359 (7 Cir. 1964); *Cold Metal Process Co.* v. *United Engineering and Foundry Co.*, 83 F.S. 914 (W.D. Pa., 1938) affirmed 107 F. 2d 27 (3 Cir., 1939); *Evans* v. *Otis Elevator Co.*, 403 Pa. 13, 168 A. 2d 573 (1961); *Braverman* v. *Braverman*, 21 N.J. Super 367, 91 A. 2d 226 (1952); *People* v. *Thorpe*, 296 N.Y. 223, 72 N.E. 2d 165 (1947); *Karp* v. *Cooley*, 349 F.S. 827 (1972), 97 CJS 366, Witnesses § 16; 31 Am. Jur. 2d 504, Expert and Opinion Evidence, § 10; Annot, Compelling Expert to Testify, 77 ALR 2d 1182 (1961).

The general rule that the expert may not be compelled to testify has been applied in eminent domain cases. See, e.g., *Pennsylvania Co. for Insurances on Lives and Granting Annuities* v. *City of Philadelphia*, 262 Pa. 439, 105 A. 630, 2 ALR 1573 (1918); *Reda* v. *State*, 62 Misc. 2d 244, 308 N.Y.S. 2d 558 (1970); *L'Etoile* v. *Director of Public Works*, 89 R.I. 394, 153 A. 2d 173, 77 ALR 2d 1174 (1959).

In *Pennsylvania Co.* v. *City of Philadelphia*, supra, the leading case on the subject, the condemner in an eminent domain case subpoenaed as expert witnesses two real estate men who objected to testifying because they had previously been employed by the landowner and had reported to him. The trial court sustained the objection on the ground that the witnesses maintained a confidential relationship with the landowner. The Pennsylvania Supreme Court said:

> We think it unnecessary to decide whether or not the reason for sustaining the objection is a sound one, in view of the fact that the witnesses themselves objected to being required to testify as experts. The process of the courts may always be invoked to require witnesses to appear and testify to any facts within their knowledge; but no private litigant has a right to ask them to go beyond that. The state or the United States may call upon her citizens to testify as experts in matters affecting the common weal, but that is because of the duty which the citizen owes to his government, and is an exercise of its sovereign power. So, also, where the state or the United States in her sovereign capacity, charges the

> citizen with crime, she may, if need be, lend her power in that regard to the accused; for she is vitally interested, as such sovereign, that public justice shall be vindicated within her borders. Perhaps, also, under like circumstances, she may also lend her power in civil cases. But the private litigant has no more right to compel a citizen to give up the product of his brain than he has to compel the giving up of material things. In each case it is a matter of bargain, which, as ever, it takes two to make, and to make unconstrained.

One of the reasons why experts are not as readily available to the adverse party as to the party by whom he was employed is well expressed in language of the N.J. Court of Errors and Appeals in *Stanton* v. *Rushmore*, 112 N.J. Law 115, 169 A. 721 (1934), where the court held that expert testimony cannot be compelled. That court said:

> It is quite clear, and no argument is required to demonstrate, that all knowledge which one has of the actual facts of a litigation, whether the witnesses to those facts be professional or lay, is available and such witnesses thereof amenable to subpeona and compellable to give evidence of such facts. On the other hand, when the experience, training, and skill acquired by years of study and practice in a given profession or calling exists, such knowledge and skill are not the property of litigants. It belongs to the professional man in his chosen occupation. Neither justice nor public policy in our view forbids that the expert shall retain such knowledge and skill free from divulgement except by his voluntary acquiescence, whether it be sought for compensation in the exercise of his skill, in the expression of his professional judgment privately, or when he is called for that purpose into a court of justice.

I submit that if we are to reconsider the *Phillips* rule because of holdings of cases such as those cited in the majority opinion, we must also adopt the corollary which furnishes the rationale on which those cases are based, i.e., that the expert witness is as available to the adverse party as he is to the party by whom he was employed and that he can be compell-

ed to testify. I cannot envision any enthusiasm for the adoption of such a rule by the trial bar of this state. No trial attorney could approach the presentation to a jury of an opinion coerced from a reluctant or recalcitrant witness with enthusiasm. Such a witness could never be said to be one the party opposing the one by whom he was originally employed would, in the nature of things, be expected to call if his testimony was not adverse. To say the least, a trial lawyer faced with the prospect of calling his adversary's expert would never agree that such a witness was "equally available" to him.

The rule of *Phillips* is right and we should adhere to it without suggestion that someone at the trial level should not.

I am authorized to state that Mr. Justice Holt joins in this opinion.

PEEK PLANTING COMPANY, Inc. and Arden VASSAUR *v.* W. H. KENNEDY & SONS, Inc.

74-156 519 S.W. 2d 49

Opinion delivered February 24, 1975

Jones, Matthews & Tolson, for appellants.

Bridges, Young, Matthews & Davis, for appellee.

J. H. EVANS, Special Chief Justice. For convenience the appellants will be referred to as "Peek and Vassaur" and the appellee as "Kennedy". Peek and Vassaur were two of the appellants and Kennedy was one of the appellees in *J. L. McEntire & Sons, Inc.* v. *Hart Cotton Company, Inc.*, 256 Ark. 937, 511 S.W. 2d 179, decided on July 8, 1974. This appeal grows out of the proceedings of the *McEntire* case in which this court affirmed the trial court's declaratory judgment that certain written contracts between Peek and Vassaur, as sellers, and Kennedy, as buyer, were valid agreements. Under these contracts Peek and Vassaur had agreed to sell Kennedy their entire 1973 cotton crops for a specified price.

The facts are not in dispute on this appeal. Pending a decision on the appeal by Peek and Vassaur in the *McEntire* case, in which they did not post a supersedeas bond, they made a written tender to Kennedy to deliver the cotton under a reservation of rights under Ark. Stat. Ann. § 85-1-207 (Add. 1961). In this letter Peek and Vassaur stated that if the contracts were declared invalid upon appeal that Kennedy, by accepting delivery, would be guilty of a tortious conversion and they would be entitled to damages as set forth in *Newburger Cotton Company* v. *Stevens*, 167 Ark. 257, 267 S.W. 777 (1925). Kennedy refused to accept delivery and perform under these conditions and promptly filed suit for specific per-

formance, which was granted by the trial court in November of 1973. Peek and Vassaur took this appeal and did not supersede the order.

Peek and Vassaur contend they had the right to tender performance and reserve their rights under § 85-1-207 to sue Kennedy for tortious conversion if the contracts were declared invalid upon appeal in the *McEntire* case. Since Kennedy refused to perform under these conditions, Peek and Vassaur claim Kennedy breached the agreement, thus relieving them of the duty to perform. The relief they seek is a reversal of the decree of specific performance and that the cause be remanded for restitution proceedings in their favor. Kennedy contends § 85-1-207 had no application and that Peek and Vassaur were imposing conditions to their tendered performance on which they had no legal right to insist. Kennedy further contended that if Peek and Vassaur did not wish to perform they could have posted a sufficient supersedeas bond and disposed of their cottton in any manner they chose.

We agree with Kennedy's contentions. There is very little authority available as to the meaning of § 85-1-207, which is as follows:

> "A party who with explicit reservation of rights performs or promises performance or assents to performance in a manner demanded or offered by the other party does not thereby prejudice the rights reserved. Such words as "without prejudice", "under protest" or the like are sufficient."

However, our view of the situation does not require an interpretation of this statute as we believe it has no application in this instance. This section appears in the General Provisions Chapter of the Uniform Commercial Code and obviously is intended to apply only to transactions falling under the provisions of the code. The rights which Peek and Vassaur had, in the event of a reversal of their appeal in *McEntire*, were fixed by Ark. Stat. Ann. § 27-2153 (Repl. 1962), which is as follows:

> "If any judgment of the Circuit Court shall be reversed

> by the Supreme Court on writ of error or appeal, and such judgment may have been carried into effect before the reversal thereof, such defendant may recover from the plaintiff in such judgment the full amount paid thereon, including costs, by an action (of the debt or on the case) for so much money had and received to his use."

Ark. Stat. Ann. § 27-2156 (Repl. 1962) makes the provisions of § 27-2153 applicable to cases in Chancery. Where, as here, the delivery of property rather than a money judgment is involved, these statutes have been construed to provide for restitution of the identical property upon reversal, and if this cannot be done, then a recovery may be had for the value of the property. *Mothershead* v. *Douglas*, 219 Ark. 457, 243 S.W. 2d 761 (1951); *Dodson* v. *Butler*, 101 Ark. 416, 142 S.W. 503 (1912). The rights of Peek and Vassaur upon appeal in *McEntire* were fixed, as a matter of law, by these statutes and court decisions and they could have performed pending their appeal without losing these rights. Obviously, § 85-1-207 had no application to the situation.

If the contracts had been held invalid on appeal in the *McEntire* case Kennedy would not have been guilty of a tortious conversion as claimed by Peek and Vassaur in their tender of performance with reservation of rights. *Berthold-Jennings Lumber Company* v. *St. Louis, I.M.&S. Railway Company*, 80 F. 2d 32 (8th Cir 1935); *Dodson* v. *Butler*, supra; 5 Am. Jur. 2d 424, Appeal and Error, § 997. In *Dodson* v. *Butler* at page 421 of 101 Ark. the following statement is made in this regard:

> "But an erroneous judgment is valid until it is reversed. By the rendition of such judgment, it is the Court which makes the mistake, and not the party in whose favor it is rendered. The judgment, though erroneous, is not void, and protects all persons acting under it until it is reversed."

The measure of damages under § 27-2153 and court decisions thereunder is different from damages growing out of a tortious conversion of cotton. Therefore, Peek and Vassaur,

under the conditions they imposed, had no right to require performance by Kennedy. Also, Peek and Vassaur could have avoided performance by posting a supersedeas bond, which they chose not to do.

Affirmed.

HARRIS, C.J., and FOGLEMAN and BYRD, JJ., disqualified and not participating. Special Justice HENRY WOODS and Special Justice WINSLOW DRUMMOND join in the opinion.

Sam A. WEEMS *v.* THE SUPREME COURT COMMITTEE ON PROFESSIONAL CONDUCT

74-143 523 S.W. 2d 900

Opinion delivered February 24, 1975

[Supplemental Opinion on Denial of Rehearing June 16, 1975, p. 685-A.]

Zachary D. Wilson and *Stuart W. Hankins*, for appellant.

John P. Gill and *Thomas M. Bramhall*, for appellee.

CHARLES M. CONWAY, Special Justice. The appellant, Sam A. Weems, has appealed from a judgment of the Circuit Court of Arkansas County, Northern District, rendered on November 14, 1973, finding him guilty of unprofessional conduct as an attorney at law, canceling his attorney's license and barring him from engaging in the practice of law in this State.

From the entire record including the pleadings and transcript of testimony in this case, we find the pertinent facts to be as follows:

The Supreme Court Committee on Professional Conduct, hereinafter referred to as the "Committee", after receiving information, commenced an investigation of the alleged professional misconduct of Sam A. Weems, a licensed attorney in Arkansas engaged in the practice of law principally in Prairie County and Arkansas County. The appellant was notified of the charges of professional misconduct and that a hearing would be held before said Committee. A hearing was had before the Committee where the appellant appeared in person, the charges were fully presented and thereafter the Committee filed a complaint in the Circuit Court of Arkansas County, Northern Division. A trial being had, judgment was entered against the appellant, which is the subject of this appeal. The complaint alleged three (3) charges of gross professional misconduct against the appellant; Charge I arising from representation of Roe Minton, sometimes referred to as "Minton", Charge II arising from representation of Leroy, Catherine and Vivian Van Houten, sometimes referred to as "Van Houten", and Charge III arising from representation of Thurston National Insurance Company, sometimes hereinafter referred to as "Thurston".

Roe Minton Charge.

Roe Minton, of Hazen, Arkansas, employed the appellant to represent him in a claim on a health insurance policy against the Prudence Mutual Casualty Company, hereinafter referred to as "Prudence". The appellant thereafter, as attorney for Minton, filed suit against Prudence and on January 3, 1970, secured a consent judgment in favor of Roe Minton for $5,000.00. Prudence was placed in receivership and on May 17, 1971, the appellant received a check from the receiver for $5,000.00, payable to the order of "Roe Minton and Sam A. Weems, Attorney". Appellant did not promptly notify Roe Minton of the receipt of these funds, and on the same day caused an endorsement of Roe Minton's name to be placed on the draft and deposited it in the appellant's checking account at the Citizens Bank of Carlisle,

Carlisle, Arkansas, hereinafter referred to as "Carlisle Bank". Roe Minton did not authorize the endorsement of the draft. (Appellant contends otherwise as will be hereinafter discussed.) The checking account in the Carlisle Bank was not identified as a trust account and was the depository of other funds belonging to the appellant and checks were drawn by appellant on said account for the payment of monies owed by the appellant to other clients, personal expenses, and business expenses. Thereafter, Roe Minton, in order to pay his bills, borrowed Twelve Hundred Dollars ($1,200.00). In January, 1972, the appellant, with Roe Minton and Mrs. Minton, at a cafe in De Valls Bluff in discussing Minton's insurance claim stated: "Now you understand your money is up there but we are not going to accept it until they pay you the back premiums and interest on those back premiums that they are supposed to pay." The appellant did not say that he had received the money. Two weeks later, on January 22, 1972, Roe Minton died without receiving payment from the appellant. On the Saturday following the burial of Roe Minton, Mrs. Minton called the appellant to inquire if Roe Minton's death would interfere with the collection of the money from the insurance company and the appellant stated, "No ma'am, I have already contacted them and they are ready to settle, and you should be getting a check in a few days". When the check did not arrive from the appellant, Dwight Minton, son of Roe Minton, went to the office of Mr. Max Sears, the receiver for Prudence, at which time he was shown the original check for $5,000.00 made by the receiver payable to Roe Minton and Sam A. Weems, attorney, which had been deposited in Sam Weems' account in the Carlisle Bank on May 17, 1971. Thereafter, on February 24, 1972, the appellant caused to be delivered to Mrs. Minton a check payable to her in the amount of $3,333.34, drawn on the trust account of Sam A. Weems, attorney, with the notation thereon "insurance settlement less legal fees". From the date of the receipt of the $5,000.00 from the receiver of Prudence on May 17, 1971, until delivery of the check for $3,333.34 to Mrs. Minton on February 24, 1972, there were occasions when the funds on deposit in the Carlisle Bank and all other accounts of appellant in other banks, including a trust account in the Farmers and Merchants Bank, did not have sufficient funds therein to pay the $3,333.34 owed to

Roe Minton or his estate.

The appellant did not have the authority to use Roe Minton's money, and the appellant borrowed money in order that the check sent to Mrs. Roe Minton could be honored. The appellant had a trust account in the Farmers and Merchants Bank in Des Arc, Arkansas, from the time the receiver's check was deposited in Sam Weems' personal account until February 24, 1972, and the appellant knew the purpose of a trust account.

The Van Houten and
Thurston Charges.

Catherine Van Houten and Vivian Van Houten, wife and daughter respectively of Leroy Van Houten, were injured while driving in a motor vehicle belonging to Leroy Van Houten as a result of a collision with Loretta Thompson. Leroy Van Houten employed the appellant as an attorney to represent Van Houten and his wife and daughter in their claim against Loretta Thompson. Leroy Van Houten's automobile was insured by Thurston National Insurance Company, and it employed the appellant to represent it in a subrogation claim for damage to the motor vehicle against Loretta Thompson, who was insured by Allstate Insurance Company, hereinafter referred to as "Allstate". On July 14, 1970, appellant filed suit in Prairie Circuit Court as attorney for the Van Houtens for their claims, and as attorney for Leroy Van Houten on the subrogation claim of Thurston. Subsequent to the filing of the suit, the appellant and the adjusters for Allstate negotiated for a settlement of the claims of all Van Houtens, including the subrogation claim of Thurston. On September 30, 1971, Allstate wrote three drafts and thereafter delivered the same to the appellant. One draft in the amount of $5,300.00 was payable to "Leroy and Catherine Van Houten, individually and as husband and wife, Route 1, Stuttgart, Arkansas; and their attorney, Sam Weems, Des Arc, Arkansas". One draft in the amount of $2,-500.00, was payable to "Vivian Van Houten, Route 1, Stuttgart, Arkansas; and her attorney, Sam Weems, Des Arc, Arkansas". One draft in the amount of $1,205.93, was payable to "Thurston National Insurance Company, 3102

West Markham Street, Little Rock, Arkansas; and their attorney, Sam Weems, Des Arc, Arkansas". Each draft reflected thereon that it was in full settlement of any and all claims . . . arising out of the accident on June 17, 1970, in Little Rock, Arkansas. The appellant endorsed his own name on each of said drafts and thereafter, without notice and without authority, endorsed the names of Vivian Van Houten, Thurston National Insurance Company, and Leroy Van Houten and Catherine Van Houten on their respective drafts. The endorsements of the clients' names were written so as to appear to not have been made by the appellant in order that the bank would not question the endorsements. The appellant deposited all three drafts in his account in the Carlisle Bank. None of the clients authorized the endorsement of the drafts. The checking account in the Carlisle Bank was the same account used for the deposit of the Roe Minton draft.

At the time appellant deposited the three drafts into his account at the Carlisle Bank and commenced using the funds as his own, neither the Van Houtens nor Thurston had been advised by appellant of the proposed aggregate settlement, the total amount of the settlement, nor the participation of each client in the settlement. On October 28, 1971, Allstate by letter to Vivian Van Houten requested that she confirm the issuance of the draft of September 30, 1971, to her and Sam Weems in the amount of $2,500.00. Leroy Van Houten on behalf of Vivian Van Houten replied that she had no knowledge of the draft and requested advice as to "why this claim has not been settled and if any offer of settlement has been made by you in regard to the damage to my father's car and in regard to the injury to my mother". Thereafter, Leroy Van Houten was requested by the appellant to execute a release for all the Van Houten claims for the sum of $6,000.00, which amount the appellant offered to pay by personal check. Mr. Van Houten refused the offer and thereafter the appellant asked the Van Houtens to execute a release for $7,800.00. Leroy Van Houten became suspicious as to how much money Allstate was willing to pay for the claims. Leroy Van Houten met with Sam Weems and John Butram, adjustor for Allstate, on December 29, 1971, at which time Mr. Butram explained what he was willing to pay on behalf of

Allstate for the settlement of all of the Van Houten claims and the Thurston claim. Mr. Van Houten did not agree to settle and thereafter on December 30, 1971, met with Mr. Butram in his office in Little Rock and for the first time saw copies of the drafts Allstate had issued on September 30, 1971, which had been endorsed and deposited by the appellant in his account. Mr. Van Houten secured the withdrawal of the appellant as his attorney and thereafter settled his claim against Allstate for the amount of $7,800.00 which Allstate paid the Van Houtens. The appellant repaid Allstate $7,500.00 on December 22, 1971, and the remaining $300.00 shortly thereafter.

No representative of Thurston ever saw the original draft from Allstate payable to it, and no representative of Thurston authorized the endorsement of the draft by appellant. Thurston had no knowledge that the claim had been settled until December 14, 1971, when they were so advised by Mr. Butram of Allstate. It was not until January 24, 1972, that Sam A. Weems paid Thurston the sum of $803.96 by check drawn on his account at the Carlisle Bank, which amount represented the balance due Thurston on its total claim after subtracting therefrom one-third (1/3) as attorney's fees. Thurston never complained to the Committee on Professional Conduct.

The trial court concluded that Mr. Weems had violated Arkansas Statute §25-401, (Repl. 1962), Canon 1, Canon 9, Disciplinary Rules 1-102(A) (4), (6); 9-102(A) (2); and 9-102(B) (1), (3), (4), on each of the three (3) Charges, and also Canon 5 and Disciplinary Rule 5-106 on Charges II and III. From our examination of the entire record in this case, we are unable to say that the findings of the trial court, and its judgment entered thereon, were against the weight of the evidence, except for violation of Canon 1 in Charge I. Violation of Canon 1 was not alleged in Charge I.

The appellant contends that the scope of appellate review should be wider than heretofore existing on appeal from the decisions of the circuit and chancery court, and cites Rule V of the Rule of the Supreme Court, Regulating Professional Conduct of Attorneys at Law as follows: ". . .

On appeal, the matter shall be heard de novo upon the record made before the trial judge, and this court shall pronounce judgment as in its opinion, should have been pronounced below." Appellant contends that this means the appellate court is in no way committed to findings of the court below even if supported by the evidence, and should make independent findings of fact, drawing its own conclusions from the evidence, except where there is a conflict in direct facts and only the demeanor and credibility of the witness is the remaining gauge upon which a decision could result.

In *Hurst* vs. *Bar Rules Committee of the State of Arkansas,* 202 Ark. 1101, 155 SW 2d 697 (1941), the court held that proceedings for disbarment of an attorney are not criminal but civil in their nature, and as such are governed by the rules applicable to all civil actions, and hence it is required that the material allegation in such cases be established only by prepondernace of the evidence and not beyond a reasonable doubt. Further, the court said: "it seems to us that, in view of the present rules of procedures relating to disbarment, this court on appeal should give even greater weight to the findings of the lower tribunal . . .". We reaffirm the teachings in the Hurst case, supra.

This Court's proper task is to inquire whether the determination of the trial court was contrary to the weight of the evidence, and must affirm the judgment of the trial court if it is not against the preponderance of the evidence.

The appellant contends that he promptly notified Roe Minton of receipt of the $5,000.00 check from the receiver of Prudence, and that he had oral authority from Minton to endorse his name on the check and deposit the same and to hold the money until a complete collection could be had. A close reading of the transcript does not support the contention of the appellant. Appellant testified, "My arrangement with Mr. Minton was that when a check would come in that he would sign it and I would sign it and we would have to let it clear before we distributed any funds. We notified Mr. Minton of this one and he called me right after, as I recall . . . ". Further, in appellant's testimony, he testified as follows, "As soon as he received this particular letter, (defendant's exhibit

10), he called me . . . ".

The appellant received the $5,000.00 check on May 17, 1971, as reflected in a letter from the appellant of that date to the receiver which states, "I am in receipt this date of your check in the amount of $5,000.00 re: Mr. Minton's claim." The check for $5,000.00 reflects the endorsement of the Citizens Bank on May 17, 1971, and was therefore deposited on or before that date. The appellant testified that he gave written notification, defendant's exhibit 10, to Roe Minton and that thereafter Minton called and gave authority to appellant to endorse and deposit the check. Had the appellant written and mailed the letter to Minton as he claimed, notifying him of receipt of the check on May 17, 1971, the same day he deposited the check in the Carlisle Bank, any call made by Roe Minton authorizing such deposit could only have been made after the written notification had been received by Minton by mail.

Also, defendant's exhibit 10, which the defendant introduced in trial, was dated May 19, 1971, which the appellant stated was not the true date of the letter. The testimony also reveals that his usual practice with regard to copies was to make a tissue copy or to make a photocopy of the original letter. The proffered exhibit was neither a tissue copy of the original letter nor a photocopy of the original letter. It was a photocopy of a tissue copy. The learned trial judge gave no credence to defendant's purported notice, finding that it was no doubt a fabrication and having been made as an afterthought in an attempt to implement a cover-up. Considering all the evidence with regard to this exhibit, we conclude that the circuit judge was not in error in finding that no notice of the receipt of the funds was given Roe Minton and that the appellant was unauthorized to endorse and deposit the check in his account.

With regard to notice of receipt of the funds and authority to endorse the check payable to the Van Houtens, the Van Houtens testified that they had no notice of receipt of the funds and that they did not authorize the endorsement of the check by the appellant. Although the appellant testified that he did give notice and was authorized by Leroy Van Houten

to endorse the checks, all the circumstances of the case, including the fact that Leroy Van Houten wrote Allstate inquiring about his settlement and that of his wife and daughter, lead us to conclude the circuit judge was not in error in finding no notice to and no authority from the Van Houtens.

Appellant testified that, with regard to Thurston, he had authority by reason of prior dealing with Thurston wherein he represented them and they had authorized him to endorse checks payable to them. Appellant did not produce other evidence of prior representation of Thurston. The representatives of Thurston testified that the appellant had never represented Thurston prior to this matter, and that no one in authority had authorized the endorsement by appellant and deposit of the check in the appellant's account. They stated further that the first knowledge they had of the receipt of the check was when they were notified of it by Allstate. We conclude that the circuit judge was not in error in finding that there was no notice to nor authority from Thurston.

The appellant contends that the committee must elect to either proceed according to Ark. Stats. Ann. § 25-411 and § 25-413 (Repl. 1962) or by the Rules Regulating Professional Conduct of Attorneys, and must state such election formally.

Rule X of the Rules Regulating Professional Conduct of Attorneys is as follows:

> "RULES AND SUPPLEMENT TO STATUTES. The rules adopted shall not be deemed exclusive of, but as supplemental to, the statutes of the State of Arkansas. The committee may invoke the statutes or proceed hereunder if it should elect to do so."

Appellant has cited no authority to support his position that election must be stated. It is apparent in the case at bar, that the Committee chose to proceed as provided by the Rules, and a formal statement of election is unnecessary.

The power to regulate and define the practice of law is a prerogative of the Judicial Department as one of the divisions

of government. *Arkansas Bar* vs. *Union National*, 224 Ark. 48, 273 SW 2d 408 (1954). Amendment 28 to the Constitution of the State of Arkansas reads,

> "The Supreme Court shall make rules regulating the practice of law and the professional conduct of attorneys at law."

The Court has adopted substantive rules relating to professional conduct and procedural rules relating to the enforcement thereof. The acts of the Legislature with regard to regulating and defining the practice of law are to be considered to be in aid of the judicial prerogative and not in derogation thereof. *Arkanaas Bar* vs. *Union National,* supra.

Appellant next contends that "essential facts" to the jurisdiction must appear in the record, and that the Rules require that the complaint "shall set forth the specific facts constituting the alleged misconduct", citing *Monks* vs. *Duffle,* 163 Ark. 118, 259 SW 735, (1924). The complaint alleges that the Supreme Court Committee on Professional Conduct, as authorized by this Court, is charging in the Circuit Court of Arkansas County, the appellant, a licensed attorney engaged in the practice of law in Prairie County and Arkansas County, with gross professional misconduct. It further states that the complaint was filed after a hearing of which the appellant received notice, and at which appellant appeared, and the matters pertaining to the charges were fully presented and the committee found violation of statutes, Canons, and Disciplinary Rules. The complaint further charges that the appellant was guilty of gross professional misconduct in representing a stated client against a stated third party concerning a stated claim, for a stated period of time at a stated place, and that with regard to said representation his conduct violated certain statutes, Canons, and Disciplinary Rules proscribed by the Supreme Court. The "essential facts" required by *Monks* vs. *Duffle*, supra, appear in the record.

Does the complaint "set forth the specific facts constituting the alleged misconduct" required by Rule IV of the Rules Regulating Professional Conduct of Attorneys? The final paragraph of each of the three charges in the complaint

alleges violation of a particular statute, Cannons, and Disciplinary Rules. The final paragraph of each of the three charges clearly relates to the acts of appellant in his representation of the stated client in a particular matter. Each charge informs the appellant of "specific facts" with sufficient clarity in order to permit him to prepare his defense, and, once the charge is determined, to constitute res judicata of the matter under consideration Rule IV of the Rules Regulating Professional Conduct of Attorneys is satisfied.

The appellant contends that Rule IV requires that the basis of the original complaint of professional misconduct, i.e. affidavit of complaint or statement that a member of the committee had information, is required. We do not agree. As pointed out in *Armitage* vs. *Bar Rules*, 223 Ark. 465, 266 SW 2d 818 (1954), the purpose of the procedure before the committee is to sift substantial charges from those without serious implication, and where serious, to allow the attorney a hearing, and if found in violation to bring formal charges by complaint. The rules have as their purpose the creation of a Committee to maintain the highest standards of ethical conduct in the practice of law. This purpose can best be served if there is free and easy access of information regarding the activities of members of the Bar. It is for this reason that the rules permit investigation on information from any source. Investigation by the Committee may be commenced without an affidavit being signed by the client. The nature or the form of the information which causes the committee to commence the investigation is not jurisdictional and a statement of the source is not required.

The appellant contends that with respect to alleged violations of Disciplinary Rules 1-102a(4)4 and (6)6, the evidence which would show that appellant "engaged in conduct involving dishonesty, fraud, deceit or misrepresenation, or engaged in any other adverse conduct" is not of sufficient degree or certainty or character to constitute the required culpability. We do not agree. In all three charges, there was active concealment of the receipt of funds. The endorsement of the drafts was deceitful and the use of the money for his own purposes dishonest. Advising Roe Minton that he was not going to accept the money at a time when he had already

deposited the same in his bank account and seeking to obtain a release for $6,000.00 from the Van Houtens at a time when $7,800.00 had already been received by him and placed in his bank account was dishonest, deceitful, fraudulent, and a misrepresentation of the true facts. The intention to permanently deprive the clients of the appropriated funds is not necessary, and the action of the appellant in dealing with his clients was a continuing one of fraud, deceit, misrepresentation, and dishonesty. The appellant had the benefit of the use of the clients' money and deprived them of its use to their damage.

The trial judge entered a permanent disbarment order. Although the charges proved against the appellant are serious and demonstrate an unfitness to practice law, we feel that in view of all the circumstances of the case the judgment should be modified.

We conclude that Sam A. Weems should be disbarred as an attorney at law for a period of three years for a period from November 14, 1973, the date the judgment of the Trial Court was entered, and that his license and right to practice law in the State of Arkanaas should be revoked. Further, should Sam A. Weems, at the end of the period of disbarment, make application for readmittance to the practice of law, the State Board of Law Examiners shall at that time determine his fitness to practice law.

It is so ordered.

WILLIAM K. BALL, Special Justice, concurs. BYRD and HOLT, JJ., disqualified.

Supplemental Opinion on Denial of Rehearing
delivered June 16, 1975

523 S.W. 2d 900

WILLIAM K. BALL, Special Justice. Each of the parties has petitioned for rehearing, and after carefully considering these petitions we have reached the conclusion that both should be denied.

The appellant's petition for rehearing, which is primarily a reiteration of some arguments he made previously, does not move us to further words.

In its petition for rehearing the appellee forcefully urges that nothing short of permanent disbarment will square with the Opinion of this Court handed down February 24, 1975. Agreeing that the appellee's position in this respect is well taken, we feel compelled to supplement our earlier opinion to explain why we reached the decision to disbar the appellant for three years instead of permanently.

Considering the record before us — and it is a good one — we unhesitatingly find that the appellant has been guilty of professional misconduct of a serious nature and adversely reflecting upon his fitness to practice law. Therefore, it is the duty of this Court, as the enforcing agency charged with the responsibility of maintaining the highest standards of professional and ethical conduct by lawyers licensed to practice law in the State of Arkansas, to take appropriate disciplinary measures.

It has been proved to our satisfaction that the appellee, in addition to being guilty of conduct prohibited by Ark. Stat. Ann. § 25-401 (Repl. 1962), violated certain of the Disciplinary Rules set forth in the Code of Professional Responsibility prepared by a special committee of the American Bar Association and recently adopted by this Court. In the "Preliminary Statement" prefacing this code it is said, "The severity of judgment against one found guilty of violating a Disciplinary Rule should be determined by the character of the offense and the attendant circumstances."

Certain attendant circumstances not mentioned in our earlier opinion but having relevance tending to mitigate the severity of judgment against this lawyer are (1) the lack of evidence of past professional or personal misconduct on his part, (2) the fact that his professional misconduct which brought on these charges fell short of being criminal in nature, (3) the fact that his clients received all moneys to which they were entitled, and (4) the generally cooperative actions of this lawyer during the course of the investigation by the appellant.

In our earlier opinion it was stated that "* * * the actions of the appellant in dealing with his clients was a continuing one of fraud, deceit, misrepresentation, and dishonesty." Actually, we are convinced that the appellant's professional conduct in issue, though inexcusable, resulted in the main from inattention, disregard and neglect, and not from a conscious desire or plan to permanently deprive his clients of their money. Thus, even though this conduct adversely reflects on his fitness to practice law and was im-

proper in several respects, nonetheless it should not have been characterized as "a continuing one of fraud, deceit, misrepresentation, and dishonesty."

The decision should not be interpreted to indicate that this Court has taken or will hereafter take a "soft" position or a "hard" stance or some middle ground in disciplining wayward members of the bar of the Court. It does evidence this Court's dedication to requiring that the attorneys on its rolls fulfill their professional responsibilities and maintain the highest standards of ethical conduct. Each disciplinary proceeding stands separate and apart from any other; and what we are saying here in the case of Sam A. Weems is that, while the charges of professional misconduct against him have been satisfactorily proved, and while a persuasive case for permanent disbarment has been presented, considering the character of the offenses and the attendant circumstances justice will be best served by disbarment for a period of three years as ordered in our earlier opinion, with his readmittance to the practice of law being subject to the conditions specified in that opinion.

Petitions denied.

CHARLES M. CONWAY, Special Justice, concurs.

BYRD and HOLT, JJ., not participating.

CHARLES M. CONWAY, Special Justice, concurring. I concur that the petitions for rehearing should be denied.

I would not modify the findings of the Trial Court by characterizing the acts of the attorney as resulting from inattention, disregard and neglect.

The judgment of disbarment was for a period of three (3) years with readmittance being conditioned upon the attorney's application for readmittance and a determination at that time of his fitness to practice law. Such judgment requires that should the attorney again desire to practice law

that he maintain a competence in the law during his disbarment period to be tested as required of all other applicants. In addition the applicant would have the burden of proving to the satisfaction of the Committee on Admissions that it was reasonable to expect that he would comply with the Conduct of Professional Responsibility adopted by this Court. The conditions of readmission are such as to assure that those who are admitted to practice law are worthy of the privilege.

Edward FARLEY, d/b/a STAMPS BUILDERS SUPPLY *v.* Mr. and Mrs. Charles JESTER et al

74-246 520 S.W. 2d 200

Opinion delivered March 3, 1975

Keith, Clegg & Eckert, for appellant.

Graves & Graves, for appellees.

CARLETON HARRIS, Chief Justice. Appellees, Mr. and Mrs. Charles Jester, desiring to build a home, requested appellant, Edward Farley, a builder, to examine their plans and submit a contract price. After some discussion on a couple of occasions, the parties met at the home of the Rev. Glen A. Park, Sr., father of Mrs. Jester, a minister and a manufacturer of furniture cream. Subsequent to this meeting, the house was built. During construction, Jester was submitted monthly invoices, and money was paid to Farley as per the invoices, until January, 1973, when the December, 1972 invoices were presented, these invoices including charges by subcontractors, and air conditioning and tile charges. Por-

tions of the invoices were paid at that time, making total payments to Farley of $53,000. According to Farley, Jester said that he did not have sufficient money to pay the complete amount of the invoices, and he was going to see his father-in-law to ascertain if the latter could help in raising the money. Further conversations were held, but on March 7, Jester directed a letter to Farley in which Jester stated:

> "I have again reviewed the invoices you have submitted for construction of my home in Forrest Hills, and find that there is a grand total amounting to $60,523.92 — of which $53,000.00 has been paid to you.
>
> "You will remember that our agreement was for you to construct a home for $50,000.00 or less, with me furnishing the home-site and carpeting for the floor.
>
> "Advances were given to you toward the completion price and they amount to $3,000.00 more than the agreed maximum total. This $3,000.00 additional was paid to you without my waiving any of my rights or remedies under our original agreement.
>
> "Actually, you never completed the house; the gutters, sidewalks, yard leveling and general clean-up were by someone other than you — yet you want approximately 21% more than agreed upon.
>
> "Please be advised that I feel you have been paid in full and cannot remit additional funds."

Thereafter, Farley instituted suit, which, after amendment, sought recovery in the total sum of $7,523.92. The Jesters answered, asserting that appellant had been completely paid for all services performed and materials delivered. Trial started on July 26 and was continued on July 28. During these hearings, the question arose of whether the chancellor was prejudiced because of his association with one of the witnesses for appellee. At the conclusion of the evidence on that date, the chancellor rendered some findings. Thereafter, on August 7, written motion was filed by appellant suggesting that the chancellor recuse himself, and this motion was denied on August 20. Subsequently, a record

was made on the motion, and further proof was taken in the case. After additional hearings, on February 5, the court entered its final decree rendering judgment for Farley in the amount of $1,530.59. From such judgment, appellant brings this appeal, and for reversal relies upon two points, *viz.*, "The court erred by refusing to recuse himself" and "The court erred in imposing a $50,000 limitation on the construction price." Since we think Point I is dispositive of the litigation, Point II will not be discussed.

During cross-examination of Mr. Park, the record reflects:

> "Q. Mr. Park, you testified to two of three things about the agreement. One of them you said was $50,000 plus 10%.
>
> A. That was a slip of the tongue. The total cost of that house as I understand it was on a cost plus basis.
>
> Q. Well, it's based on a slip of a lot of tongues because people don't agree with what was said. That's the reason I'm using that question in this case.
>
> A. Well, I resent that statement. I didn't get on this witness stand to lie. I came up here to tell the truth and that's what I'm trying to tell you."
>
> AT THIS POINT, THE ABSTRACT REFLECTS THAT THE COURT GOES "OFF THE RECORD" AND THEN PICKS UP WITH THE FOLLOWING:
>
> "MR. ECKERT: My clinet is going to be impaired. He's telling the truth too. I won't agree to what this witness testified to. We'll have to impeach him. There is no way I can question him.
>
> THE COURT: I want you to do that. It might be more difficult as far as I'm concerned for you to impeach his credibility than it would be of Mr. Jester. Fact the matter is, I knew Ed Farley in business at Stamps and I thought well of him, but didn't know him as well as I do this fellow.

MR. ECKERT: I'm quite concerned about the possibility of trying a lawsuit in which anyone is held in the Court's esteem in such a great favor. It causes too great a burden. I'll go ahead.

THE COURT: Mr. Park, in view of what I have said here, Mr. Eckert is going to try to get rough with you. Keep your temper."

As previously stated, the trial continued and at the conclusion of the first hearing, the court made some findings.

It has already been pointed out that appellant had filed a motion for the chancellor to disqualify himself. Appellees argue that the motion for disqualification was not timely, i.e., it was not made at the time the issue arose; that though appellant's attorney indicated concern about going ahead with the suit, he did proceed with the trial, and authority is cited to the effect that in order to raise a matter on appeal, objections or motions must be timely made. Appellee states that appellant, after some findings of the chancellor had been rendered, should not be permitted to then question the qualifications of the court. This argument does not settle the issue for it is the contention of appellant that the motion for disqualification was made at the first hearing during the time that discussion between court and counsel was "off the record."

This seems an appropriate time to mention the subject of courts going "off the record." The present instance is by no means the first that has occurred; rather, it has been done over the years by many courts, and this court is accordingly left in the dark as to what actually was said or transpired. Of course, there are some matters relating to procedure to be followed, or matters of a similar nature which do not justify lengthening the record, but let it quickly be said that *any* phase of the trial which relates to the testimony, other evidence, or is pertinent in any way to a determination of the litigation, should be included in the record. In other words, "If it is worth saying, it is worth placing in the record."

In the present case, at a subsequent hearing, witnesses

testified relative to what occurred during the "off the record" discussion between court and counsel. Counsel for appellant stated that the chancellor had said that the court was closely connected with the witness Park; that if the chancellor had known that Park was going to be a witness he would have excused himself, and that whatever Park testified to would be the findings of the court. The chancellor responded that he did not remember saying that what Mr. Park testified to would be the verdict of the court, and did not believe he said it; that what Park said wasn't the verdict of the court, in his opinion. He said that he considered Park to be a man of integrity and that what he had sought to do was to place appellant's counsel on notice that Park was a man he knew and that he had considerable confidence in whatever Park might say under oath and he just wanted counsel not to go easy on him because he was a preacher and because the chancellor had stated that he knew him well. He reiterated that what Park said would not dictate what the court determined, though "It may have outweighed some of the other testimony." The chancellor stated that he had had no business or social relationship with Park for ten years.

Counsel for appellee testified that the chancellor told counsel for appellant that he would have to cross-examine Park in a "tough manner or something like that to discredit his testimony," but that he did not recall whether or not the court said the testimony of Park would be the findings of the court, or words to that effect. He did remember an objection to the court's remarks, but did not remember if it were made at that time. The witness said that he remembered the chancellor commenting that he did not know Park was going to be a witness in the case, but he did not remember whether the chancellor said anything about whether he would have disqualified.

Park testified that he recalled appellant's counsel objecting to the court's comments but did not recall any of the alleged remarks made by the court.

Earley testified that Park was asked a question that he objected to and feelings were "raised a little bit", and the court stopped the case and told the court reporter, "This

would be off the record."[1] Farley said that the chancellor stated that he had known Park over 20 years and if he (the chancellor) had known that Park was going to testify, he would have disqualified himself. He then stated that the chancellor said that "Whatever Mr. Park testifies in this case will be the findings of the court"; that appellant's counsel had objected.

Probably the most significant testimony of all is that of Mr. Charles Jester, one of the appellees in the case. Jester said that he was present in the courtroom during the entire hearing and that during the cross-examination of his father-in-law, Mr. Park by counsel for appellant, a question was asked by counsel in a tone that was "sensitive to my father-in-law," who responded that he resented the line of questioning that counsel was taking, and "the way you are asking it has to do with my integrity and honesty." The witness said that the chancellor remarked to counsel "that I want to also tell you that I have known this man for a long time and I know him to be an honest man, and that he has a good reputation. If I had known ahead of time that he was going to testify in this case, I wouldn't have been presiding, but I want to state also I have known Mr. Farley for a long, long time, and he was connected with some type of court over in Stamps, and I know Mr. Farley also, but I do not know the Jesters." He said that he did not recall the court making any statement that his father-in-law's testimony would be the verdict or the findings of the court. Mr. Jester responded to a question asked by appellant's counsel as follows:

> "You objected to the fact the Judge making a statement like that and you suggested that he should disqualify himself or declare a mistrial. He might not have used the word 'mistrial' but that's the way I've got it in my mind."

The witness said that he did not gather that the chancellor and his father-in-law had had a close relationship, but he assumed that the chancellor, being "a lay preacher and my father-in-law a preacher, they had known one another throughout the community."

[1]The court reporter testified that "I went off the record at that time on the instructions of the court."

We think, under all the circumstances, the chancellor should have disqualified himself to hear this case. In so finding, we do not mean to say, nor even imply, that the chancellor had preconceived ideas or that his friendship with the Reverend Park prejudiced his findings. To the contrary, we consider this chancellor a capable jurist and a man of integrity, a reputation that he bears over the state. As pointed out by the chancellor himself, the final judgment fell far short of conforming to the contentions of appellee, who contended vigorously that the agreement limited the cost of the home to $50,000.

However, court proceedings must not only be fair and impartial — they must also appear to be fair and impartial. This factor is mentioned in a Comment found in 71 Michigan Law Review 538, entitled, "Disqualification for Interest of Lower Federal Court Judges: 28 U.S.C. § 455', as follows:

> "Another factor to be considered in a judge's decision to disqualify is the contention that the appearance of impartiality is as important, if not more so, than actual impartiality. In 1952, Justice Frankfurter explained his disqualification in a case by stating that 'justice should reasonably appear to be disinterested as well as be so in fact.' The Supreme Court gave support to this view in the due process context when in *Murchison* Justice Black wrote for the Court:
>
> (T)o perform its high function in the best way 'justice must satisfy the appearance of justice.'
>
> More recently the Court set aside an arbitration award and stated that '(a)ny tribunal permitted by law to try cases and controversies not only must be unbiased but also must avoid even the appearance of bias.' "

Likewise, in the Code of Judicial Conduct, prepared by the Special Committee on Standards of Judicial Conduct of the American Bar Association, and adopted by this court by *Per Curiam* Order of November 5, 1973, the Commentary to Canon 2 points out that not only must a judge avoid all impropriety, but must avoid also any appearance of impropriety.

It seems probable that the chancellor, during the period when no record was being made, may well have commented that had he known Mr. Park would be a witness, he would not have tried the case. The attorney for appellee recalled the chancellor remarking that he did not know Mr. Park was going to be a witness, although he did not recall what was said about disqualifying. However, Mr. Jester, one of the appellees, testified that the chancellor did say if he had known ahead of time that Mr. Park would testify, he (the chancellor) wouldn't have been presiding. This was also testified to by Farley, and the only person who recalled nothing about the remarks (not knowing Park would testify and disqualifying) was Mr. Park. The chancellor himself in stating his recollections, made no comment about this particular fact. Of course, if the court's relationship with a witness is such that he would, with advance knowledge that that person would testify, recuse himself — then — the matter becomes very simple — he is disqualified, and should so announce when he learns that that person will be a witness.

Actually, the statement of the court which was taken for the record, *viz.*, "It might be more difficult as far as I am concerned for you to impeach his credibility than it would be of Mr. Jester," could be taken as an implication that Park's testimony would receive more consideration, and would carry more weight than some others, particularly when he added "I knew Ed Farley in business at Stamps and thought well of him, but didn't know him as well as I do this fellow."

What we are saying is that it is understandable that appellant could feel that he was under a handicap in the trial of this case and that he might not receive impartial treatment.

Reversed and Remanded.

Carl E. ABBOTT et ux *v.* C. T. PEARSON Jr., et al

74-227 520 S.W. 2d 204

Opinion delivered March 3, 1975

Daily, West, Core & Coffman, by: *Thomas A. Daily*, for appellants.

Pearson & Woodruff, by: *Ronald G. Woodruff*, for appellees.

GEORGE ROSE SMITH, Justice. The appellants, husband

and wife, filed this suit to quiet their title to part of a recently abandoned railroad right-of-way and to cancel a deed by which the railway company had purportedly conveyed the disputed part of the right-of-way to the appellee Pearson. This appeal is from a final order sustaining a demurrer to the appellants' complaint, for failute to state a cause of action. The key question is whether the property description in the 1954 deed by which the appellants acquired their land must be said as a matter of law to have conveyed no interest whatever in land lying within the boundaries of the railroad right-of-way. Inasmuch as we have concluded that such a rigid interpretation of the deed is not necessarily the proper construction of its language, we hold that the demurrer to the complaint should have been overruled.

According to the complaint, with its exhibits, in 1881 certain landowners executed a right-of-way deed to the Frisco Railroad's predecessor, "for the purpose of constructing and operating said Railway and the necessary conveniences and uses thereto attaining." The easement appears to have been 300 feet wide for a distance of 1,500 feet and 100 feet wide for the remaining length of the grantors' 80-acre tract. The deed provided that if the grantee ceased to use the land for the specified purposes the title would revert to the grantors or their heirs or assigns.

Apparently both the right-of-way and contiguous lands were thereafter platted as lots and blocks within the city of Fayetteville. In 1954 the appellants purchased lots that were abutted at the rear by the railroad right-of-way. The warranty deed to the appellants described the property as a certain Lot 12 and part of Lot 11, "except that part of it in the Frisco Railroad right-of-way." The railroad company was then still claiming the right-of-way.

In 1968 the Frisco abandoned part of its right-of-way and by quitclaim deed conveyed it to the appellee Pearson. (The deed to Pearson also included Lot 16, but in their brief the appellants have relinquished the claim which their complaint originally asserted to that lot.) We are not now concerned about whether the Frisco's deed actually conveyed title to Pearson, for the appellants must recover on the strength of their own title.

The disputed question of law centers upon the quoted language in the appellants' deed, "except that part of it in the Frisco Railroad right-of-way." At the outset it is essential to bear in mind the sound distinction, recognized by our decisions, between a description purporting to stop at the edge of an abandoned right-of-way and one purporting to stop at the edge of a right-of-way still in use. We considered the former type of description in *Pyron* v. *Blanscet,* 218 Ark. 696, 238 S.W. 2d 636 (1951), where the grantor's deed to the appellees contained a metes and bounds description extending to the edge of an abandoned railroad right-of-way and thence along that right-of-way for a given distance. In reluctantly holding that the grant did not extend to the center of the abandoned strip we said:

> The appellees insist that the legal effect of their deed is to convey to the center line of the abandoned right-of-way, and several cases from other jurisdictions are cited to support this contention. In practical effect there is much to be said in favor of this view, since the opposite rule often leaves in the grantor the ownership of a narrow and inaccessible strip of an abandoned railroad right-of-way, street, alley, etc.
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> The appellants rely chiefly upon *Fordyce* v. *Hampton,* 179 Ark. 705, 17 S.W. 2d 869 [1929], and with some reluctance we concede that case to be controlling. There we held that although a conveyance of land bounded by an alley is usually presumed to carry title to the center line, the presumption does not arise when the alley has been vacated or abandoned. In the opinion we recognized the fact that two lines of authority exist and chose the rule that the grantee takes to the center of an abandoned easement only when the grantor explicitly expresses that intention. Those of us who are joining in this opinion do not think the doctrine of the *Fordyce* case to be a desirable one, since a grantor does not ordinarily intend to retain title to an abandoned right-of-way that is of little practical value. But the *Fordyce* case laid down a rule of property . . . . If the rule is to be changed it should be done by legislation that operates prospectively rather than by judicial decision that is retroactive.

The rule, however, is—and should be—entirely different when the right-of-way is still in use. In that situation the conveyance extends to the center of the right-of-way *unless a contrary intention is clearly stated.* Thompson explains the sound reasons for the rule:

> The intent to convey to the middle line of the highway arises from the presumption that the adjoining owners originally furnished the land for a right-of-way in equal proportions; and from the further presumption that such owner, in selling land bounded upon the highway, intended to sell to the center line of the street, and not to retain a narrow strip which could hardly be of use or value except to the owner of the adjoining land. The public policy of discouraging separate ownership of narrow strips of land is the basis for the rule.
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> The presumption that a deed carries to the center of an abutting road applies to private as well as public roads. It also applies to railroad rights-of-way.

Thompson on Real Property, § 3068 (Repl., 1962).

As Thompson indicates, the rule favoring an extension of the conveyance to the center line of the right-of-way, "unless a contrary intention is clearly stated," rests upon two strong practical circumstances in its favor. First, that interpretation gives effect to what is almost certainly the intention of the parties. Among scores of similar statements the following comments upon the element of intention are typical:

In *Barker* v. *Lashbrook*, 128 Kan. 595, 279 P. 12 (1929), the court sensibly observed that "it is difficult to conclude that businesslike people, able to own, sell, and buy land, could reasonably have had in mind, at the time of the sale and purchase, the leaving of a long, narrow strip of land through the 120-acre tract that was to remain the absolute property of the grantor in the happening of a very possible contingency."

In *Brown* v. *Weare*, 348 Mo. 135, 152 S.W. 2d 649 (1941), it was said: "We cannot conceive that it was the intention of the grantor to retain the title to the servient estate in the strip over which the right of way ran while disposing of the abutting land. Furthermore, as pointed out in *Quinn* v. *Pere Marquette Ry. Co.*, 256 Mich. 143, 239 N.W. 376, 379, the term ' "right of way" has two meanings in railroad parlance — the strip of land upon which the track is laid — and the legal right to use such strip.' See also, Tiffany Real Property, 3d. Ed., § 772. The grantor must have intended to except the use only."

Again, the principle was by no means overstated in *Shell Petroleum Corp.* v. *Ward*, 100 F. 2d 778 (5th Cir. 1939), where the court declared: "If construed as appellees would have it, a result both unreasonable and clearly unintended would have been produced.For it is inconceivable that Gregory, plaintiffs' grantee, would have bought a tract of land split into two tracts by a small narrow strip which the Canal Company was not only authorized to use as a lateral, but if appellees are right, appellees would be entitled, under the restrictions in the Canal deed, to close up and occupy and thus cut appellant's land in two.

"If construed as appellant contends it should be, every part of the deed would be harmonized and reconciled, and a result would be produced both reasonable and without doubt, in accordance with what the parties to the deed intended."

Secondly, as Thompson, *supra*, says, there is a sound public policy discouraging the separate ownership of narrow strips of land. The Kansas court, after reviewing the development of the established rule at common law, aptly summarized the considerations of public policy: "Experience revealed that separate ownership of long narrow strips of land distinct from the territory adjoining on each side, was prolific of private dispute and public disturbance, and public policy became an important factor in the interpretation. Therefore it became settled doctrine that a deed of land abutting on a road passes a moiety of the road, unless intention not to do so be clearly indicated." *Bowers* v. *Atchison, Topeka, & S.F. Ry.*,

119 Kan. 202, 237 P. 913, 42 A.L.R. 228 (1925).

We recognized and applied the rule in *McGee* v. *Swearengen*, 194 Ark. 735, 109 S.W. 2d 444 (1937). There the description in a deed ran in a southerly direction "to a street; thence in a westerly direction along the north line of said street" for a given distance. After recognizing the rule that a conveyance describing land as being bounded by a street or highway is generally held to indicate an intention to convey to the center thereof, we said: "When, in 1926, the appellant McGee purchased lot 8, so situated, and so described in the deed by specific measurements, projecting appellant's south line to the north line of Nance avenue, she nevertheless acquired a fee to the center of Nance avenue. *This, for the reason that there were no expressions showing an intent to limit the grant in a manner contrary to the general rule of construction.*" (Italics supplied.)

In the case at hand the chancellor reasoned that the pivotal language in the deed, "except that part of [the described lots] in the Frisco Railroad right-of-way," could not be interpreted in any way except as an exclusion of the land itself from the deed. There are two answers to that point of view. First, a reference to the right-of-way can refer to the easement only, rather than to the entire fee simple. See Thompson, *supra*, § 3069. Secondly, such language may be intended to except the easement from the grantor's warranty rather than to reserve the entire servient estate to the grantor. Thompson, § 3094. In this connection we may observe that the language of the granting clause in the appellants' deed, "do hereby grant, bargain and, sell," constitutes an express warranty in Arkansas. Ark. Stat. Ann. § 50-401 (Repl. 1971).

Judge William Howard Taft, in a statement that has been quoted many times, explained why the courts go to extreme lengths in construing narrowly such clauses as the one now in controversy: "The evils resulting from the retention in remote dedicators of the fee in gores and strips, which for many years are valueless because of the public easement in them, and which then become valuable by reason of an abandonment of the public use, have led courts to strained constructions to include the fee of such gores and strips in deeds

of the abutting lots. And modern decisions are even more radical in this regard then the older cases." *Paine* v. *Consumers' Forwarding & Storage Co.*, 71 F. 626 (6th Cir. 1895).

Yet there is nothing unfair about such a strict interpretation of the language, because the draftsman of the deed has been put on notice by scores of cases that he must express his intention to reserve the servient estate so clearly that no reasonable construction can avoid his meaning. In the case at bar the draftsmen excepted that part of the lots "in" the railroad right-of-way. That language appears to be no stronger than the explicit metes and bounds description which we construed in *McGee* v. *Swearengen*, *supra*, yet we held the *McGee* conveyance to extend to the center of the street. Similarly, in *Kassner* v. *Alexander Drug Co.*, 194 Okla. 36, 147 P. 2d 979 (1943), the deed described only the north 120 feet of two lots, but the court held that the conveyance extended to the center of an abutting railroad right-of-way on the south. Again, in the *Shell* case, *supra*, the grantor described a tract as containing 162 acres, "except therefrom 5.6 acres taken up by the rights of way of the Neches Canal Company lateral, making 156.4 acres herein and hereby conveyed." Despite the grantor's arguable intent to convey only 156.4 acres, the court held that his deed conveyed the entire 162 acres, subject to the rights-of-way.

There is no end to the examples that might be found in the authorities (with a few contrary cases) to illustrate the rule that the grantor must clearly and unmistakably state his intention to reserve the servient estate underlying the right-of-way. We find it hard to believe that the draftsman of the deed to these appellants, had he been familiar with the law and had he meant to effect the reservation contended for by the appellee, would have contented himself with the language that he selected. It would have been so much simpler for him to have explicitly stated that the grantors were reserving to themselves the entire servient estate within the boundaries of the railroad right-of-way. Any number of methods of similarly expressing *affirmatively* the pivotal intention to reserve an interest come readily to mind.

Finally, the case reaches us on demurrer to the complaint. When the description in a deed is doubtful the court

may put itself in the position of the parties and interpret the language used in the light of attendant circumstances. *Schweitzer* v. *Crandell*, 172 Ark. 667, 291 S.W. 68 (1927). Although we think the better construction of the deed now in controversy to be that argued for by the appellants, we ought not to foreclose the possibility that extrinsic proof may be of assistance. The record does not disclose what reservations or exceptions were contained in the chain of title between the execution of the right-of-way deed to the railway company in 1881 and the execution of the warranty deed to the appellants in 1954. We do not know how much of Lots 11 and 12 were subject to the Frisco's easement. Although the Frisco's deed to the appellee shows that the company's "main track" is still upon that part of the original easement that is contiguous to the land purportedly conveyed by the Frisco to the appellee, we have no idea whether that fact indicates that the various references to the "right-of-way" may have had some reference to the strip occupied by the tracks rather than to land susceptible of being used for other railway purposes. All the foregoing questions relate to evidentiary matters not required to be included in the appellants' complaint. It is clear that the case is not one to be decided upon demurrer, upon the sole basis of a 12-word clause in the appellants' deed and without regard to what may prove to be enlightening extrinsic proof.

Reversed, the demurrer to be overruled.

FOGLEMAN, JONES and HOLT, JJ., dissent.

JOHN A. FOGLEMAN, Justice, dissenting. I cannot accept either the result reached by the majority or its premises. I do not believe that it is appropriate to apply "center of the right-of-way" presumptions in this case. Furthermore, I cannot see how either "ownership of a narrow and inaccessible strip of an abandoned railroad right-of-way" or "a narrow strip which could hardly be of use or value except to the owner of the adjoining land" is involved.

In 1881, Isaac and Mag. J. Taylor conveyed to the predecessor of appellee St. Louis-San Francisco Railway Company a tract of land. The granting clause read:

> ...do hereby grant, bargain, sell and convey to said Railway Company the following described tract and parcel of land situated lying and being in the County of Washington, State of Arkansas, to-wit: The East half of the Southwest quarter of Section Nine (9) in Township Sixteen (16) north of Range thirty (30) West, to-wit: A strip of land three hundred feet in width beginning on the Northern boundary line of said tract and running South with the line of Survey of said Railroad fifteen hundred feet measuring two hundred feet in width on the west side of said line and one hundred feet in width on the east side of said line and equidistance from center of said Railroad Company tract and from said point North to South boundary line of said tract a strip one hundred feet in width running with said line of survey and measuring fifty feet on either side from the center of said railway company tract said railway company, its assigns and successors. . . .

It is clear that adjoining owners did not furnish equal proportions of the tract used for railroad right of way. The Taylors furnished it all. It is also clear that the "strip" is at least 300 feet (a city block) in width and 1500 feet (five city blocks) long, with an additional strip 100 feet wide for an additional distance. Although the exact dimensions of the tract now in dispute are not clear, the railroad company conveyed 0.44 acres of this right of way in the City of Fayetteville to appellee Pearson.

The habendum clause of the deed from the Taylors to the railroad company reads:

> ....to have and to hold the same forever for the purpose of constructing and operating said Railway and the necessary conveniences and uses thereto attaining to which we hereby bind ourselves, our heirs, executors and administrators forever provided, however, that in case said railway company shall fail or cease to use said land for said purposes then this grant and title shall revert to the undersigned grantors, their heirs or assigns.

The conveyance under which appellants claim reads as follows:

That we, Charles E. Hughes and Ruby E. Hughes, husband and wife, for and in consideration of the sum of One Dollar and other valuable considerations to us in hand paid by Carl Abbott and Helen Abbott, husband and wife, do hereby grant, bargain and sell unto the said Carl Abbott and Helen Abbott, husband and wife, and unto their heirs and assigns, the following described land situate in Washington County, State of Arkansas, to-wit:

Lot Numbered Twelve (12) and the North sixty (60) feet of Lot Numbered Eleven (11) in Block Numbered Five (5) of Archias-Bushnell Addition to the City of Fayetteville, as designated upon the recorded plat of said addition, except that part of it in the Frisco Railroad right of way.

This deed is made subject to a mortgage in favor of the Fayetteville Building and Loan Association the unpaid balance of which in the sum of $5,982.94 the grantees herein assume and agree to pay and also subject to a second mortgage in favor of Carl Ferguson, the unpaid balance of which in the sum of $690.00, the grantees assume and agree to pay as a part of the consideration of this conveyance.

To Have and to Hold the said lands and appurtenances thereunto belonging to said Carl Abbott and Helen Abbott, husband and wife, and unto their heirs and assigns, forever. And we, the said Charles E. Hughes and Ruby E. Hughes, husband and wife, hereby convenant that we are lawfully seized of said land and premises; that the same is unincumbered, and we will forever warrant and defend the title to the said lands against all legal claims whatever.

The fiction that it was the intention of appellants' grantors to merely except the easement from their warranty is simply inconsistent with the plain language of the deed. There is no exception from the warranty. There is an exception from the grant. Whenever an exception is a part of the granting clause of a deed, it must be read in connection with

the grant as a limitation therein. *Bodcaw Lumber Co.* v. *Goode,* 160 Ark. 48, 254 S.W. 345, 29 ALR 578. An exception is of some part of an estate not granted at all. *Eye* v. *Baumann,* 231 Ark. 278, 329 S.W. 2d 161. That which is excepted is not granted at all. *Beardslee* v. *New Berlin Light and Power Co.,* 207 N.Y. 34, 100 N.E. 434 (1912). Consequently, that part of it (Lot Numbered 12 and the North 60 feet of Lot Numbered 11 in Block Numbered 5 of Archais-Bushnell Addition to the City of Fayetteville) *in* the Frisco Railroad right of way was not granted to appellants. There are cases from other jurisdictions in which similar exceptions have been held to be an exception of the land and not just an easement. See e.g.: *Reynolds* v. *Gaertner,* 117 Mich. 532, 76 N.W. 3 (1898) - "except two and forth-sixths hundredths acres to the Chicago and Canada Southern Railroad"; *Vincent* v. *City of Kalamazoo,* 111 Mich. 230, 69 N.W. 501 (1896) - "except so much thereof as was set aside for sidewalk purposes"; *Hannah* v. *Southern Pacific Railroad Co.,* 48 Cal. App. 517, 192 P. 304 (1920) - (1) "reserving a strip of land 100 feet wide for the right of way of the Southern Pacific Railroad Co." - (2) "reserving a 100-foot strip granted by Alfred Robinson, trustee, as a right of way for a railroad by deed recorded in Book, ..." - (3) "excepting therefrom a strip of land 100 feet wide containing 1.75 acres, being the right of way of said Southern Pacific Railroad Company" - (4) "containing 20.61 acres, less 1.75 acres, right of way of said Southern Pacific Railroad Company ..."

The use of the words "grant, bargain and sell" would hardly make the granting clause in this deed an express warranty, because the deed contains a general warranty clause which is indeed, much broader than the limited warranty provided by Ark. Stat. Ann. § 50-401 (Repl. 1971). This section itself contains certain exceptions and is inapplicable where the deed contains other clauses stating the claims against which the title is warranted. *Doak* v. *Smith,* 137 Ark. 509, 208 S.W. 795.

Furthermore, the use of those words does not create a general warranty. The covenant against encumbrances is limited to those done or suffered by the grantor. *Seldon* v. *Budley E. Jones Co.,* 74 Ark. 348, 85 S.W. 778. There we said:

....In regard to the covenant against incumbrances the

> rule is thus stated: "The covenant against incumbrances embraces every right to and interest in the lands conveyed, diminishing the value of the estate, but not inconsistent with a transfer of the fee. It is not a mere covenant to indemnify, though often described as such, but an engagement that the grantor's title is not incumbered, and is broken, if at all, at the instant of its creation." 2 Warvelle on Vendors, §§ 971, 975. See *Brooks* v. *Moody*, 25 Ark. 452.

The easement for the railroad right-of-way was an encumbrance. Patton on Titles 1022, § 344 (1938); Thompson, Title to Real Property 71, § 61 (1919); Maupin on Marketable Title to Real Estate 851, § 305; 3 Flick, Abstract & Title Practice (2d ed.) 259, § 1951; 92 CJS 69, Vendor & Purchaser, § 206; 25 Am. Jur. 2d 418, Easements & Licenses, § 2; 57 ALR 1376, 1426, 1436; 4 Tiffany, Real Property 135, § 1004 (1920); 7 Thompson on Real Property (Perm. Ed.) 198, § 3720. The latter author says:

> 3721. Particular rights and easements as encumbrances. A right of way in existence when the grantor acquired title does not constitute a breach of a covenant that the grantor has not done and has not suffered to be done any act, matter, or thing whatsoever to encumber the land.

The railroad right-of-way was an encumbrance done or suffered by a remote grantor, not appellants' grantor.

I do agree with the premise of the majority that the intention to except the fee of the right-of-way or to reserve an interest therein in the grantor must be clearly expressed. I ask "How could it have been more clearly expressed than by words in the granting clause 'except that *part of it in* the Frisco Railroad right-of-way?" (Emphasis mine.)

I am incapable of expressing my conception of the correct holding in this case any better than the learned chancellor did. He said:

> As successor in title to the right-of-way grantor,

plaintiffs claim those portions of the lots formerly within the abandoned right-of-way, as being appurtenances to the lots. After abandonment of right-of-way by railroad, it conveyed its interest in the right-of-way to defendant Pearson by quit claim deed. Based on these allegations, the complaint asks removal of Pearson's quit claim deed as a cloud on plaintiff's title.

The demurrer, with other reasons not pertinent here, challenges the statement of a cause of action. In my opinion, the demurrer should be sustained. While such a demurrer admits all facts well pleaded, it does not admit conclusions of law. Further where there is a variance between the pleading and exhibits thereto, the exhibits control the pleading.

Paragraph 3 of complaint alleges that the conveyance to plaintiff was "specifically subject to a railway right-of-way in the defendant ... Railway Company." Exhibit A to complaint is plaintiff's deed, and part of the granting language in that deed is "except that part of it" (the described land) "in the Frisco Railroad right of way." Exhibit B to the complaint is the right-of-way grant to defendant railway.

Thus, the grant to plaintiff of Lot 12 and part of Lot 11 was not merely subject to the right-of-way, but had excepted from it that part of the railway right-of-way. The effect is that such part as lay in the right-of-way simply was not granted.

Ordinarily, an exception in a deed description must be described with the same definitiveness and certainty that is required when describing the property granted. But, if the language of the exception provides information which, when supplemented by competent extrinsic evidence, satisfactorily identifies the excepted parcel, it is sufficient. *Parker* v. *Cherry*, 209 Ark. 908; *Rye* v. *Baumann*, 231 Ark. 278.

Here, a plaintiff's deed description, together with the railway company right-of-way grant, furnish com-

plete description of the excepted parts of the lots in question. The exception therefore removed the excepted portion from the grant to plaintiff, and on the face of the complaint, with exhibits, plaintiff has no title to such excepted portion.

The effect of plaintiffs' authorities is simply to say that the grantor, where an exception appears to be made, is only recognizing the pro tempore or perpetual existence of a dominant estate of use, such as an easement or a common carrier right-of-way, and does not intend to except the servient fee from the whole grant. Practical reasons are advanced to support the conclusion, such as the economic unlikelihood of one deliberately excepting a narrow or irregularly shaped piece from a greater tract, and the proliferation of litigious causes likely to arise from such a matrix. Such considerations are well and good, and may lead to enunciations of a generally desirable public policy. But they do not answer particular cases, based upon particular facts, nor serve to alter more anciently grounded rules of conveyancing and titles.

It is recognized that a danger exists in becoming bound up in semantics, but: It is noted the language in cases cited are in terms of "less railroad right-of-way" or "excepting railroad right-of-way". In the instant case, the language is "except that part of it in the Frisco Railroad right-of-way". If words have not lost their meaning, the instant exception is considerably more than mere recognition of the physical existence of the right-of-way; it is a specific exception of the *land*, those parts of the platted lots that lie *in* the right-of-way.

Plaintiffs' concluding point in their brief on motion for reconsideration is without merit. It offers, as argument, the legal result sought by the complaint. The whole suit is on the theory that the right-of-way is an appurtenance to plaintiffs' grant. If there was no grant of the land *in* the right-of-way, the inclusion of "appurtenance" in the habendum clause would not supply the omission in the grant. An attempted exception in the

habendum will not stand as against an entire grant in the granting clause (*Mason* v. *Jackson*, 194 Ark. 236); no more will it supply a full grant where there is exception in the granting clause.

This case is virtually identical with *Hall* v. *Wabash R. Co.*, 133 Iowa 714, 110 N.W. 1039 (1907). The language of the court there is particularly applicable and I would apply it here. That court said:

> . . . .The plaintiff's deed to the S.W. ¼ of the N.W. ¼ of section 28 was from Athalia Carroll, who owned the land when the right of way was first located, and who deeded the same to the old Iowa Central Railroad Company. In her deed to the plaintiff, she excepted the land occupied by such right of way, in the following language, "excepting the part occupied by the right of way of the Iowa Central Railroad Company." This exception is clear and unequivocal, and no title to the land embraced in the right of way passed. She deeded all of the 40-acre tract, except the land occupied by such right of way. We do not see how an exception could be more definite, or how the intent of the grantor could be made plainer. The railroad company then had a recorded deed of the right of way. An exception in the grant of the right of way alone would amount to nothing, and, unless the exception in question withheld from the grant the strip of land so occupied, it is meaningless. It was the soil itself that was in terms excepted from the grant, and not merely the right of way.
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> The exception before us is not repugnant to the grant, and must be held valid; and, if it be valid, the title to the land occupied as right of way remained in the grantor, with the like force and effect as if no grant had been made. *Spencer* v. *Wabash Railroad Company (Iowa)*, 109 N.W. 453; *Wiley* v. *Sirdorus*, 41 Iowa, 224; 4 Kent, Com. 468; *Moulton* v. *Trafton*, 64 Me. 218; *Marshall* v. *Trumbull*, 28 Conn. 183, 73 Am. Dec. 667; *Ashcroft* v. *Eastern R. Co.*, 126 Mass. 196, 30 Am. Rep. 672; *Allen* v. *Scott*, 21 Pick. (Mass.) 25, 32 Am. Dec. 238. It was therefore error for the court to instruct that the plaintiff was entitled, under his deed from Mrs. Carroll, to

> recover as to the 40 acres in question. *Spencer* v. *Wabash Railroad Co.*, supra.

This case has been cited with approval in *Studebaker* v. *Beek*, 83 Wash. 260, 145 P. 225 (1915); *Higgins Oil & Fuel Co.* v. *Victory Co.*, 230 F. 421 (1916); *Las-Daub Realty Corporation* v. *Fain*, 210 N.Y.S. 623 (1925); *Marr* v. *Wood*, 283 Ky. 428, 141 S.W. 2d 573 (1940); *Corning* v. *Lehigh Valley Railroad Co.*, 14 A.D. 2d 156, 217 N.Y.S. 2d 874 (1961). Appropriate distinctions are made when the grant excepts *a right of way* and when the conveyance is subject to a right of way. See *Moakley* v. *Blog*, 90 Cal. App. 96, 265 P. 548 (1928); *Corning* v. *Lehigh Valley Railroad Co.*, supra.

In spite of the language quoted from *McGee* v. *Swearengen*, 194 Ark. 735, 109 S.W. 2d 444, the decision, as I recall it, seems to be somewhat inconsistent with the result here, although I am not sure whether the majority is holding that appellants' grant carried the "reversionary interest" to the center of the railroad right of way, to the outer boundaries of the lots described in the deed or clear across the right of way. There, Monaghan, as trustee, owned a quarter section of land. The south boundary line of the tract was in the right of way of State Highway No. 70. A right of way for a drainage canal 45.8 feet wide across the Monaghan tract adjoined the highway right of way on the north. The quarter section was then platted as Compress Subdivision. The plat showed the highway and located a street designated as Nance Avenue immediately adjoining the drainage district right-of-way on the north. A lot conveyed by Monaghan to the appellant McGee was bounded on the south by Nance Avenue. Subsequently, Monaghan conveyed the land in the right-of-way for the drainage canal to Doyle, who obtained permission from the drainage district to erect a building on the tract so long as it did not interfere with flowage through the drainage canal. Nance Avenue was later vacated by the City of West Memphis. Monaghan had quitclaimed all interest in Nance Avenue and his residuary interest in the drainage ditch to the property owners along the north side of Nance Avenue. Swearangen was the devisee of Doyle, the deceased. Appellant McGee claimed the reversionary interest in all three rights-of-way since her southern boundary was

separated from the south boundary of the quarter-section only by these rights-of-way. Ms. Swearengen claimed that Ms. McGee had no interest in Nance Avenue and certainly none beyond the center line. This court held that Monaghan had retained the fee underlying the drainage district and highway easements and that his conveyance to Ms. McGee did not carry a "reversionary interest" beyond the center line of Nance Avenue and that his quitclaim deed to adjoining owners would not convey any interest to Ms. McGee because of the prior conveyance to Doyle.

It seems to me that the holding that Monaghan retained the fee underlying all these easements except one-half of Nance Avenue, where there was no reservation or exception anywhere in the conveyance to Ms. McGee, is not consistent with the holding here where there was.

I certainly disagree with the statement that the language here is no more explicit than that in *McGee*. In *McGee*, there was not even an attempt to express a reservation of the servient tenement. Here there was a clear, concise, and, in my opinion, effective expression of intention. The ordinary scrivener would have expressed it no differently.

I should like to point out that, except for isolated extreme applications which would not even permit extrinsic proof, the principal authorities relied upon by the majority do not involve a situation like the one before us. The widely quoted language of Mr. Justice (then Judge) Taft in *Paine* v. *Consumers' Forwarding & Storage Co.*, 71 F. 626 (6th Cir. 1895) involved deeds closing with the phrase, "Subject to all legal highways". Judge Taft said of this:

> . . . . There is not the slightest evidence that the land within the lot lines was subject to any easement of way, public or private, and unless this refers to the common way for all the lots sought to be reserved in Water street it is difficult to understand its meaning. If such is the reference, then it is clear that the grantors in the deeds supposed that they were parting with all their interest, not only in the land within the lot lines, but also in the street.

Furthermore, the author of that opinion also said:

> . . . .Most of the decisions are rested on some perculiarity of phrase in the description, and it is very difficult to lay down any general rules for determing when the grantor has used language sufficiently explicit to exclude from the operation of the deed the fee to the center of the abutting road.

It should be noted that in *Shell Petroleum Corp.* v. *Ward,* 100 F. 2d 778 (5th Cir., 1939), the right-of-way was for an irrigation canal. The court construed an exception, stating that grants are liberally, and exceptions strictly, construed against the grantor and explained the physical situation thus:

> This principle is especially vigorous in operation, where, as here, a construction is contended for which would produce the unreasonable result of splitting into two pieces a tract of land, which existed as one tract, subject only to an easement, and which, in reason, must be considered to have been conveyed as such, and not to have been split into separate parts, with a thin wedge of land between.

It should be noted also that the grantors of the right-of-way and the grantors who made the subsequent conveyance to the grantee, who was contending that there was no exception in his deed, were the same persons.

It seems to me that the appropriate distinction was made in *Moakley* v. *Los Angles Pac. Ry. Co.*, 139 Cal. App. 421, 34 P. 2d 218, where the tract was conveyed "excepting therefrom so much as has been taken for the county road known as Vermont avenue, for the street known as Benefit street and for electric car lines across said land." The grantor had previously granted a right-of-way to Los Angeles Pacific Railway Company, a corporation. The court said:

> . . . .In cases where the clause referred merely to the right of way previously granted it has been generally held that it was not the intention to reserve the fee; but where the deed in terms excepts the piece of land oc-

> cupied by the right of way it has been held that an exception was plainly intended and that title remains in the grantor subject to the easement.
>
> . . . .However, when the language of the deed is equivocal the question of construction may rest upon extrinsic facts and circumstances. (Citations omitted.)

The court there determined that only an easement had been "taken." I would agree that a similarly worded exception here would have been ambiguous, but I strongly feel that the deed we have before us "excepts the piece of land occupied by the right-of-way."

I would affirm the decree.

I am authorized to state that Mr. Justice JONES and Mr. Justice HOLT join in this opinion.

Laymon BUCK *v.* MATHEWS OIL COMPANY, INC.

74-272 520 S.W. 2d 194

Opinion delivered March 3, 1975

Laser, Sharp, Haley, Young & Boswell, P.A., for appellant.

Plegge, Lowe & Whitmore, for appellee.

LYLE BROWN, Justice. This appeal is a sequel to our recent case of *Buck* v. *Monsanto Co. & Mathews Oil Co.*, 254 Ark. 821, 497 S.W. 2d 644 (1973). The sole question presented on this appeal is whether appellant is obligated under a contractual indemnity agreement with appellee, Mathews Oil Company, to reimburse the latter for attorney's fees and expenses incurred on appeal in *Buck* v. *Monsanto, et al,* supra.

The basic facts giving rise to this appeal are succinctly set forth in the court's prior opinion. Appellee Mathews leased a service station in Arkadelphia from Monsanto Company. Mathews in turn subleased this station to appellant Laymon Buck. Both the lease and sublease contained contractual indemnity agreements whereby the lessee agreed to indemnify the lessors for any amounts they might be required to pay on account of legal liability incurred by them in the operation of the filling station.

An employee of appellant filed suit for personal injuries suffered while working on the filling station premises. Mathews and Buck were eventually joined as defendants. Both parties successfully defended the actions brought against them. Monsanto then filed a petition asking for reimbursement of its defense costs from Mathews under the contractual indemnity agreement. Mathews then cross-petitioned against appellant asking for its own costs of defense as well as reimbursement for any amounts it was required to pay Monsanto. The trial court granted both petitions and this court affirmed. That judgment has been satisfied and is not an issue on this appeal.

It is important to note that in *Buck* v. *Monsanto, et al.,*

supra, Buck failed and refused to defend Monsanto and Mathews. We held in that circumstance Buck was bound to reimburse Monsanto and Mathews for their costs of defense.

We reiterate our holding in *Buck* v. *Monsanto, et al.*, supra, to the effect that since Buck declined to defend he was obligated to reimburse Monsanto and Mathews for their costs of defense at the trial level; however, we hold that the case presently before us is an effort to recover costs and attorney's fees expended in enforcing the indemnity agreement. From an examination of the indemnity agreement we find no authority for the taxing of such costs. The key wording of that agreement is as follows:

> Lessee agrees to protect, indemnify and save lessor harmless from any and all liability for loss, damage, injury or casualty to persons or property caused or occasioned by any leakage, fire or explosion of gasoline and kerosene or other products stored in any tanks or drawn through any pumps located at or on the above described premises whether due to imperfections in the equipment or any part thereof, latent or patent, and whether the same may arise from negligence or otherwise or from any and all liability arising from any other cause arising out of the use, occupancy, or possession of said premises by lessee.

A reading of the indemnity agreement clearly shows that there is no provision for attorney's fees if the agreement is breached by one of the parties and the other is forced to file suit to enforce the contract. The indemnity clause specifically limits the liability incurred by Mathews "arising out of the use, occupancy or possession of said premises by lessee". The legal expenses incurred by Mathews in enforcing the agreement, on the other hand, arose out of a breach of contract by Buck in failing to voluntarily pay these expenses. As such, these expenses are not included in the indemnity agreement. In *Olmstead* v. *Rosedale Building & Supply*, 229 Ark. 61, 313 S.W. 2d 235 (1958) we said: "Appellants' other contention is that they were entitled to damages of $1,600 for attorney fees and other costs incurred in litigating the first suit. In the first place, there is no provision under our statutes and decisions

to allow attorney fees and miscellaneous expenses as elements of damge in an action for breach of contract. [Citing cases]. Even if such items were recoverable, the right to them could and should have been asserted in the prior suit under the principles already announced."

For cases from other jurisdictions supporting our position, see *General Electric Co.* v. *Mason & Dixon Lines, Inc.*, 186 F. Supp. 761 (D.C. Va. 1960); *Foley Co.* v. *Employers-Commercial Union*, 488 P. 2d 987 (Ariz. App. 1971); *Swiss Credit Bank* v. *International Bank, Ltd.*, 200 N.Y.S. 2d 828 (1960); and *Grossblatt* v. *Kleinerman*, 160 N.Y.S. 2d 80 (1956).

Reversed and Dismissed.

Richard R. Heath, Director, DEPARTMENT OF FINANCE AND ADMINISTRATION *v.* LITTLE ROCK PAPER COMPANY

74-262 520 S.W. 2d 196

Opinion delivered March 3, 1975

Karl D. Glass, Chief Counsel; *Harlin R. Hodnett, Robert G. Brockman, James R. Eads, Jr., James R. Cooper*, for appellant.

Rose, Nash, Williamson, Carroll & Clay by: *William Nash* and *James H. Wilkins, Jr.*, for appellee.

J. FRED JONES, Justice. The question on this appeal is whether certain specified paper, plastic and styrofoam products are exempt from the Arkansas Gross Receipts tax under Ark. Stat. Ann. § 84-1904 (i) (Repl. 1960).

The facts appear as follows: The appellee, Little Rock Paper Company, is a wholesaler of paper and plastic products in Arkansas. Many so-called "fast food" restaurants purchase from the appellee certain paper, plastic and styrofoam containers and other items which the restaurants use in dispensing their food and drink products to the buying public. The specific items involved in this case case are separately designated as follows:

"A. Paper and styrofoam cups in various sizes used for coffee, soft drinks and other liquids·

B. Paper and plastic lids for such cups;

C. Paper bowls and wrappers used for pies and pastries;

D. Paper boats and sacks used for French fried potatoes;

E. Paper plates;

F. Paper wrappers, boxes, and foil wrappers used as containers for sandwiches;

G. Paper and plastic containers for cole slaw, baked beans, etc.

H. Plastic lids for such containers.

I. Paper buckets and boxes used for fried chicken.

J. Paper and plastic straws and stirrers;

K. Plastic tableware and utensils;

L. Paper napkins and premoistened towelettes."

The appellant, Richard R. Heath, as Director of the Department of Finance and Administration, collected the gross receipts tax from the appellee paper company on the sale of the above products. The tax was paid under protest and the paper company filed its petition in chancery to recover the tax so paid pursuant to Ark. Stat. Ann. § 84-1911 (Repl. 1960). The chancellor held the items exempt and on appeal to this court the Director relies on the following point for reversal:

> "The various items of tangible personal property purchased by members of the Arkansas Restaurant Association are not exempt from Arkansas Gross Receipts tax pursuant to Section 84-1904 (i)."

Ark. Stat. Ann. § 84-1904 (i) (Repl. 1960), under which the exemptions are claimed in this case, reads as follows:

> "Gross receipts or gross proceeds derived from sales for resale to persons regularly engaged in the business of reselling the articles purchased, whether within or without the State, provided that such sales within the State are made to persons to whom sales tax permits have been issued as provided in section 12 [§ 84-1913] of this act.
>
> Goods, wares, merchandise, and property sold for use in manufacturing, compounding, processing, assembling or preparing for sale, can be classified as having been sold for the purposes of resale or the subject matter of resale only in the event such goods, wares, merchandise, or property becomes a recognizable, integral part of the manufactured, compounded, processed, assembled or prepared products. Such sales of goods, wares, merchandise, and property not conforming to this requirement are classified for the purpose of this act [§§

84-1901—84-1904, 84-1906—84-1919] as being 'for consumption or use.' "

It is well settled that the clear Legislative intent in the passage of § 84-1904 (i), *supra*, was to exempt purchases that are made for the purpose of resale, to the end that the same property will not be twice subjected to the same tax. *Hervey* v. *Southern Wooden Box*, 253 Ark. 290, 486 S.W. 2d 65; *Hervey* v. *International Paper Co.*, 252 Ark. 913, 483 S.W. 2d 199.

In *Wiseman* v. *Ark. Wholesale Grocers' Ass'n*, 192 Ark. 313, 90 S.W. 2d 987 (1936), we denied a tax exemption upon the purchase of wrapping paper, paper bags and twine to be used in the retail sale of groceries. We reasoned in that case that grocers buy such wrapping materials for consumption in the course of their own business rather than for resale.

In *McCarroll, Comm'r of Rev.* v. *Scott Paper Box Co.*, 195 Ark. 1105, 115 S.W. 2d 839 (1938), it was stipulated that Wortz Biscuit Company, a manufacturer, purchased paper boxes to be used in the sale of prepackaged cakes, cookies, etc. Wortz also sold the same products in bulk at a lower price. The paper boxes became a component of the product which was sold in the box to the jobber, retailer, and ultimately to the consumer. The cost of the box measured into, and became an element in the cost to the final consumer. In that case we said:

"It is clear that the Wortz Company sells at wholesale to a retailer *a package of its manufactured products* — not a quantity of cakes or cookies or crackers *enclosed in a box it has consumed.*"

In that case we also said:

"Expressed differently, the Wortz Company proposes to prepare, box, and offer in the market at wholesale the particular commodities in question. It buys flour, sugar, soda, salt, shortening, flavoring, etc., as ingredients. None of these components is taxable under act 154 when purchased for the purposes mentioned. The plan of sale, however, calls for wrapping or enclosure in individual

cartons at the time of manufacture; and it is for the latter purpose that purchase of pasteboard boxes is made."

The appellant in the *Scott Paper Box Co.* case relied on *Wiseman* v. *Ark. Wholesale Grocers' Ass'n, supra,* but *Wiseman* was distinguished in the *Scott Paper* case in language as follows:

> "In the Wiseman case the wrapping paper, bags, and twine were sold for convenience of retailers in manually wrapping or enclosing bulk commodities. The price of a dozen oranges, a peck of potatoes, a roast, and other merchandise customarily found in a retail grocery store, is predetermined either by weight or count, without reference to the attributes of delivery."

In *Hervey* v. *Southern Wooden Box, supra,* we held that paper cups sold to the Coca Cola Bottling Company for use in its automatic vending machines were exempt from the tax, but that wooden boxes sold to the bottling company for the delivery of bottled drinks were not exempt.

In the case at bar the sales were made to various members of the Arkansas Restaurant Association primarily engaged in the "fast food" business. Mr. Wesley Hall, the president of Minute Man of America, Inc., testified that the Minute Man chain of restaurants operates on a self-service and pick-up basis under which food is purchased for consumption on the premises or to be carried out. He said that because of public demand for speed and convenience of service, Minute Man package services all its products in the various paper, plastic and styrofoam containers listed in the complaint, and pays sales tax on its purchases of the various items listed in the complaint. He said that paper cups, lids and straws are purchased solely for use in the sale of soft drinks at retail; that these drinks are compounded by Minute Man personnel and after the customer pays therefor, the Minute Man personnel puts the lid on the container, adds a straw and the assembled product is delivered to the customer. He said the components of a 16 ounce Coke currently cost Minute Man 6.6 cents; that the cup, lid and straw make up 55.3% of the cost, or 3.65 cents, and the cost of each compo-

nent, including the container, lid and straw, is passed on to the consumer. He said the same procedure is used in the sale of a deep dish apple pie. He said the pie is placed in a single serving paper cup and a lid, a plastic spoon and paper napkin are added thereto. He said the same procedure was used in connection with such items as hamburgers and French fries. He said the French fries are sold in paper trays with wrapper, napkin and fork added, and that these compoents make up 20% of the product cost and 5.8% of the retail selling price. He said that the wrapper on the container for French fries served the same purpose as the lid on the beverage containers, and that the fork and napkin are provided solely for the convenience of the customer. He said that the food products sold by Minute Man are placed in the containers for delivery to the customer after the food itself is actually prepared.

On cross-examination Mr. Hall said that a customer at Minute Man has an option of receiving coffee in a paper cup, styrofoam cup, or a china cup, and that the charge for the cup of coffee is the same in spite of the containers available to the customer. He said that if a customer chooses not to take a lid or straw in the purchase of a soft drink, there is no price reduction for the product. He said that straws, napkins and items of that nature are not necessary items in preparing beverage products for sale but are offered to the customer as a convenience. He said the food wrappers for hamburgers and sandwiches have the name of the firm on them, and that the paper cups, napkins and paper bags used for carrying items out of the eating establishment have advertising printed on them.

On redirect examination Mr. Hall said that soft drinks sold by Minute Man automatically include a straw and lid and it is then up to the customer to decide whether or not the straw and lid leave the premises or stay on the premises.

Mr. Marvin D. Johnson, Jr., president of some of the Kentucky Fried Chicken outlets in Arkansas, testified as to the procedure in the sale of Kentucky Fried Chicken products substantially as did Mr. Hall. He said the Kentucky Fried Chicken products are placed in different size containers

and sold to the customer under order designation such as "dinner box," "bucket of chicken," etc. He said that the dinner box contained three pieces of chicken, cole slaw, mashed potatoes and gravy, each in a four ounce container with a lid. He said two rolls, a spoon, a towelette and a napkin are also added, and the cost of the paper products is included in the overall price charged the customer. He said that potato salad and cole slaw were made up at the various Kentucky Fried Chicken outlets and delivered to the customer in a 16 ounce paper salad container with a plastic lid. He said that the Kentucky Fried Chicken outlets are not manufacturers of "fast food" products but are retailers; that the outlets purchase raw chicken and then cook the chicken and place it in the boxes for sale at each retail outlet. He said Kentucky Fried Chicken retail outlets do utilize paper bags for containers for boxed chicken, and that paper bags when so used, are not unlike the utilization of paper bags in retail grocery stores.

Mr. Richard W. Sherwood, president of W. G. W. Corporation, trading as "Burger King," testified as to the procedure in packaging and selling that corporation's products substantially as did Mr. Hall and Mr. Johnson. He said Burger King is a national chain of franchised restaurants and operates on a self-service and pick-up basis because the bulk of its trade is carry out. He said that each of the three Arkansas Burger King locations holds a gross receipts tax permit and pays a three per cent sales tax on the total revenue taken in at the three locations.

We conclude that the chancellor was correct as to items A, B, C, D, F, G, H and I, but on trial de novo we reverse as to items E, J, K and L. We are of the opinion, under the evidence in this case, the paper and styrofoam cups used for dispensing coffee, soft drinks and other liquids, and the paper and plastic lids for such cups; the paper bowls and wrappers used in the dispensing of pies and pastries; the paper boats and paper covers used for French fried potatoes; paper wrappers, boxes, and foil wrappers used as containers for sandwiches; the paper and plastic containers for cole slaw, baked beans, etc., and the plastic lids for such containers; and the paper buckets and boxes used for fried chicken are all

items exempt under our reasoning in *McCarroll* v. *Scott Paper Box Co.* and *Hervey* v. *Southern Wooden Box, supra,* but we hold that paper plates; paper and plastic straws and stirrers; plastic tableware and utensils; paper napkins; brown paper sacks and premoistened towelettes are subject to the tax under our reasoning in *Wiseman* v. *Ark. Wholesale Grocers' Ass'n. supra.*

The decree is affirmed as to items A, B, C, D, F, G, H and I, and is reversed as to items E, J, K and L.

Affirmed in part; reversed in part.

HOLT, J., not participating.

W. O. COLLINS and Ruby COLLINS, Husband and Wife *v.* H. B. DUNCAN and Loretta R. DUNCAN, Husband and Wife

74-276 520 S.W. 2d 192

Opinion delivered March 3, 1975

Evans, Ludwig & Evans, by: *Stanley W. Ludwig,* for appellants.

Crouch, Blair, Cypert & Waters, by: *Michael H. Mashburn,* for appellees.

J. FRED JONES, Justice. This is an appeal by W. O. Collins and Ruby Collins, husband and wife, from a judgment of the Washington County Circuit Court apparently sustaining a demurrer to the complaint filed by the appellees H. B. Duncan and Loretta R. Duncan, husband and wife. None of the pleadings are abstracted.

From the statement in appellants' brief it appears that Mr. and Mrs. Collins sold some real and personal property to Mr. and Mrs. Duncan under a contract calling for monthly payments, and that Mr. and Mrs. Duncan ceased making the payments and abandoned the property. It appears from the statement that Mr. and Mrs. Collins filed suit for damages for breach of contract and in the alternative prayed that the contract be canceled and the parties be placed back in status quo. It further appears from the statement that Mr. and Mrs. Duncan demurred to the complaint contending that a provision of the contract provided for liquidated damages in case of default of payment; that this provision of the contract constituted the exclusive remedy available to Mr. and Mrs. Collins and that the complaint did not state a cause of action. The statement sets out that the trial court sustained the appellees' demurrer and upon appellants' refusal to plead further, the court entered an order dismissing the cause with prejudice.

The appellants have designated the points upon which they rely for reversal as follows:

> "The trial court finding that a clause of the contract constituted a liquidated damages clause and therefore was the exclusive remedy of the appellants was clearly in error based upon a fair construction of the contract.
>
> The trial court's order sustaining appellees' demurrer and dismissing appellants' cause with prejudice constitutes a ruling contrary to established law."

The appellants have designated two and one-half pages of their brief as "Abstract of Record," but these two and one-half pages are in no sense an abstract of the record, they simply constitute a continuation of the statement of the case.

The contract upon which this entire case is based and which Mr. and Mrs. Collins contend was breached, and which the appellees contend, and the trial court apparently agreed, contained a liquidated damages clause which the appellees relied on as an exclusive remedy, is not abstracted in the appellants' brief.

The appellants cite numerous cases on contract law and pertaining to measure of damages, the intention of parties, and ambiguity in contracts, but we are unable to determine whether the decisions cited by the appellants are applicable to the contract here involved because we do not know what the contract contained without each member of this court being required to read the single record in this case.

In appellants' reply brief they argue that they abstracted the contract on page eight of their brief, but on page eight of the appellants' brief under "Argument" they argue their interpretation of a portion of the contract and quote from the contract as follows:

> " '. . . in either or all of said events, the sellers shall have the right to immediately retake possession of said property . . . and any payments theretofore made by the buyers shall be kept and retained by the sellers as rents or liquidated damages for the use and possession of the said property by the buyers.' "

Rule 9 (d) of this court does not require or permit the substitution of the entire record as an abstract as was the situation in *Gary* v. *Ouachita Creek Watershed Dist.*, 239 Ark. 141, 387 S.W. 2d 605, cited by the appellants in their reply brief, but we agree with the appellees' statement that:

> "Appellants' argument contains several references to alleged ambiguities in the contract which was attached as an exhibit to their original complaint, but appellants' 'abstract of record' fails to sufficiently set forth the wording of this contract to allow this Court to make an independent determination as to the existence of any alleged ambiguity."

The requirements as to abstracting records on appeal to

this court under Rule 9 (d) have been stated so many times in our published opinions it would appear that citation of cases should not be necessary, but, see *Alfa Controls Engineering, Inc.* v. *Flagmaster, Inc.*, 257 Ark. 75, 514 S.W. 2d 223 (1974). In *Key* v. *Ark. Power & Light Co.*, 228 Ark. 585, 309 S.W. 2d 190, we pointed out that the extent of the abstract required, depends on the nature of the question involved and if it's one of fact, obviously a more complete abstract would be indicated than if the question is one of law. See also *Tally* v. *Sanders*, 234 Ark. 814, 354 S.W. 2d 736; *Tudor* v. *Tudor*, 247 Ark. 822, 448 S.W. 2d 17; *Reeves* v. *Miles*, 236 Ark. 261, 365 S.W. 2d 460; *Ellington* v. *Remmel*, 226 Ark. 569, 293 S.W. 2d 452; *Thornbrough* v. *Danco Construction Co.*, 226 Ark. 797, 294 S.W. 2d 336; *Porter* v. *Time Stores, Inc.*, 227 Ark. 286, 298 S.W. 2d 51; *Griffin* v. *Mo. Pac. Rd. Co.*, 227 Ark. 312, 298 S.W. 2d 55; *Farmers Union Mutual Ins. Co.* v. *Watt*, 229 Ark. 622, 317 S.W. 2d 285. See also the many additional cases cited under Rule 9 (d) found in Ark. Stat. Ann., vol. 3A, Cumulative Pocket Supplement (1973) at p. 106.

As we have so often pointed out in prior cases, one transcript of the record is filed in a case on appeal to this court and time simply does not permit each of the seven members of this court to search the single record for the pertinent provisions pertaining to points involved on appeal. In many instances the record is voluminous and to require each member of this court to ferret out from a single record the matter necessary for a clear understanding of the question in controversy, would create an impossible situation.

A good rule of thumb would be for an attorney to forget that he knows anything at all about the case, and examine his abstract of the record for a determination of whether it clearly sets out all he would need to know if he were required to decide the issues involved on appeal.

The judgment is affirmed.

Fred Carroll LUCAS and Ronnie Ray
LUCAS *v.* STATE of Arkansas

CR 73-31 520 S.W. 2d 224

Opinion delivered March 3, 1975
[Rehearing denied April 7, 1975.]

Fred A. Newth Jr., for appellants.

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

J. FRED JONES, Justice. We have reconsidered this case in the light of *Lewis* v. *City of New Orleans*, 415 U.S. 130 (1974), as directed by mandate of the United States Supreme Court in its one sentence decision of April 15, 1974. The dissenting opinion of Mr. Justice Blackmun, in which the Chief Justice and Mr. Justice Rehnquist joined, sets out the facts in more detail than we did in our original opinion, *Lucas* v. *State*, 254

Ark. 584, 494 S.W. 2d 705. The facts are not germane to the issue now before us and they will not be recited again here.

The statute under which the appellants were convicted, Ark. Stat. Ann. § 41-1412 (Repl. 1964), was Act 30 of the Arkansas Legislature for 1909. It was entitled "An Act to Better Protect the Public Peace," and it has served its purpose for more than 50 years without question as to its constitutionality until now.

We find no comparison between Ark. Stat. Ann. § 41-1412 (Repl. 1964) and the New Orleans Municipal Ordinance 828 M. C. S. § 49-7 struck down as unconstitutional in *Lewis* v. *City of New Orleans*, *supra*. The New Orleans Ordinance provided as follows:

> "It shall be unlawful and a breach of the peace for any person wantonly to curse or revile or to use obscene or opprobrious language toward or with reference to any member of the city police while in the actual performance of his duty."

Aside from the ambiguity in the word "opprobrious", as pointed out in *Lewis*, the New Orleans Ordinance would have made it unlawful and a breach of the peace to curse, revile or use obscene language *toward* or with *reference to* any member of the city police while in the actual performance of his duty regardless of when, where, or to whom the language was used or addressed. Furthermore, the New Orleans Ordinance provided a one sided violation. It was apparently designed to protect the police force against unguarded and overemphatically expressed criticism of its members in the performance of their duty regardless of when, or where, or to whom the language was addressed, and regardless of whether the language arose from incitement, anger or frustration. In other words, the New Orleans Ordinance protected members of the police force from the use of the described language toward, or with reference to them, but did not protect the public from the same language used by any member of the city police while in the performance of their duty even when addressed directly to a member of the public who might be involved. Such is not the wording, effect or intent of Ark. Stat.

Ann. § 41-1412 (Repl. 1964). Mr. Justice Powell concurring in the result reached in *Lewis* v. *City of New Orleans, supra,* clearly sets out the constitutional deficiencies in the New Orleans Ordinance, but we are of the opinion its deficiencies do not apply to Ark. Stat. Ann. § 41-1412 (Repl. 1964) as interpreted and applied by the courts of this state.

Under Ark. Stat. Ann. § 41-1412 (Repl. 1964) the language must be *profane, violent, vulgar* or *abusive* and must be directed toward or about any other person *in his presence or hearing.* Such language must *in its common acceptation be 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 assault.* When a police officer is involved, this statute applies to language used *by* a police officer, as well as to the language used *to* a police officer. It is a matter of common knowledge that many assaults, both simple and aggravated, and also many homicides, have their origin in profane, violent, vulgar, abusive or insulting language addressed to or about another person in his presence or hearing. It is also common knowledge that such language used by members of the police, when addressed to a member of the public, results in resisting arrest and more important, results in a loss of respect for law and order.

In our original opinion, *Lucas* v. *State, supra,* we attempted to distinguish Ark. Stat. Ann. § 41-1412 (Repl. 1964) from the Georgia statute, § 26-6303, struck down in *Gooding* v. *Wilson,* 405 U.S. 518 (1972). We are still of the opinion that "opprobrious words or abusive language tending to cause a breach of the peace," as was used in the Georgia statute, is much broader than the "profane, violent, vulgar, abusive or insulting language . . . 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," as used in the Arkansas statute, § 41-1412, *supra.* Unlike the standard fixed by the jury in applying the Georgia statute as was exemplified in the case of *Fish* v. *State,* 52 S. E. 737, where the Georgia Supreme Court held that a jury question was presented under the statute by the language: "You swore a lie," as pointed out in *Gooding, supra,* this court (Arkansas Supreme Court) narrow-

ed the language of the Arkansas statute as early as 1918 in the case of *Holmes* v. *State*, 135 Ark. 187, 204 S.W. 846. In *Holmes* the prosecuting witness, Hatch, was very much offended at the conduct of some boys in the community frequently calling him by the nickname "Taters" and other similar nicknames. In that case the trial court, among other instructions, gave one to the jury submitting to them for determination the question of whether or not the language used was such as in its common acceptation was calculated to arouse a person to anger and cause a breach of the peace. In reversing the judgment of the trial court and dismissing the charges, this court said:

> "Counsel for appellant insist that the instruction should not have been given and that the evidence was not sufficient to warrant a conviction, in that the language used by the boys does not come within the statute. It will be observed that the statute defines the character of language constituting the offense as 'profane, violent, abusive or insulting language * * * 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,' etc. The language used must be in its nature 'profane, violent, abusive or insulting' and it must be of that character which '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.' It is not sufficient that the language used gives offense to the person to whom or about whom it is addressed, but is must be that which in its ordinary acceptation is calculated to give offense and to arouse to anger.
>
> In *State* v. *Moser*, 33 Ark. 140, the defendant was accused of directing toward another person the language 'go to hell, God damn you,' and in passing upon the question of the guilt of the defendant, this court said that the language used was certainly profane, but that it was a question for the jury to determine whether the words were used under such circumstances as was calculated to arouse to anger the person to whom the words were addressed. In the present case the word used towards

> Hatch was neither profane, violent, abusive nor insulting, and was not in its common acceptation calculated to arouse a person to anger. The fact that Hatch became offended at the application to him of the nickname does not make the language such as is insulting according to its common acceptation. * * * It did not carry the implication of unlawful conduct or moral turpitude on the part of the person toward whom it was used. It was undoubtedly offensive to him and he showed his irritation repeatedly, but the statute was not intended to reach cases where persons by the use of harmless nicknames or in a spirit of fun make use of nicknames or expressions which, although they are not calculated in their common acceptation to arouse anger, do in fact give offense because of the peculiar sensibilities of the person to whom or about whom the words are used. It may be considered bad taste for men or boys to indulge in such practice, but the law was not intended to reach such cases. We know that even innocent amusement at the expense of others sometimes brings about a breach of the peace, but those are not the things which the law meant to reach by this statute. It is only the language of the kind referred to which is calculated in its ordinary acceptation to arouse to anger or cause a breach of the peace that the statute denounces.
>
> Our conclusion is, therefore, that the testimony in the case, given its strongest force, does not establish an offense under the statute. The judgment of the circuit court is reversed and the charge against each of the defendants is dismissed."

Thus is is seen, and we so hold, as was indicated in *Smith* v. *Moser*, *supra*, that before a person may be properly charged with an offense under the statute, the profane, violent, vulgar or abusive language alleged to have been employed must be such as in its common acceptation is calculated to arouse to anger, etc. and the only question for determination by the jury is whether the accused employed such language, and whether it was calculated to arouse to anger, etc. Surely no one would suggest that in order to pass constitutional muster in sustaining the convictions in the case at bar, it would be

necessary for the statute to set out the exact language employed by the appellants in this case. We adhere to our former opinion that Ark. Stat. Ann. § 41-1412 (Repl. 1964) should be measured by the reasonable and common sense rules announced in *Chaplinsky* v. *New Hampshire*, 315 U.S. 568.

We conclude, therefore, that Ark. Stat. Ann. § 41-1412 (Repl. 1964) is constitutional in the light of *Lewis* v. *City of New Orleans*, *supra*, and that the judgment of the trial court in this case should be reaffirmed.

The judgment is affirmed.

GEORGE ROSE SMITH, BROWN and BYRD, JJ., dissent.

CONLEY BYRD, Justice, dissenting. As I read *Lewis* v. *City of New Orleans*, 415 U.S. 130, 94 S. Ct. 970, 39 L. ed. 2d 214 (1973), *Gooding* v. *Wilson*, 405 U.S. 518, 92 S. Ct. 1103, 31 L. ed. 2d 408 (1971) and *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 62 S. Ct. 766, 86 L. ed. 1031 (1942), they hold that a statute punishing spoken words is overly broad and invalid when it can be applied to utterances other than those which "inflict injury or tend to invite an immediate breach of the peace." Of course, our statute in addition to fighting words, as defined in *Lewis* v. *City of New Orleans*, *supra*, punishes the use of profane, violent, vulgar, abusive or insulting language which in its common acceptation is calculated to arouse to anger, *Holmes* v. *State*, 135 Ark. 187, 204 S.W. 846 (1918) and *State* v. *Moser*, 33 Ark. 140 (1878). As pointed out in *Cox* v. *Louisiana*, 379 U. S. 536, 85 S. Ct. 453, 13 L. ed. 471 (1965), speech that arouses or stirs people to anger is protected by the Constitution of the United States.

Consequently, it appears to me that the one sentence opinion by the majority of the United States Supreme Court gave us a sufficient guide to determine the constitutionality of our statute, Ark. Stat. Ann. § 41-1412 (Repl. 1964), when it referred us to *Lewis* v. *City of New Orleans*, *supra*.

For the reasons stated I would hold the statute invalid.

GEORGE ROSE SMITH and BROWN, JJ., join in this dissent.

Alton YARBROUGH, James SPENCER and Alonzo ROBINS *v.* STATE of Arkansas

CR 74-51 520 S.W. 2d 227

Opinion delivered March 3, 1975

Appellants *Pro Se.*

Jim Guy Tucker, Atty. Gen., by: *Gary Isbell*, Asst. Atty. Gen., for appellee.

J. FRED JONES, Justice. The appellants Yarbrough, Spencer and Robins were convicted at a jury trial on three separate counts of possessing forged instruments. Spencer was sentenced to the penitentiary for three years on each of the three counts. Yarbrough and Robins were sentenced to the penitentiary for seven and one-half years on each count. The sentences as to each appellant were to run consecutively, with one-third of the time to be served before parole. The court appointed attorneys did an excellent job in representing the appellants in the trial court but the evidence as to the appellants' guilt was overwhelming.

On appeal to this court the appellants have refused the services of the court appointed counsel and have attempted to represent themselves *pro se* and, in doing so, they have submitted separate handwritten or handprinted briefs which tax to the limit our visual endurance. Each appellant has separately designated several points on which he relies for reversal and in several instances the same point is designated by each appellant. Their designated points of assigned error will be discussed in order following statement of the facts as evidenced by the record.

The facts as revealed by the record are simply these: On July 12, 1973, the appellant Spencer, representing himself to be Donald E. Kelly, presented for payment at a branch of the Worthen Bank and Trust Company a printed check form No. 671 on the property account of Harry E. McDermott, Jr., and William B. DeYampert. The check was filled in for $500; signed "Wm. B. DeYampert," and made payable to Donald E. Kelly. For identification in cashing the check Spencer produced a temporary Arkansas driving permit made out to Donald E. Kelly, and also produced a Social Security card made out to Donald Edward Kelly. The check was cashed by Worthen but as a matter of precaution on a check in such

large amount, the assistant bank manager took two photographs of Spencer and followed him from the bank in an effort to obtain the license number and description of any automobile in which he might leave the premises. Spencer is a black man and was observed to have hesitated beside an automobile occupied by two other black men as he walked by the automobile parked on the parking lot. No one testified to actually seeing Spencer get into an automobile but a call to McDermott's office verified the forgery and the police were advised of the transaction.

The police officers were given a description of Spencer together with a description and the license number of the automobile in which he was thought to have left the bank premises, and the automobile was soon located on a motel parking lot. The officers learned from the motel clerk that the owner of the automobile was registered under the name of Alonzo Robins in Room 312 of the motel, and that another black male, and possibly a third, were also occupying the room. The officers went to the motel room; heard a television playing inside the room, but obtained no response to their knock on the door. They then obtained a passkey and entered the room in search of the owner of the automobile. No one was in the room but as they returned to the motel lobby, Robins and Spencer were getting on the elevator as the officers got off of it and Yarbrough was standing nearby. The officers ascertained from Robins that he occupied Room 312 and owned the automobile in the parking lot; they ascertained from Spencer that he was occupying the room with Robins and also ascertained from Yarbrough that he also had a key to Room 312.

All three appellants were placed under arrest. Robins gave consent to a search of the motel room and also his automobile. A search of the room revealed a typewriter and in a suitcase in the room the officers found a check protecting device; and, in a brown envelope in the suitcase, they found nine consecutively numbered Worthen Bank and Trust Company printed check forms on the property account of Harry E. McDermott, Jr., and William B. DeYampert, and three of these check forms were filled out. All three checks were dated July 12, 1973. They were made payable to Donald E. Kelly in

the amounts of $500, $360 and $500 respectively, and were checks identified as having come from the back part of a checkbook kept in the Little Rock office of Harry E. McDermott, Jr., and William B. DeYampert. They were signed "Wm. B. DeYampert" and the fact of forgery as to the three checks filled out is not questioned. Each of the three appellants had on his person a temporary Arkansas driving permit made out to "Kelly, Donald Edward" and signed, in space for signature of permitee, "Donald E. Kelly." As already stated, the one Social Security card made to "Donald Edward Kelly" and signed "Donald E. Kelly" was found on the person of Spencer.

One felony information containing three counts was filed against the three appellants and as to form and substance, it reads as follows:

> "Comes Lee A. Munson, Prosecuting Attorney within and for the Sixth Judicial District of Arkansas, and in the name, by the authority, and on behalf of the State of Arkansas information gives accusing ALTON YARBROUGH, JAMES L. SPENCER, and ALONZO ROBINS A/K/A EDWARD L. HILTON of the crime of violating Ark. Stat. Ann. § 41-1811, POSSESSION OF COUNTERFEIT INSTRUMENTS, committed as follows, to-wit: The said defendants did in Pulaski County, Arkansas, unlawfully, feloniously, and fraudulently:
>
> POSSESSION OF COUNTERFEIT INSTRUMENT: On or about the 12th day of July, 1973, have in their possession an altered check, said check being No. 680, drawn on Worthen Bank and Trust Company on the property account of Harry E. McDermott, Jr. and Wm. B. DeYampert in the amount of $500.00, said alteration being that the check was forged, with the unlawful and felonious intent then and there to pass or utter said check as true and genuine."

Separate counts two and three were in the identical language of count one except as to check numbers and the $360 face amount of the check in count two. The information concluded as follows:

> "The said ALTON YARBROUGH has previously been convicted of at least one felony, and consequently his sentence should be increased pursuant to Ark. Stat. Ann. § 43-2328.
>
> The said ALONZO ROBINS A/K/A EDWARD L. HILTON has previously been convicted of at least two felonies, and consequently his sentence should be increased pursuant to Ark. Stat. Ann. § 43-2328."

Ark. Stat. Ann. § 41-1811 (Repl. 1964), under which the three counts were laid, reads as follows:

> "Whoever shall fraudulently keep in his possession or conceal the counterfeit resemblance or imitation of any bank bill, note, check, or draft, or any instrument which circulates as currency, of any corporation, company or person that exists, or may exist, whether such bill, note, check, draft or instrument be complete and filled up, or otherwise, or shall fraudulently keep in possession or conceal any fictitious instrument, purporting to be a bank bill, note, check or draft of any corporation, company or person, whether the same be filled up and complete or not, though no such corporation, company or person exist, or shall fraudulently alter or erase any genuine bill, note, draft, check or instrument that circulates as currency, of any corporation, company or person, or shall fraudulently keep in possession or conceal any such bill, note, draft, check or instrument that shall be so altered or erased, or shall fraudulently buy, pay or tender in payment, alter or offer to alter, pass or offer to pass, or assist, or be concerned in fraudulently buying, paying, or tendering in payment, altering or passing any such bill, note, draft, check or instrument that may be so altered or erased, on conviction, shall be imprisoned in the penitentiary not less than three [3] nor more than ten [10] years."

The jury returned separate verdicts of guilty as to each of the three counts and as to each of the appellants. The trial court instructed the jury that the state had failed to prove previous convictions as alleged in the information. The jury then returned its verdicts assessing separate penalties on each count for each appellant upon which the judgment was

entered as already stated. As to Spencer, the jury recommended that the three sentences run concurrently but the trial court did not follow the jury's recommendation.

We now turn to the points relied on, most of which merit little discussion. All three appellants contend that the arresting officer, Ronnie Gatewood, committed perjury in testifying to the legality of the arrest. This assignment is apparently directed at conflict in the testimony of Detective Gatewood and that of the branch manager Tollett, as to who gave the description and license number of the automobile to Detective Gatewood by telephone. We consider it immaterial whether Mr. Tollett or some other person gave Detective Gatewood the description and license number of the automobile involved. Furthermore, if such conflict in testimony had been material, it would have been a question for the jury to determine which witness was telling the truth. We find no merit to this contention.

Spencer and Robins contend that the trial court erred when it failed to excuse the jury *panel* because of a prejudicial statement by Mr. Sommers, one of the panel members, during voir dire examination in the presence of the other members. Mr. Sommers stated on voir dire that he did his banking at the branch bank involved and that he was well acquainted with the teller and officers of the bank. He was excused from jury service and we find no prejudicial error in this assignment.

Spencer contends that the trial court erred when it failed to grant his motion to suppress as evidence the identification taken from his billford. The appellant's billfold was searched incidental to his arrest and the identification he used in uttering the forged check was found therein. We find no merit to this contention.

Spencer contends that the trial court erred when it admitted into evidence the statement taken from the appellant. The only statement taken from the appellant pertained to his identity and the fact that he was occupying the same motel room with the appellant Robins. We find no merit to this contention.

Spencer and Yarbrough contend that the trial court erred when it admitted into evidence testimony of the alleged felony at the Worthen Bank and the paper taken from the automobile. Spencer was the one who cashed the forged check at the bank and he was charged with possession of almost identical forged checks all out of the same checkbook. No competent attorney would have made such contention. We find no merit to this contention for more reasons than we care to enumerate. As to the paper taken from the automobile, that was a blank piece of white paper lying on the dashboard of the automobile and it bore the sample imprint from a check protector later identified as the same one used in forging the checks. As already stated, Robins owned the automobile and the paper was taken from it after he gave his consent to search his room and the automobile. Furthermore, the officers testified that the paper was lying on the dashboard of the automobile in full view; that it bore markings similar to other samples they had in their possession and, that they observed it from outside the automobile even before it was taken therefrom under the consent granted by Robins. We find no merit to this contention.

All three appellants contend that the evidence is insufficient to support the verdict of the jury. Again, no competent attorney would pursue such contention in the face of the record in this case. The evidence is not only sufficient to support the verdict of the jury, it is overwhelming as to the guilt of the appellants on the possession of the forged instruments involved; it is overwhelming as to their design, intent, and the course of their conduct, in embarking upon the usually short career of obtaining money by forgery. We find no merit to this contention.

Yarbrough contends that the trial court erred in admitting into evidence a motel key and statements attributed to him because he was illegally arrested and interrogated without being advised of his right to remain silent. Yarbrough's only statements pertained to his identity and association with the other two appellants in the motel and there was undenied testimony that he was advised of his constitutional right to remain silent. The motel key was to Robins' room at the motel, it was taken from Yarbrough in-

cidental to his arrest, and we conclude it was admissible in evidence.

Yarbrough and Robins contend that the trial court erred by admitting into evidence counterfeit checks obtained from motel Room 312 because they were the illegal fruit of a warrantless search and, as Yarbrough contends, on the alleged consent of a codefendant. From what we have already said, we find no merit to this contention.

Robins contends that he was deprived of the adequate and effective assistance of counsel. It is difficult to understand this contention. As already stated, the defense counsel did an excellent job of defending the appellants and preserving the record in this case. It is difficult to understand just how effective the appellants could expect their counsel to be in the light of the forged checks found in their possession, their forged instruments of identity to conform to the forged checks and vice versa, and the excellent pictures of Spencer as he appeared to pocket the proceeds from one of the forged checks he had just uttered. We find no merit to this contention.

Robins also contends that the search of the automobile was illegal. We have already covered this point and find no merit in it. Robins also contends that he was not given credit for time spent in pretrial confinement. The evidence is to the effect that Robins was indigent and an attorney was appointed for him on that account, but there is no evidence that his indigency was the reason for his failure to make bond. The bond was set at only $1,500 and the record suggests that the reason he was unable to make bond was because of inability to get bondsmen to take a chance on him appearing for trial since he was an out of state resident and a number of detainers from other jurisdictions had been lodged against him. We find no merit to this assignment.

We now come to two assignments which we feel do merit more discussion. Robins contends that the lower court erred in not declaring a mistrial when the state offered proof of appellant's prior convictions which fail to show that appellant was represented by counsel, or that he waived counsel; and, Yarbrough contends that the trial court erred

in presenting appellant's prior convictions at the punishment stage of the trial, and that it had a prejudicial effect upon the jury.

From the record before us it appears the state's requested instruction No. 7 recited the law as set out in § 41-1811, *supra,* and ended with the words "on conviction, shall be imprisoned in the penitentiary not less than three (3) years nor more than ten (10) years." At this point the record appears as follows:

> "MR. ACHOR: Your Honor, will No. 7 be amended to eliminate 'shall be imprisoned in the penitentiary not less than three nor ——'
>
> THE COURT: (Interposing) You're right. Eliminate, 'on conviction shall be imprisoned,' this will be guilty or not guilty. All right."

The court then gave instruction No. 7, as amended, setting forth the statute eliminating the penalty provision and then the court gave the court's instruction No. 10 as follows:

> "As to each count in the Information previously read to you and as to each defendant,
>
> if you find the defendant guilty, you will say: 'We, the jury, find the defendant Guilty as charged in the Information.'
>
> On the other hand, if you find the defendant, as to each count, not guilty, or have a reasonable doubt as to his guilt, you will say: 'We, the Jury, find the defendant not Guilty.'
>
> In any event, your verdict must be unanimous and signed by one of your members as foreman."

Apparently after the jury returned its verdict of guilty on all counts, the court dismissed the jury to return at a quarter of two. When the jury returned, the court instructed the jury as follows:

> "The Information further alleges that the defendant Alton Yarbrough, has previously been convicted of at least one felony and, consequently, his sentence should be increased pursuant to Arkansas Stats. Annotated 43-2328. It further alleged that the said Alonzo Robins, also known as Edward L. Hilton, has previously been convicted of at least two felonies and, consequently, his sentence should be increased pursuant to Ark. Stats. Annotated 43-2328, which is the Arkanaas Habitual Criminal Act."

The trial judge then directed the prosecuting attorney to proceed, but then requested the attorneys to approach the bench where a conference was had out of the hearing of the jury or the reporter. Detective Gatewood was then called by the state and identified a Michigan driver's license found in the motel room. It had been issued to Edward L. Hilton and was signed "Edward L. Hilton" but it bore the photograph of the appellant Robins.

Certificates of prior convictions of "Edward Lee Hilton" and Alton Yarbrough in the State of Michigan were then offered in evidence, but were objected to on the ground that they did not show representation by an attorney or waivers of attorney. The trial court refused the certificates in evidence and denied the appellants' motions for mistrial. The court then instructed the jury as follows:

> "There has been a failure of proof in regard to the Habitual Offender Act. You're not to consider the allegation. You're to presume that — You're instructed that for the purpose of this trial and for any other purpose, none of these defendants have been convicted of a prior offense. That's a question that's not in issue. You have previously found the defendants guilty of the offense, now it only remains for you to set the punishment . . . . "

The court then directed the reporter to write up the penalty instructions.

As we view the record, the trial court simply directed a

verdict for the appellants Yarbrough and Robins on the habitual offender charges. The record is not perfectly clear as to how much of the bar-side discussion pertaining to the certificates of prior convictions was within the hearing of the jury, but the appellants argue that prejudice was shown by the jury verdict of seven and one-half years for Yarbrough and Robins and only three years on each count for Spencer, with the recommendation that his sentences run concurrently. We are unable to say as a matter of law that prejudice was demonstrated in this case. In the first place the evidence would have sustained the maximum sentence of 10 years in each case.

It must be remembered that Robins owned the automobile and had rented the motel room in his name, and he and Yarbrough carried the keys to the room. It is true that Spencer uttered the forged check, but the jury had an opportunity of observing the three appellants as they sat in the courtroom throughout the trial. It is entirely possible the jury could have concluded that Spencer was not as smart as the other two appellants and that he was a mere "dupe" or "fall guy" in the service, or under the influence and directions, of smarter operators. After all, Spencer cashed a forged check for $500 on the account of a well-known attorney and a well-known planter and did so under the operating lens of a bank camera, and no money was found on his person when he was searched incidental to his arrest. For some reason not apparent in the record, the jury recommended that Spencer's three year sentences run concurrently. We conclude that the trial court did not err in refusing the motions for a mistrial.

All three appellants contend that they were convicted and sentenced three times for the same offense. We are forced to the conclusion that there is merit in this contention. Throughout the entire trial of this case the appellants' attorneys vigorously objected to the trial for three separate violations based on the possession of the three separate checks charged as separate counts in the single information filed in this case. It will only lengthen this opinion to recite the objections and rulings thereon but they were continuous throughout the trial. There is no question that the appellants were charged, tried, and convicted of three separate offenses of possessing the three separate checks involved in this case.

Ark. Stat. Ann. § 43-1009 (Repl. 1964) provides as follows:

> "An indictment, except in the cases mentioned in the next section, must charge but one offense, but, if it may have been committed in different modes, and by different means, the indictment may allege the modes and means in the alternative."

The next section, § 43-1010, provides for joinder of offenses and the *possession* of counterfeits, or of separate counterfeits, is not among the offenses that may be joined. Section 43-1010 provides that the offense named in each of the subdivisions may be charged in one indictment, and the nearest it comes to the charges in this case is:

> "Third. Forgery and uttering forged instruments, or several acts of forgery and uttering forged instruments, when such forgery and the uttering of such forged instruments grow out of the same matter, business or transaction, or when done in a series of transactions relating to the same matter of business.
>
> Fourth. Passing, or attempting to pass, counterfeit money or bank notes, knowing them to be such, and having in possession counterfeit *money* or *bank notes*, knowing them to be such, with the intention of circulating same." (Our emphasis).

In Wharton's Criminal Law and Procedure, vol 2, § 654, is found the following:

> "The simultaneous possession of several forged bank notes is but a single offense. The defendant cannot be prosecuted separately for each bank note."

Citing *State* v. *Benham*, 7 Conn. 414; *State* v. *Egglesht*, 41 Iowa 574, 20 Am. Rep. 612; *People* v. *Van Keuren*, 5 Park. Crim. Rep. (N.Y.) 66. See also Wharton's Criminal Pleading and Practice, § 468, et seq.

In the Iowa case of *State* v. *Egglesht, supra,* the defendant

delivered at the same time and by the same act, to the teller of a bank, four forged checks which purported to have been drawn on four different parties. The court held that this constituted but one offense of uttering forged checks, and that a conviction for uttering one of the checks was a bar to a conviction for uttering the others. In doing so, the Iowa Supreme Court said:

> "When the defendant uttered, at the Davenport National Bank, four forged checks, the character of his act became fixed. He either committed one crime, or he committed four. It is not competent for the State, at its election, by the form of the indictment, to give to defendant's act the quality of one crime or of four at pleasure. The act partakes wholly of the one character or wholly of the other.
>
> We think the decided weight of reason and of authority supports the position that when defendant by one muscular action and one volition passed to the bank in question four forged checks, and procured them to be placed to his credit, he committed one crime, and not four."

In Wharton's, Criminal Pleading and Practice, 8th ed., § 470, at p. 327, pertaining to theft, is found the following:

> "[T]he weight of authority now is that the prosecution, wherever it is at liberty to join in one indictment all articles simultaneously stolen, may be treated, when it selects only one of them for trial, as barring itself from indicting for the others."

See *State* v. *Clark*, 32 Ark. 231, where it was held that stealing several articles simultaneously from the same owner forms but one offense and after one conviction for stealing a part, no further prosecution can be pursued for the rest.

In the case of *Bine* v. *United States*, 331 F. 2d 390 (1964), 5th Cir., the defendant was convicted on three counts of making false statements to the Federal Housing Administration in violation of 18 U.S.C.A. §§ 1001, 1010, and although the

court held that there were two separate crimes committed in that particular case, the court stated the rule as follows:

> "[I]t is well settled that the test for determining whether several offenses are involved is whether identical evidence will support each of them, and if any dissimilar facts must be proved, there is more than one offense. Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306 (1932); Morgan v. Devine, 237 U.S. 632, 35 S. Ct. 712, 59 L. Ed. 1153 (1915). * * * Whether a continuous transaction results in the commission of but a single offense or separate offenses is not dependent on the number of unlawful motives in the mind of the accused, but is determined by whether separate and distinct prohibited acts, made punishable by law, have been committed. Caballero v. Hudspeth, 114 F. 2d 545, 547 (10th Cir. 1940)."

In *Keese and Pilgreen* v. *State*, 223 Ark. 261, 265 S.W. 2d 543, the information charged that the defendants did:

> ". . . unlawfully, wilfully and feloniously, falsely and fraudulently have and keep in their possession divers false, forged and counterfeited checks and drafts and fictitious instruments purporting to be checks, etc."

The state proved that the appellants had two checks in their possession. They were each sentenced to three years for the single violation and we affirmed.

In *Velasquez* v. *United States*, 244 F. 2d 416, the defendant was charged and convicted of receiving, concealing and facilitating the transportation of opium, and on a separate count was charged with the sale of opium. The charges referred to separate items of the drug. In affirming the judgment of conviction, the court said:

> "The question of double punishment is presented. The substance of the argument is that the first and second counts of the indictment were predicated upon a single transaction, and that the imposition of separate sentences upon the two counts with provision that the

sentences should run consecutively amounted to double punishment for a single offense. The accepted test to be applied in determining the identity of offenses charged in two or more indictments or in two or more counts in a single indictment is whether the same evidence is required to establish the several indictments or the several counts. If so, there is identity of offenses. But if each indictment or each count requires proof of a fact or element not required by the others, the charges are separate. Gavieres v. United States, 220 U.S. 338, 31 S. Ct. 421, 55 L. Ed. 489; Morgan v. Devine, 237 U.S. 632, 35 S. Ct. 712, 59 L. Ed. 1153; Blockburger v. United States, 284 U.S. 299, 52 S. Ct. 180, 76 L. Ed. 306; Pereira v. United States, 347 U.S. 1, 74 S. Ct. 358, 98 L. Ed. 435; Mills v. Aderhold, 10 Cir., 110 F. 2d 765; Beacham v. United States, 10 Cir., 218 F. 2d 528."

In *Wilburn* v. *United States*, 326 F. 2d 903 (1964), the defendant was charged with unlawfully possessing stolen letters. He was convicted on two counts which accused him, and another charged jointly, with the possession on or about September 4, 1959, of a stolen letter addressed to Stewart Title Company. Under count four he was charged alone with possession of a letter on or about September 9, 1959, addressed to Ray L. Ryan. The record showed that each letter came from a mail depository located in a Houston office building and established that the theft from the depository occurred on one occasion. In upholding the conviction, the United States Court of Appeals, Fifth Circuit, said:

"The usual test to distinguish separate offenses from elements of a single offense is whether each purported offense would require the proof of a fact not essential to the other. If the record showed that appellant stole or secured possession of a mail bag with the letters therein, then the proof of one fact would prove the other. Such is not the case. The conviction on count 2 is based on the testimony of an accomplice that appellant approached him about passing some stolen checks and gave him a group of checks which included one taken from the letter described in count 2. The evidence relating to count 4 is entirely different. Appellant was identified as the man

> who burned some papers in a trash can. Among the partially burned papers was the letter mentioned in count 4. Thus, we have two separate acts relating to two separate items on two different days. The proof under one count does not prove an offense under the other count. The only unity is that the letters were mailed on the same day in the same depository. The circumstances of how the theft occurred and how the appellant obtained possession are left to speculation."

In the United States Supreme Court decision in *Bell* v. *United States*, 349 U.S. 81 (1955), Bell was charged on two counts with violation of the Mann Act under provisions of the Act which provide as follows:

> "Whosoever knowingly transports in interstate or foreign commerce . . . any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose. . . .
>
> Shall be fined not more than $5,000 or imprisoned not more than five years, or both."

Bell was charged with having transported two women in violation of the Act and the charge was laid in separate counts for each woman. Both women were transported in the same automobile and on the same trip. Bell was convicted on each count in the district court and the sentences were affirmed by the circuit court of appeals, holding that two separate offenses were committed. In reversing the decision on certiorari, the Supreme Court said:

> "Congress could no doubt make the simultaneous transportation of more than one woman in violation of the Mann Act liable to cumulative punishment for each woman so transported. The question is: did it do so? It has not done so in words in the provisions defining crime and fixing its punishment.
>
> * * *
>
> [I]f Congress does not fix the punishment for a federal

> offense clearly and without ambiguity, doubt will be resolved against turning a single transaction into multiple offenses, when we have no more to go on than the present case furnishes."

In the case of *Castle* v. *United States*, 287 F. 2d 657 (1961), the defendant was convicted of knowingly transporting with fraudulent intent five falsely made money orders in interstate commerce. He was tried and convicted on all five counts of the indictment. On petition for rehearing he contended, among other things, that he was convicted of five offenses, one for each of the money orders although there was only one transportation. By per curiam opinion on petition for rehearing, the trial court said:

> "Since the transportation of each of the money orders was a separate offense, the contention that there were multiple sentences for a single transportation cannot prevail."

And the petition for rehearing was denied. Certiorari was granted by the United States Supreme Court and by per curiam opinion dated October 16, 1961 (368 U.S. 13), the Supreme Court said:

> "We are in agreement with the representations of the Solicitor General that, under the principles announced in *Bell* v. *United States*, 349 U.S. 81, the petitioner was guilty of but a single offense under 18 U.S.C. § 2314. In light of such representations and upon consideration of the entire record, the judgment is vacated and the case is remanded to the Court of Appeals with instructions to remit to the District Court for resentencing in accordance with this opinion."

In the case at bar not only was different evidence not necessary to the proof of each count—the same evidence was necessary to the proof of each count and the same evidence, and only the same evidence, was actually used in the proof of the separate counts. Had all nine check forms been filled in by forgery in the case at bar, according to the state's theory the appellants would have been subject to minimum

sentences totaling 27 years and maximum sentences totaling 90 years. We do not believe that the Legislature intended such results. To Paraphrase the language of the United States Supreme Court in the *Bell* case, *supra:* The Legislature could no doubt make the simultaneous possession of more than one counterfeit check in violation of § 41-1811 liable to cumulative punishment for each check so possessed, but we conclude that the Legislature did not do so.

We do not reach the question that might have been presented had it been necessary that different evidence be offered to sustain each of the separate counts, such as might have been the case if the purported signatures were of different persons or the forgers had been different persons. We only say that in this case the identical evidence supported each count in the information.

The judgment is reversed as to the two additional counts in each case. The judgment is affirmed as to the single three year sentence for Spencer and the single seven and one-half year sentence for Yarbrough and Robins.

Affirmed in part; reversed in part.

James E. BENTLEY et ux *v.* Thomas W. PARKER et al

74-266 525 S.W. 2d 460

Opinion delivered March 3, 1975

James R. Howard, for appellants.

Rose, Nash, Williamson, Carroll & Clay by: *Stanley E. Price,* for appellees.

CONLEY BYRD, Justice. The only issue here is the right of the mortgagors, appellants James E. Bentley, et ux, to redeem from a foreclosure decree sale to a third party at any time prior to an order of confirmation of the sale. The particular foreclosure decree here involved gave the mortgagors ten days from the date of the foreclosure decree to redeem the property — after the expiration of the ten day period the commissioner in chancery was directed to advertise and sell the property.

On the date of sale appellees Thomas W. Parker and Nell Parker, his wife and Jack B. Carter and Martha G. Carter, his wife were the successful bidders in the amount of $24,500.00. The total judgment of Capital Savings & Loan Association was for only $21,713.91. Before the sale was submitted to the court for confirmation, the mortgagors tendered the total amount of the judgment and court costs into the registry of the court and asked to redeem the property. The trial court reluctantly denied the redemption and hence this appeal. We agree with the trial court.

In *Martin* v. *Ward,* 60 Ark. 510, 30 S.W. 1041 (1895), we stated the matter in this language:

> "The only question in this case is whether a right of redemption remains to the mortgagor of real estate after a decree of foreclosure and a sale of the mortgaged property thereunder. In the absence of a statute giving this right to the mortgagor, his equity of redemption is barred by the decree and sale. The object of the proceeding to foreclose is to cut off the equity of redemption which exists in the mortgagor, and a sale under a valid decree of foreclosure must have this effect unless the legislature has extended the right of the mortgagor, so that he may redeem after sale."

We there held that the Act of March 17, 1879, did not extend the right of redemption to a mortgagor under a foreclosure decree. It was there pointed out, however, that a "...court in its decree may, and usually does, allow a reasonable time for the mortgagor to pay the amount adjudged against him and redeem the property."

The cases of *Pope* v. *Wylds,* 167 Ark. 40, 266 S.W. 458 (1924) and *Jermany* v. *Hartsell,* 214 Ark. 407, 216 S.W. 2d 381 (1949), involved cases in which the foreclosure decree had provided that the redemption could be made at any time before confirmation. Of course such cases are not controlling under the decree here which allowed only ten days for redemption after the foreclosure decree.

Obviously the time for redemption must be left to the sound discretion of the trial court. If the redemption is cut off before sale date, it tends to give credence to judicial sales and to prevent collusion between the mortgagors and unsuccessful bidders at the sale who have second thoughts on the value of the property. However, if the redemption is permitted at any time before confirmation of the sale, then there may be some lack of incentive for competitive bidding at the sale.

Affirmed.

Alexander CRAIG, Adm'r. *v.* STATE FARM AUTO INSURANCE CO

74-279 519 S.W. 2d 741

Opinion delivered March 3, 1975
[Rehearing denied March 31, 1975.]

Daggett, Daggett & Van Dover by: *Jesse B. Daggett,* for appellant.

Laser, Sharp, Haley, Young & Boswell, P.A., for appellee.

CONLEY BYRD, Justice. At issue in this action by appellant Alexander Craig, Administrator of the Estate of Jeff Craig, deceased, against appellee State Farm Auto Insurance Company, is whether the driver of an uninsured vehicle was responsible in any manner for the acts of his passenger in tossing a sack of cans into the path of a Volkswagen driven by Dianne Birdsong. Jeff Craig was a passenger in the Volkswagen. The trial court granted a directed verdict in favor of State Farm at the close of appellant's evidence.

The record shows that Dianne Birdsong was driving a Volkswagen on Interstate 55 toward Memphis, Tennessee. While driving along she noticed a white Chevrolet truck with two men in it that was slowing down traffic. After the traffic would get by the truck it would speed up and pass the traffic and then repeat the slowing down process. Dianne stayed behind the truck until it kept getting slower and slower. When she finally pulled into the left lane of traffic to pass the truck the driver of the truck looked at her as she got even with the truck and speeded up and got in front of the Volkswagen. The passenger in the truck turned around and looked at the Volkswagen. The truck passenger then held a sack of cans out the window on the passenger's side of the truck and at the appropriate moment, gave it a toss so that the cans rolled under the Volkswagen with the sack hitting the windshield. As a result of the tossing of the sack of cans, the Volkswagen went off the road causing the death of Jeff Craig. The white Chevrolet truck did not stop but left the scene of the accident.

State Farm points out that their uninsured motorist policy only covers the "owner or operator" of the uninsured vehicle. To support the action of the trial court it then argues that unless one is to engage in a guessing game, there is simp-

ly no evidence that the driver participated in any manner in throwing the sack from the truck or indeed knew that the passenger was throwing the sack from the truck.

Had not the two men in the truck been slowing down, jamming up traffic to the rear and then accelerating the truck rapidly to pass everyone only to repeat the slowing and jamming of traffic, there might be some merit to State Farm's contention. But when we consider the previous conduct of the driver of the uninsured vehicle in slowing and jamming traffic together with his conduct in leaving the scene of the accident after the sack throwing incident, we find that there is substantial evidence to go to the jury on the issue of his participation in the hazardous traffic game that was being played. See Restatement of Torts § 877(b).

Reversed and remanded.

Wade Earl STEWART and Tommy MCGHEE *v.* STATE of Arkansas

CR 74-121 519 S.W. 2d 733

Opinion delivered March 3, 1975
[Rehearing denied March 17, 1975.]

Harold L. Hall, Public Defender, for appellants.

Jim Guy Tucker, Atty. Gen., by: *O. H. Hargraves,* Dep. Atty. Gen.; *Lee A. Munson,* Pros. Atty., by: *John Wesley Hall Jr.,* Dep. Pros. Atty., for appellee.

FRANK HOLT, Justice. Appellants were charged by information with murder in perpetration of an attempt to commit robbery. Ark. Stat. Ann. § 41-2205 (Repl. 1964). The jury found them guilty of murder in the first degree and assessed their punishment at life imprisonment in the Department of Correction. Appellants first assert for reversal that the evidence is insufficient because there is no substantial evidence from which the jury could find that murder resulted from an attempt to perpetrate robbery. Upon appellate review, it is firmly established that we consider that evidence which is most favorable to the appellee, with all reasonable inferences deducible therefrom, and affirm if any substantial evidence exists to support the jury verdict. *Miller* v. *State,* 253 Ark. 1060, 490 S.W.2d 445 (1973).

A witness for the state, Bullock, testified that he met the appellants at a party. Later that evening, he, appellants, and others went to the victim's apartment "[T]o take some dope" and we would get it with a gun "[I]f it was necessary." Appellant McGhee was armed with a .38 caliber pistol and appellant Stewart carried a sawed-off shotgun. The state's witness testified that he saw McGhee pull his pistol on the victim who then put his hands up. Thereupon, Stewart was observed jumping over a porch railing and the shotgun he was carrying discharged. The witness then heard several small caliber shots. Another witness for the state, who was living with the victim, testified that she heard "a loud shot and then three other shots." The victim fled to their apartment where she observed him "covered with blood." He spontaneously told her "that as soon as he [the victim] opened the door this one kid was standing there and flashed this money in his face for some reason, and then this other one, this little one, jumped onto the porch with a shotgun and shot him and he turned to run up the stairs and then the other one shot him three times with the pistol."

Appellants Stewart and McGhee made separate written statements which were read to the jury subsequent to Bullock's testimony. Neither testified. Stewart admitted in his statement that he was armed with a shotgun and accompanied his codefendant, McGhee, and others in furtherance of the plan to rob the victim. McGhee admitted in his statement that he accompanied his codefendant, Stewart, and others to the victim's apartment and that he, McGhee, was armed with a .38 caliber pistol. As soon as the victim opened the door, he, McGhee told him he wanted to buy some dope and that "Danny" had sent him. During the discussion, one of the group said "if he won't sell it to us we'll just take it." A blast from a shotgun followed and thereupon "he [McGhee] grabbed the pistol from my rear pocket and struck Lenoris [a companion] in the face, so he wouldn't shoot. As I slapped at Lenoris, the pistol did go off, but I'm not sure when it struck."

Certainly the state adduced ample substantial evidence that would justify the jury in finding the appellants committed murder in an attempt to perpetrate robbery. They

went heavily armed to the victim's residence where they confronted him at the door. When the victim "throwed his hands up," he was wounded by a shotgun blast into the right side of his chest and wounded in other areas of his body from two pistol shots. The "transaction had gone beyond intent and preparation and had passed into acts which amounted to an attempt at robbery." *Turnage* v. *State,* 182 Ark. 74, 30 S.W.2d 865 (1930).

Appellants next contend that the court erred in admitting evidence of an autopsy not performed by the state medical examiner or one of his authorized assistants in violation of the defendants' state and federal constitutional rights. Ark. Stat. Ann. § 42-611, *et seq*, establishes the office of state medical examiner and prescribes the duties and the stringent qualification required of that individual. The present medical examiner meets the statutory requirement and is a forensic pathologist based upon specialized training. § 42-623 provides that records and reports made under authority of the act "shall be received as competent evidence . . . . upon being properly attested." § 42-615 requires that the state medical examiner be notified whenever a person dies from violence or under unusual circumstances. Appellants assert that the purpose of this statute is to give the state medical examiner, a medico-legal expert, the exclusive authority, here, to conduct the postmortem examination. Therefore, an autopsy performed without this authority is inadmissible evidence.

We do not construe the statute to absolutely prohibit another doctor, who is competent to do so, from performing an autopsy and then testifying. The purpose of the act, and properly so, was to create a scientific and uniform method of investigating violent and unusual deaths. In *State* v. *Ruggiero,* 93 R.I. 241, 174 A.2d 555 (1961), the proper statutory procedure was not followed and the court said:

> These contentions lack merit. A careful reading of Chap. 23-4 shows clearly that it does not apply to matters affecting the admissibility of evidence. It has no bearing on the question of the admissibility of the testimony of a medical expert who is otherwise qualified

to perform an autopsy, or on the admissibility of the autopsy report prepared by such medical expert.

In the case at bar, the victim was taken to a local hospital suffering from a shotgun blast to the right chest and pistol wounds to the wrist and knee. Following removal of the right lung by his personal physician, the victim was placed in intensive care. Five days later additional surgery was required to remove several ribs to curtail infection. Five days later while still in intensive care, the victim suddenly died. Without notifying the state medical examiner, the victim was partially embalmed and then an autopsy was performed by an anatomical pathologist at the hospital in the regular course of his duties there. His training does not meet the strict statutory standard required of a state medical examiner. However, he has performed over 300 autopsies in addition to testifying in court. This pathologist testified that the victim died from a blood clot in the pulmonary artery and that the blood clot resulted from either the surgery or the gunshot wound which required the surgery. Needle marks were found in the victim's legs which appellants assert indicate he was a drug user. The doctor testified that an improper injection of drugs could have caused death and the embalming procedure could have nullified the presence of drugs. Regardless, we perceive no prejudice to the appellants based upon this pathologist's testimony. Furthermore, it was cumulative to the testimony of the victim's attending physician, who observed the victim each day. He testified:

> Q. What in your opinion, was the cause of death of Nicholas Papadoplas?
>
> A. Nicholas Papadoplas died of a pulmonary embolism, which is secondary to the gunshot wound of the chest.

The surgeon who operates on and attends the victim may give an opinion as to the cause of death without reference to an autopsy. *McClendon* v. *State*, 197 Ark. 1135, 126 S.W.2d 928 (1939).

From what we have previously indicated, suffice it to say that the court did not err in refusing appellants' requested instruction for a directed verdict of acquittal; their requested

instruction that "where substantial evidence alone is relied upon to establish the cause of death . . . .;" and their requested instruction that the sheriff and the state medical examiner must be notified in the circumstances here.

Appellants assert that the court erred in admitting into evidence the cross-implicating confessions of appellants. Each confession was read to the jury with only the codefendant's name deleted and replaced by a blank line. As previously indicated, neither of the appellants testified. Appellants assert that a cross-implicating confession by a nontestifying codefendant, as here, denied them their constitutional right to be confronted by that witness and, therefore, was in violation of *Bruton* v. *United States*, 391 U.S. 123 (1968). We cannot agree with appellants that *Bruton* or our own subsequent cases dictate a reversal in the case at bar. In *Bruton*, the cross-implicating confession of a codefendant who did not testify, was admitted into evidence against Bruton, who had made no admissions or confession. Neither did he testify. There it was held that this denied Bruton his constitutional right to be confronted by the witness against him. Thereafter, in *Mosby and Williamson* v. *State*, 246 Ark. 963, 440 S.W.2d 230 (1969), we reversed the trial court because it gave an instruction, unrequested by the defendant, stating that his failure to testify could not be considered as evidence of guilt. However, in view of a retrial, we deemed it necessary to observe, since cross-implicating confessions were permitted there, that:

> The answer to the problem [in *Bruton*] 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.

The progeny of that case is *Miller* v. *State*, 250 Ark. 199, 464 S.W.2d 594 (1971); *Byrd* v. *State*, 251 Ark. 149, 471 S.W.2d 350 (1971); *Grooms* v. *State*, 251 Ark. 374, 472 S.W.2d 724 (1971); and *Patrick* v. *State*, 255 Ark. 10, 498 S.W.2d 337 (1973). In the case at bar, as indicated, the codefendant's name in each cross-implicating confession was deleted and replaced by a blank line in an effort to comply with our decisions.

There were numerous other participants whose names were not deleted. The statement of one of the nontestifying appellants, Stewart, was that his shotgun discharged accidentally when he jumped off a porch rail and that _____, who had a pistol, started shooting at the victim. A statement of the other nontestifying appellant, McGhee, was that he had a pistol as did another named companion. Also when he "was talking to the pusher, _____ and Lenoris Ball came up on the side of the porch" and "both had sawed off shotguns." He denied shooting the victim and struck Ball to prevent him from using his shotgun. When he did so his, McGhee's, pistol went "off." Ball's gun was never fired. Consequently, each of the declarants admitted their presence and purpose at the scene of the crime, though contradicting each other in some aspects with respect to the extent of their complicity. Furthermore, Bullock, a participant and the state's witness, had previously testified that he saw McGhee at the door with a pistol on the victim and that he observed Stewart, who had a shotgun, jump "over a post, and the shotgun discharged" shooting the victim.

Since *Bruton* various U. S. Circuit Courts of Appeal and state courts have found *Bruton* inapplicable in factual situations somewhat similar to the case at bar on the premise that interlocking confessions, which are assertively corroborative of each other, as here, are not violative of *Bruton* when admitted into evidence. The first case in which the rule as to interlocking confessions was expounded is *U. S. ex rel, Catanzaro* v. *Mancusi*, 404 F.2d 296 (2d Cir. 1968), cert. den. 397 U. S. 942, 90 S.Ct. 956, 25 L.Ed.2d 123. There the court held that the admission into evidence of a confession of a codefendant, which interlocked with and was supported by Catanzaro's own confession, did not prejudice Catanzaro's right to a fair trial. The court said:

> Where the jury has heard not only a codefendant's confession but the defendant's own confession no such 'devastating' risk attends the lack of confrontation as was thought to be involved in *Bruton*.

This case was decided only six months after *Bruton*. Cf. *Harrington* v. *California*, 395 U.S. 250 (1969); and *Nelson* v.

O'Neil, 402 U.S. 622 (1971).

Then came *United States ex rel Duff* v. *Zelker*, 452 F.2d 1009 (2nd Cir. 1971), cert. den. 406 U.S. 932, 92 S.Ct. 1807, 3 L.Ed.2d 134, where the court again applied the rule on interlocking confessions. There the court said:

> We reject appellant's claim that the admission of the written statements of Ferguson and Hill violated the rule of *Bruton* v. *United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968). The statements were similar to Duff's own confessions, written and oral, which placed him at the scene with a fair implication of knowing participation. When the defendant's 'confession interlocks with and supports the confession of' the codefendant, there is no violation of the *Bruton* rule.
>
> * * * * * *
>
> As far as Ferguson's statement is concerned, it should be noted also that Duff had the opportunity to cross-examine Ferguson at the Huntley hearing. [Denno hearing.] See *California* v. *Green*, 399 U.S. 149, 165, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970); *People* v. *Moll*, 26 N.Y.2d 1, 307 NYS 2d 876, 256 N.E.2d 185 (1970).

The rule was applied reluctantly by a different panel of the same court in *United States ex rel Ortiz* v. *Fritz*, 476 F.2d 37 (2nd Cir. 1973), cert. den. 414 U.S. 1075, 94 S.Ct. 591, 38 L.Ed. 2d 482. The court considered itself bound by the *Catanzaro* rule. The court resolved the question whether the confessions there were sufficiently interlocking because discrepancies in them were such as to make one or more erroneous or false, by saying that as to motive, plot and execution they were (as here) essentially the same. The court then said that it was uncomfortable with the implications of *Catanzaro*, but found it to be the law of the circuit, having been followed in two subsequent cases. The court then said:

> . . . . If it is to be overruled, it will have to be by the Supreme Court, absent the requisite en banc vote which — through prior circulation of this opinion — has not ensued.

In spite of the open invitation, certiorari was again denied. The court found *Catanzaro* expressive of the law in *United States* v. *DeBerry*, 487 F. 2d 448 (2d. Cir. 1973). To the same effect are *United States ex rel Long* v. *Pate*, 418 F. 2d 1028 (7th Cir. 1969); *Metropolis* v. *Turner*, 437 F. 2d 207 (10th Cir. 1971), where the *Harrington* harmless error rule and the *Cantanzaro* rule were both held applicable, and *United States* v. *Spinks*, 470 F. 2d 64 (7th Cir. 1972).

Bruton has been distinguished also in state courts on the difference between the situation here and the situation where a defendant who has remained silent at all times is inculpated by a codefendant's confession. *State* v. *Hall*, 185 Neb. 653, 178 N.W. 2d 268 (1970); *State* v. *Aiken*, 75 Wash. 2d 421, 452 P. 2d 232 (1969); *State* v. *Hopper*, 253 La. 439, 218 So. 2d 551 (1969); and *Commonwealth* v. *Scott*, 355 Mass. 471, 245 N.E. 2d 415 (1968).

In the case at bar, each defendant has, by his own statement, implicated himself in active participation in a robbery which resulted in the killing of the victim. Each participant is equally as guilty under these circumstances as is the other. *Turnage* v. *State*, 182 Ark. 74, 30 S.W. 2d 865 (1930). Ark. Stat. Ann. § 41-118 (Repl. 1964). Stewart said he wanted to go along on the robbery of the dope pusher, went up to the house, cocked his shotgun and climbed upon the porch rail. The fact that he claimed that his shotgun went off accidentally made him no less guilty of the crime with which he was charged, particularly when this happened because he jumped off the porch rail thinking that his *unnamed* confederate, who was talking to the "dude", was waiting on Stewart to "make his move."

McGhee's statement was that he had a .38 pistol in his hip pocket when he went to the "pusher's" door and that two others had sawed off shotguns. One of them, Lenoris, said "if he won't sell it to us, we'll just take it." About this time, said McGhee, the pusher opened the screen door and an *unnamed* companion's shotgun went off as he jumped off the wooden rail. McGhee admitted that the pistol he had went off and that when he was back in the car in which he came to the scene, three shells had been fired. Also each statement is corroborative of the testimony of their accomplice, Bullock.

We did not actually hold in *Mosby and Williamson* v. *State, supra*, that *Bruton* required reversal of their convictions. Our reversal was predicated upon an erroneous instruction. We did little more than the Massachusetts Supreme Judicial Court did in *Commonwealth* v. *Scott, supra*, i.e., alert the courts and prosecutors to the risks inherent in the introduction of confessions of individual defendants in the joint trial of multiple defendants. We merely called attention to *Bruton* and the case of *Roberts* v. *Russell*, 392 U.S. 293 (1972). In addition, we pointed out that a separate trial was mandatory in a capital case, as Mosby was, so that the "problem" of cross-implicating confessions would not arise if a separate trial were requested. See *Sims* v. *State*, 253 Ark. 1119, 491 S.W. 2d 583 (1973). Furthermore, the only evidence other than the confessions in the *Mosby* case was the fact that the crime had been committed. In *Miller* v. *State*, supra, we simply held that no problem of confrontation contrary to *Bruton* arose when the trial court struck all portions of confessions of codefendants relating to other defendants. In *Byrd* v. *State, supra,* we did say that we had held, in *Mosby*, that it was prejudicial error to admit cross-implicating confessions in a joint trial, again suggesting that an answer to the problem would be deletion of offending portions referring to a codefendant, if feasible. However, we emphasized the fact that the appellant testified and denied any complicity in the alleged crime. So the case now before us is readily distinguishable from *Byrd*.

In *Grooms* v. *State*, 251 Ark. 374, 472 S.W. 2d 724 (1971), there was no confession by the appellant in whose trial the confession of a codefendant implicating appellant was narrated without any apparent deletion. In *Patrick* v. *State, supra*, the cross-implicating confessions of all three codefendants were introduced "in toto." There is nothing to indicate what other evidence was offered to show their complicity in the burglary and grand larceny with which they were charged.

In short, in our post-*Burton* cases, we have not foreclosed the treatment of cross-implicating confessions as approved in *Catanzaro* and kindred cases. Significantly, it has not been foreclosed by the U.S. Supreme Court in spite of an undisguised plea for it to do so by the court in which it was first

ennunciated. *United States, ex rel Ortiz* v. *Fritz, supra.* This is the first time that our state has urged its applicability.

In the case at bar, appellants' motives, plots and participation in the crime are essentially the same. Unlike *Bruton,* both appellants made interlocking and corroborative confessions, the voluntariness of which is not in issue. As codefendants, their names were deleted. It does not appear that a severance was requested. Also their confessions are corroborative of one of their accomplices, who was subjected to a lengthy cross-examination. It does not appear in the factual situation here that harm is being done to individual rights by holding, as we do, that *Bruton* is inapplicable.

Affirmed.

BYRD, J., dissents.

CONLEY BYRD, Justice, dissenting. It sounds logical to tell the jury that they should not consider the confession of one codefendant against another jointly tried codefendant, but the logic becomes absurd when on appeal we compare one with another to determine if there was any prejudicial error in admitting the confessions. If we do what we tell the jury not to do, then I can find no practical reason why the jury ought to disregard the confession of one defendant when considering the guilt or innocence of the other.

The Constitution prohibits the conviction of an individual without confronting him with the witnesses against him. When the confession of the codefendant is introduced through an officer, the other codefendant has no right to cross-examine the codefendant as to the truth and veracity of the facts therein recited.

Like Justice Marshall in his dissent in *Nelson* v. *O'Neil,* 402 U.S. 622, 635, 91 S. Ct. 1723, 1729, 29 L. ed. 2d 222 (1971), I think we should follow the procedure suggested by The American Bar Association's Project on Standards for Criminal Justice. He there stated:

"The American Bar Association's Project on Stan-

dards for Criminal Justice, Advisory Committee on the Criminal Trial, suggested that if a defendant in a joint trial moves for a severance because the prosecutor intends to introduce an out-of-court statement by his codefendant that is inadmissible against the moving defendant, then the trial court should require the prosecutor to elect between a joint trial in which the statement is excluded; a joint trial at which the statement is admitted but the portion that refers to the moving defendant is effectively deleted; and severance. I believe that the adoption of such a practice is the only way in which the recurring problems of confrontation and equal protection can be eliminated."

Edward POOLE *v.* Noah BATES and
Pate PEARSON d/b/a
BATES-PEARSON AUTO SALES

74-285 520 S.W. 2d 273

Opinion delivered March 10, 1975

Hodges, Hodges & Hodges, for appellant.

Boyett and Morgan, P. A., for appellees.

CARLETON HARRIS, Chief Justice. Appellees, Noah Bates and Pate Pearson d/b/a Bates-Pearson Auto Sales, sold an automobile to Edward Poole, appellant, Poole signing an installment contract. As typed, the contract called for 24 equal payments of $84.47, which would make a total payment of $2,072.28. Included in the figures was a charge for $55.94 for credit life insurance. The interest charged was 10%. Appellees instituted suit in August, 1972 alleging that after allowance of credits, Poole was indebted to appellees in the sum of $1,489.11, for which judgment was sought, together with an attorney's fee and costs of the collection. Poole answered alleging that the contract was in violation of the usury provision of the Arkansas Constitution;[1] other defenses were interposed, but on appeal, only the usury defense is argued. On trial, the court held that the contract was not usurious, and judgment was entered for the amount sought, together with an attorney's fee, and costs of the suit. From the judgment so entered, appellant brings this appeal.

The principal contention for reversal is based upon the credit life insurance premium. The premium was $55.94, and appellees placed this insurance with an insurance agency; appellees, however, received 35% of the credit life insurance premium as a commission, this amount being in addition to the other moneys under the contract, i.e., the premium was included in the total prior to determining the monthly amount of payments. Accordingly, interest on the commis-

[1]Arkansas Constitution, Art. 19, § 13.

sion received by appellees was called for in the monthly payments, and it is appellant's contention that appellees were not entitled to receive interest on that portion of the premium constituting a commission, and since the payments under the contract called for a full 10% interest, that instrument is therefore usurious.

Admittedly, this court has not passed directly on this question, though appellant argues that certain of our cases indicate that the interest charged on the commission made the contract usurious. *Universal CIT Credit Corp.* v. *Lackey*, 228 Ark. 101, 305 S.W.2d 858, *United Bilt Homes* v. *Knapp*, 239 Ark. 940, 396 S.W.2d 40, *Ragge* v. *Bryan*, 249 Ark. 164, 458 S.W.2d 403.

Appellant cites the Annotation at 91 ALR2d 1344, "Usury: requiring borrower to pay for insurance as condition of loan", as follows:

> "In determining the usurious nature of a loan contract containing a provision whereby the lender, which was not an insurance company, required the borrower as a condition of the loan to pay for insurance in addition to the full legal interest, the fact that the lender retained as a commission a portion of the insurance payment made by the borrower or that it in some other respect made a profit by means of the insurance provision has been considered in many cases as a factor supporting a finding of the lender's intent or device to cover usury."

Of course, in all of our cases since *Hare* v. *General Contract Purchase Corp.*, 220 Ark. 601, 249 S.W.2d 973, the court has particularly scrutinized every phase of a transaction that might conceivably be a cloak for usury, and it is true that the manner of the insurance charge has been closely examined, for any violation of standards set out in our cases would necessarily involve an unlawful charge and/or an unlawful profit. But we do not agree that the commission herein involved, though, as pointed out in the annotation, a factor to be considered, makes this particular contract usurious. In the first place, this is not a case where the purchaser was com-

pelled to purchase insurance before appellees would finance the purchase of the car; i.e., it was not a charge made for the purpose of allowing them more interest. Rather, it appears that appellant requested this insurance. In the next place, there is no contention that the insurance charge was excessive. In other words, it was a *bona fide* transaction. The charge for insurance was paid and appellant received the benefit requested. The rebate itself was not illegal, nor is there any reason, since appellant asked for the insurance and received exactly what he requested, why such should be illegal. After all, there could be no difference to appellant in purchasing the insurance through appellees, and purchasing it from some company across the street or elsewhere, i.e., there is no showing that the premium would have been less. So long as there is no element of fraud, nor duress or compulsion upon the borrower to take the insurance from the lender, we see no reason why the automobile agent is not as entitled to represent the insurance company, and accordingly receive a commission, as anyone else. In other words, no *unlawful* charge or profit is involved.

Appellant also argues that the figure on the face of the contract ($2,772.28) reflects a usurious charge. While this figure is actually incorrect, as will be mentioned hereafter, neither the $2,772.28 nor the correct figure, $2,072.28, has any bearing on this case. The figure mentioned reflects the sale price of the automobile, but an allowance of $700.00 was given for a trade-in and the finance charges are not at all based on this figure. Using the first figure and deducting $700.00 leaves the sum of $2,072.28, reflecting an unpaid balance of $1,830.94 and finance charge of $196.34. The installment sales contract and note reflect that both the typewritten $2,772.28 figure and the $2,072.28 typewritten figure were stricken and the figures $2,727.28 and $2,027.28 were respectively inserted by hand. The evidence does not reflect when this was done, whether in the presence of Poole or after he had left the company office. Mr. Pearson stated that he did not remember but that the figure was changed upon observing it was incorrect. Poole did not testify. Of course, the burden is upon appellant to establish usury. *Knox* v. *Goodyear Stores*, 252 Ark. 530, 479 S.W.2d 875.

As stated, the total price for the automobile including the trade-in is not involved, for the finance charge is only added to the balance due on the automobile after allowing for such trade-in. It seems very clear that a typographical error was made for the installment sales contract calls for 24 payments of $84.47 and this totals $2,027.28, so that it is only necessary that the 24 payments be totaled in order to determine the correct figure. Actually, it appears that the typist, in each instance, transposed the figures 7 and 2. This does not constitute usury.

Affirmed.

Clarence BAUGH Jr. *v.* City of PINE BLUFF

74-287 520 S.W. 2d 275

Opinion delivered March 10, 1975

Reinberger, Eilbott, Smith & Staten, for appellant.

Tim Boe, City Atty., for appellee.

GEORGE ROSE SMITH, Justice. On June 14, 1972, the

appellant was fined $10 in the Pine Bluff municipal court, upon a charge of "driving left of center." Within two weeks he appealed to the circuit court, apparently remaining at liberty on bond. On June 24, 1974, the circuit court set the case for trial on July 18. On July 9 the appellant filed a motion to dismiss the case, on the broad ground that he had been denied a speedy trial as guaranteed by the federal constitution and the state constitution and statutes. On the date set for trial, July 18, the circuit court entered an order dismissing the appeal from the municipal court and directing that a capias issue against the defendant to enforce the municipal court's judgment. The defendant filed a notice of appeal from that order.

In this court the appellant argues that the trial court should have granted his motion to dismiss the charge, because the case was not brought to trial in the circuit within three terms of court, as required by Ark. Stat. Ann. § 43-1709 (Repl. 1964). To support his argument the appellant relies upon our holding in *Holland* v. *State*, 252 Ark. 730, 480 S.W. 2d 597 (1972).

Upon the meager record before us we cannot sustain the appellant's contention. In *Holland* the appellant showed by stipulation and apparently by other proof that three terms of court had elapsed since her arrest and that the delay had not happened upon her application. In the case at bar there is no similar proof. The appellant, as the moving party, had the burden of proving facts to support his motion to dismiss, but there is actually no proof in the record. If a hearing was held, we have no transcript of the proceedings. Apart from the pleadings and the judgment the record contains only a copy of the court's docket sheet, which contains notations of the order setting the case for trial, of the denial of the motion to dismiss, and of the dismissal of the appeal. There is no showing that the docket sheet was introduced in evidence. A docket notation is not the entry of a judgment and cannot be used to supply a deficiency in the record. *Hollaway* v. *Berenzen*, 208 Ark. 849, 188 S.W. 2d 298 (1945). Hence there is no proof that the delay did not happen upon the appellant's application.

Affirmed.

ARKANSAS STATE HIGHWAY COMMISSION
v. Bessie W. COFFELT

74-218 520 S.W. 2d 294

Opinion delivered March 10, 1975
[Supplemental Opinion on Denial of Rehearing June 2, 1975, p. 780-A.]

Thomas B. Keys and *Kenneth R. Brock,* for appellant.

Kenneth Coffelt and *Carl Langston,* for appellee.

J. FRED JONES, Justice. This is an appeal by the Arkansas State Highway Commission from a decree of the Pulaski County Chancery Court enjoining the Highway Commission from closing so-called Coffelt Road where it crosses Highway No. 67 in connection with improvements on Highway 67.

On appeal to this court the Highway Commission relies on the following points for reversal:

> "The trial court erred in finding that there was no notice of the county court order.
>
> The trial court erred in finding that appellee was the title holder in fee of at least 20 feet of the south part of Coffelt Road, which crosses U. S. Highway #67.
>
> The trial court erred in finding that appellant had never entered or attempted to stop the flow of traffic across Coffelt Road to the extent that such entry would amount of [sic] notice that the appellant was claiming said road in fee."

The appellee, Bessie W. Coffelt, has cross-appealed and for reversal of the chancellor's decree on cross-appeal she relies on the following points:

> "The trial court erred in dissolving the Temporary Injunction entered August 23, 1972, without the Arkansas Highway Commission affirmatively requesting permission to make a deposit and comply with Per Curiam Order of September 25, 1972.
>
> To comply with Per Curiam Order of Supreme Court of September 25, 1972, Highway Commission must request affirmative relief.

> With respect to compensation due process requires that the landowner be given reasonable notice of, and an opportunity to be heard in the proceedings."

The facts, as they appear from the record in this case, are as follows: On July 12, 1955, Horace D'Angelo and his wife owned the land involved in this case and through which the then proposed Highway 67 would run. On that date Pulaski County purchased from the D'Angelos a perpetual easement for Highway 67 over the right-of-way area here involved. The granting clause in the deed from the D'Angelos provided:

> ". . . do hereby grant and convey unto the said Pulaski County, Arkansas, and unto its successors and assigns forever, a perpetual and exclusive easement for the right of way of State and U. S. Highway No. 67 through and over the following described lands lying in Pulaski County, Arkansas as shown on attached sketch marked Exhibit 'A'."

Following the granting clause and description the deed then provided as follows:

> "This conveyance is made for the purposes of a freeway and adjacent frontage road and the grantor hereby releases and relinquishes to the grantee any and all other abutter's rights including rights appurtenant to grantor's remaining property in and to said freeway, provided, however, that such remaining property shall abut upon and have access to said frontage road which will be connected to the freeway only at such points as may be established by public authority.
>
> To have and to hold the same unto the said Pulaski County, Arkansas and unto its successors and assigns forever, with all appurtenances thereto belonging."

On July 25, 1955, the Pulaski County Court entered an order reciting as follows:

> "Now on this day there comes on for consideration the

> matter of right of way damages in connection with the cost of the right of way on the above captioned road project.
>
> And the Court being well and sufficiently advised on all matters of law and fact herein doth find that Pulaski County, Arkansas has entered upon the property of the herein named property owners under authority conveyed by easement deeds executed by the several property owners to said county and that the property acquired and the value thereof expressly including damages to their remaining lands is as follows and said property owners have agreed to accept the following allowance in full settlement of their claims for damages filed in this Court in this matter."

This court order then set out the various amounts to be paid the landowners, including the D'Angelos, and the order concluded as follows:

> "IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED BY THE COURT that the above named property owners recover the amounts shown as total damage and that such allowance is to be paid by Pulaski County, Arkansas from funds made available by the Arkansas State Highway Department which allowances expressly include damages to their remaining lands located outside the right of way."

On September 8, 1955, the D'Angelos sold their entire tract of land consisting of 240 acres, more or less, to Kenneth Coffelt by warranty deed. Following the legal description of the property, this deed provided as follows:

> "[S]ubject to an easement for a road designated as Pickthorn Lane that runs across the North side of said property, if said Lane encroaches in any manner upon the above described property;
>
> Also subject to a perpetual easement for a right-of-way for State and U. S. Highway No. 67 through and over said land, which easement and right-of-way is par-

> ticularly set forth and described in an instrument described as 'Easement Deed' dated the 12th day of July, 1955, executed by Horace D'Angelo and his wife, Eleanor B. D'Angelo, to Pulaski County, Arkansas, which said deed is recorded in Book 578 at Page 437 of the Deed Records of Pulaski County, Arkansas. The highway right-of-way *excepted from this conveyance* and described in the Easement Deed above referred to contains 27.92 acres more or less in permanent right-of-way and 1.508 acres more or less in temporary right-of-way." (Emphasis added).

This deed also contains a warranty clause as follows:

> "And we hereby covenant with the said Kenneth Coffelt that we will forever warrant and defend the title to said lands against all claims whatsoever except the easements set forth in the *granting clause*, and the rights of Herman Berkhead, Jr., a tenant by the month, who is now occupying the tenant house on said property." (Emphasis added).

On December 16, 1955, the Pulaski County Court entered an order finding that for the purpose of constructing, improving and maintaining U.S. Highway No. 67, the highway should be a controlled access facility for the reason that traffic conditions then and those contemplated and forecast for the future justify such special facility, "and therefore the owners or occupants of abutting land shall have no right or easement of existing, future, or potential common law or statutory rights of access, or ingress and egress to, from, or across this facility to or from abutting lands, except at such designated points at which access may be permitted upon such terms and conditions as may be specified from time to time by the Arkansas State Highway Commission." The county court then found that under the provisions of said Act 383 of 1953 the said right-of-way should be acquired in fee simple. The county court order then provided as follows:

> "IT IS THEREFORE CONSIDERED, ORDERED AND ADJUDGED BY THE COURT that:

1. The right of way for the Jacksonville Air Base-North Road, U.S. Highway No. 67, be and the same is hereby condemned, located and changed in accordance with the description hereto attached and as shown on the right of way sketch map hereto attached, and that the title to said lands in fee simple absolute is hereby vested and confirmed in Pulaski County, Arkansas.

2. That the said Jacksonville Air Base-North Road, U. S. Highway No. 67, be and is hereby designated and established a controlled-access facility under the authority of and as provided by Act 383 of the 1953 General Assembly of the State of Arkansas, and that the owners or occupants of abutting and adjoining lands shall have no right or easement of existing, future, or potential common law or statutory rights of access, or ingress and egress to, from, or across this facility to, from, or across abutting lands, except at such designated points and places at which access may be permitted by the rules and regulations of the Arkansas State Highway Commission which Commission is hereby permitted to regulate, control and designate such access, light, air or view and points and places of ingress and egress.

3. That the right of way herein described has been obtained by Pulaski County, Arkansas for the public use and benefit and for this purpose the property rights acquired under this order be and they are hereby transferred to the Arkansas State Highway Commission to construct and maintain said road, being a controlled-access facility."

Kenneth Coffelt subsequently transferred title by quitclaim deed to the appellee, Bessie W. Coffelt. On August 23, 1972, Mrs. Coffelt filed the present action in chancery court praying that the appellant and its contractors be temporarily restrained from interfering with the existing exit off of U.S. Highway 67 and its east frontage road abutting the property owned by her, and that upon final hearing the order be made permanent, and praying that the Highway Commission be required to deposit estimated damages into the registry of the court if it proposed to condemn the property

right of the appellee in the exit in question. The complaint alleged that the appellee's land had a one-fourth mile frontage along U. S. Highway 67; that the right-of-way was acquired by easement deed to Pulaski County by the appellee's predecessor in title; that the exit in question was from the two north-bound lanes of traffic on U.S. Highway 67 to a two-lane frontage road running directly in front of appellee's property, and that the closing or removal of said exit would deprive the appellee of a property right to her damage in the amount of $46,375. The complaint also alleged representations made as to the permanency of the exit. A temporary injunction was entered by the trial court as requested in the complaint.

On September 6, 1972, the appellant filed its answer denying most of the allegations in the complaint; denying the appellee's fee ownership in the right-of-way, and denying that the appellee would be deprived of access from the main travel portion of the highway to the frontage road upon which the appellee's property abuts.

On September 18, 1972, the appellee filed a motion asking the court to require the appellant and its contractors to deposit $46,375 before they tore out ramps, exits or entrances to the highway on the access road abutting appellee's property, or the closing of Pickthorn or Coffelt Road. The motion alleged that to permit the tearing out of the ramps and to close Coffelt Road without making deposit subject only to the orders of the court, was taking her property without compensation in violation of the State and Federal Constitutions.

On September 18, 1972, the chancellor dissolved the temporary injunction previously ordered and recited retention of jurisdiction for determination "upon permanent hearing" of what damages, if any, should be awarded the appellee.

On September 19, 1972, the chancellor denied the appellee's motion for deposit of estimated damages, whereupon, the appellee filed notice of appeal to this court and on September 25, 1972, this court entered its order reciting as follows:

> "The temporary restraining order entered by the Chancery Court on August 23, 1972, is reinstated and shall remain in effect *until this case is disposed of or until* the appellees have either filed an eminent domain proceeding or shall have deposited an adequate amount (to be determined by the chancery court) to compensate the appellant for any damages or compensation to which she may be found to be entitled upon final adjudication of the issues between the parties." (Emphasis added).

On September 29, 1972, the appellee amended her complaint alleging that Coffelt Road intersects Highway 67 and that such crossover constituted a fixed property right of the plaintiff; that she is the owner of the fee title thereto; that said crossover was the only means by which she could get from her property on one side of Highway 67 to the other side; that the Highway Commission was planning to close said Coffelt Road where it crossed Highway 67; that the Highway Commission had agreed to build an overpass at said crossing, and that if the Highway Commission elected to condemn said crossing by eminent domain, it should be required to deposit the sum of $285,000 as just compensation for the taking.

On September 29, 1972, the chancery court entered an order restraining the appellant and its contractors from interfering in any manner with Coffelt Road crossing and setting the matter for hearing on the merits for October 3, 1972. On October 18, 1972, the Highway Commission filed its answer to amendment to the complaint denying the allegations set out in the amendment and stating that the closing of Coffelt Road was for the purpose of diverting and rerouting traffic for the safety of the public, and that such action did not constitute a taking of any compensable property right held by the plaintiff.

On August 22, 1973, the appellee amended her amendment to the complaint alleging that she was the fee owner of the Coffelt Road crossing and also held a prescriptive right of ownership along with all other members of the traveling public to said crossing. She alleged that the Coffelt Road crossing was a county road maintained by the county, being a

blacktop road with a 40 foot right-of-way over which school bus and mail routes were being operated and had been operated for a quarter of a century, and that the original and exclusive jurisdiction of said road rests with the County Judge. She alleged that the Highway Commission has no right to interfere with the Coffelt Road crossing under any proceedings because it had not applied to the county court for permission to so interfere with the crossing and, no order had been entered by the county granting such permission. She alleged that the county court is given exclusive jurisdiction of the closing under its exclusive jurisdiction relating to county roads under Section 28 of Article 7 of the State Constitution. The appellee further alleged that "Even the circuit court could not entertain a condemnation plea by the appellant to take the road or crossing."

On April 17, 1974, the chancellor entered a decree which, among other things, found the appellee to be the holder in fee subject to the easement of Pulaski County, Arkansas, "of at least 20 ft. of the South part of what is known as Coffelt Road, which crosses Highway #67, a four-lane highway." The court then decreed as follows:

> "1. The defendants, Arkansas State Highway Commission and E. C. Rowlett Construction Co., Inc., and each of them are hereby permanently restrained and enjoined from closing or interfering in any manner with the free use of Coffelt Road Crossing or interfering with the flow of traffic on said crossing. The temporary injunction pertaining to said crossing heretofore entered in this cause is hereby made permanent.
>
> 2. That the plaintiff, Bessie Coffelt, has suffered no damage nor will the plaintiff, Bessie Coffelt, suffer damage by virtue of any construction or proposed construction of the exit or entry ramps by the Arkansas State Highway Commission within the 300 ft. right-of-way acquired by Pulaski County from D'Angelos on July 12, 1955, and she will not suffer any damages by the defendants tearing out the present existing exit ramp involved in this case and therefore the Temporary Injunction heretofore entered against the defendants pertaining to said ramp is hereby dissolved."

In the posture this case is presenting to us on appeal, the appellant's second and third points for reversal are really dependent upon the first point. The appellant argues that construction on Highway 67 was begun in 1956 or 1957 following entry of the county court order of December 16, 1955; that the appellee's husband, Kenneth Coffelt, held title to the property at the time the condemnation order was entered; consequently, the entry in 1956 or 1957 under the county court order was notice to the appellee that the Highway Commission was claiming title under the court order. The appellant argues inferentially that the twelve months statute of limitations under Ark. Stat. Ann. § 76-926 (Supp. 1973) was set in motion by such entry and any claim for damages the appellee might otherwise have had, was barred by limitations when her petition was filed in this case.

Thus, as we understand the contentions of the parties presented under the points the appellant has designated, the question on this appeal is narrowed to whether the statute of limitations has run on any claim for damages the appellee may have for the taking of the *fee title* involved under the county court order of December 16, 1955.

In *Ark. State Highway Comm'n* v. *French*, 246 Ark. 665, 438 S.W. 2d 276, we reviewed some of our previous decisions pertaining to when the statute of limitations begins running against a claim of the nature here involved and our conclusion as recited in the *French* case is as follows:

> "As we read these decisions the one year statute of limitations does not begin to run against a property owner until he is served with notice by legal process or until an entry is made by the condemning agent."

It is apparently conceded that the Coffelts were not served with notice by legal process pursuant to the aforesaid county court order. Consequently, the question is whether the entry by the Highway Commission on the land involved constituted such notice as to set in motion the statute of limitations. We are of the opinion that it did not under the facts in this case. The Highway Commission had a perfect right, which no one questions, to enter into possession and

construct the highway under the right-of-way easement deed from the D'Angelos to Pulaski County. There is nothing in the record to place the appellee on notice that the appellant, by its entry onto the property involved, was entering the property under a claim of fee title. All of the appellant's actions were consistent with the rights it acquired under the easement deed from the appellee's predecessors in title. Whether or not the appellee would be damaged by the taking of the *fee*, beyond or in addition to the rights the appellant acquired by easement deed, is a matter yet to be determined, but a matter which the appellee has a right to have determined and upon which the statute of limitations has not run in this case.

We do no pass upon the effect of the various deeds on damages claimed in this case, but we are of the opinion the chancellor's finding that the appellee owns the fee title to at least twenty feet of Coffelt Road is not against the preponderance of the evidence. We conclude, therefore, that the chancellor did not err in granting the injunction until the question of damages, if any, is fully determined.

As to the points relied on by the appellee on cross-appeal, we are of the opinion the chancellor was correct in dissolving the temporary injunction entered on August 23, 1972, without the Arkansas Highway Commission affirmatively requesting permission to make a deposit and comply with this court's per curiam order dated September 25, 1972. The per curiam order of this court did not hold that the Highway Commission must request affirmative relief as argued by the appellee. We only held in our per curiam order that the restraining order entered by the chancellor on August 23 be reinstated and "remain in effect *until this case is disposed of or until* the appellees have either filed an eminent domain proceeding or shall have deposited an adequate amount," etc. (Emphasis added). The chancellor's findings that "There has been no loss of ingress or egress to the plaintiff by virtue of any construction or proposed construction of the exit or entry ramps on Highway #67, and, therefore, the plaintiff would not be entitled to any damages," is not against the preponderance of the evidence. Consequently, we affirm

the chancellor's decree on the appeal as well as on cross-appeal.

The decree is affirmed.

Supplemental Opinion on Denial of
Rehearing delivered June 2, 1975
522 S.W. 2d 839

JOHN A. FOGLEMAN, Justice. On petition for rehearing, appellant states the following as one ground:

> The Court erred in overruling principles of law announced in the cases of *Arkansas State Highway Commission* v. *Palmer*, 222 Ark. 603, 261 S.W. 2d 772, and *The State Life Insurance Company of Indianapolis, Indiana* v. *Arkansas State Highway Commission*, 202 Ark. 12, 148 S.W. 2d 671. The principles of law were (1) that where a county condemns land for highway purposes upon petition of the Arkansas State Highway Commission, the county becomes liable for damages arising from the county court order and not the Arkansas State Highway Commission; (2), where appellees have a remedy at law in that they can pursue their claim against the county for damages arising from the county court order, equity should not grant an injunction.

In argument, appellant says that we held that the statute of limitations had not run against appellee and that appellee still has a right to determination of her damages resulting from the taking of the fee title by the county court order, but complains that we overlooked the fact that appellee's claim for damages is against the county and not appellant under our holding in *Arkansas State Highway Commission* v. *Palmer*, 222 Ark. 603, 261 S.W. 2d 772. Thus, says appellant, appellee had an adequate remedy at law and injunction was improper under our holding in *The State Life Insurance Company of Indianapolis, Indiana* v. *Arkansas State Highway Commission*, 202 Ark. 12, 148 S.W. 2d 671.

In spite of the fact that we said in our original opinion that appellee still owns the fee, appellant correctly interprets the effect of our holding in that, regardless of who may be said to be the owner of the fee, appellant cannot proceed to use the area until just compensation has been paid or secured to appellee.

Appellee has asserted rights in the Coffelt Road Crossing at least from September 18, 1972 when she moved that appellant be required to deposit $46,375 in the registry of the court, saying that closing the road at the intersection with Highway 67, without doing so would constitute a taking of private property without compensation in violation of the constitutions of Arkansas and of the United States. By an amendment to her complaint, she asserted that the first notice to appellee of appellant's intention to enter upon and close the crossing was on September 13, 1972, and that she would be damaged in the amount of $285,000. Appellant's answer was that the closing of Coffelt Road was a rerouting of traffic and a valid exercise of its police power.[1] In seeking to have vacated a temporary injunction restraining appellant from interfering with appellee's use of Coffelt Road crossing until appellant either deposited in the registry of the court a sum of money sufficient to cover the amount of appellee's damages or filed a condemnation proceeding taking the crossing, appellant again relied only on the police power. In its brief on this motion, appellant first mentioned the county court order, saying that appellee at that time (December 16,

[1]But see *Arkansas State Highway Commission* v. *Union Planters Bank*, 231 Ark. 907, 333 S.W. 2d 904.

1955) had no standing to seek compensation for any damages resulting from the action proposed by appellant. Appellant again relied upon its police power and asserted that under *Arkansas State Highway Commission* v. *Bingham*, 231 Ark. 934, 333 S.W. 2d 728, there was no compensable damage to appellee, since the highway had been designated in the county court order as a controlled access facility. Appellee again amended her complaint to allege fee ownership of the crossing and a prescriptive right of ownership and use of it. Appellant's answer consisted principally of a denial of these allegations.

In the court's decree of April 17, 1974, there was a specific finding that there had been neither notice of taking of Coffelt Road crossing nor entry upon it. Appellant's motion for reconsideration in the trial court was upon these issues principally. Otherwise it amounted to a restatement of positions previously taken by it.

Never at any time did appellant raise the issue it now asserts on petition for rehearing in the trial court. As will be seen from its statement of points, it never raised the issue in its brief on appeal. Neither of the cases now relied upon was cited until the filing of the reply brief. There appellant cited *Palmer* and asserted for the first time, that Pulaski county and not appellant, was liable for any claim of appellee for just compensation. This was too late. It was an issue raised for the first time on appeal. *State Life Insurance Co.* v. *Arkansas State Highway Commission*, supra, was never mentioned. We cannot now consider this issue and we have not overruled either case. Furthermore, we do not perceive any error or conflict with *State Life Insurance Co.* v. *Arkansas State Highway Commission*, supra. As a matter of fact, it was recognized in *Palmer* that the chancery court might do what it did. There we said:

> . . . while the property owner may not sue the state or the commission acting in its name for damages, he may restrain the commission from taking his property until the damages have been paid, or provision for payment made.

In *Palmer* both the county court and the circuit court had rendered judgment against both the county and the highway department.

It was certainly within the jurisdiction of a court of equity to enjoin appellant from trespassing upon or appropriating the property of a landowner when the right to compensation had been denied because the fiscal year in which a county court's order of condemnation was issued had expired and the revenues exhausted, leaving the landowner without an adequate remedy at law. *Arkansas State Highway Commission* v. *Hammock*, 201 Ark. 927, 148 S.W. 2d 324. See also, *Arkansas State Highway Commission* v. *French*, 246 Ark. 665, 439 S.W. 2d 276; *Arkansas State Highway Commission* v. *Cook*, 236 Ark. 251, 365 S.W. 2d 463. In *Hammock*, we said that the chancery court erred in holding that the county court order was void, but we affirmed the injunction there issued insofar as it enjoined appellant from taking the land until the landowners were compensated. In *French*, as here, there had been no entry upon the property before the decree was entered.[2] In *Cook*, 35 years had elapsed between the county court order and appellant's undertaking to take possession of a disputed ten foot strip not entered upon at the time of the county court order.

Another case similar to this one is *Arkansas State Highway Commission* v. *Anderson*, 234 Ark. 774, 354 S.W. 2d 554, where the county court order was 25 years old at the time appellant sought to enter upon right-of-way beyond the limits of that it had been using. We sustained a decree enjoining the Highway Department from going on the strip involved or attempting to use the same. Although it was clearly proper for the chancery court to enjoin appellants from entering upon the crossing until whatever compensation was due appellee has been paid or secured, it may well be that appellee has recourse to the county court under the authorities hereinabove cited and such cases as *Miller County* v. *Beasley*, 203 Ark. 370, 156 S.W. 2d 791 and *Arkansas State Highway Commission* v. *Croom*, 225 Ark. 312, 280 S.W. 2d 887. Appellant simply did not raise this question in the trial court and raised it belatedly here. The ownership of the fee is not material; appellee's right to a day in court on just compensation is. There has not been either legal notice of the taking or

[2]As pointed out in our original opinion in this case, the entry made upon the right-of-way at the time of the original construction was not inconsistent with the easement and thus insufficient to serve as notice of the rights appellant claims.

entry by appellant, and there will not be as long as the injunction is in effect.

We cannot reverse the decree on an issue not raised.

SMITH and BYRD, JJ., concur only in the denial of the rehearing.

JONES, J., would grant the rehearing.

Robert Daniel SMITH *v.* STATE of Arkansas

CR 74-159 520 S.W. 2d 301

Opinion delivered March 10, 1975

Harold L. Hall, Public Defender, by: *Robert L. Lowery*, Dep. Public Defender, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Robert A. Newcomb*, Asst. Atty. Gen., for appellee.

CONLEY BYRD, Justice. The sole issue on this appeal is whether appellant Robert Daniel Smith, an indigent, is entitled to credit for jail time served by him prior to conviction.

The record shows that appellant was held in custody from December 8, 1973, until the date of his trial before the court on January 11, 1974. The record also shows that appellant was sentenced and committed to the penitentiary for 15 years upon a charge of robbery with a firearm without

being given the opportunity to show why he should not receive the full 15 year sentence.

Thus unlike *Coleman* v. *State*, 257 Ark. 538 518 S.W. 2d 487 (1975), the record shows appellant was not given the right of allocution and consequently, we cannot indulge in the presumption that the trial court did its duty according to law or that it exercised its discretion pursuant to Ark. Stat. Ann. § 43-2813 (Supp. 1973), in denying jail time, *Shelton* v. *State*, 255 Ark. 932, 504 S.W. 2d 348 (1974). Consequently, this case seems to be controlled by *Smith* v. *State*, 256 Ark. 425, 508 S.W. 2d 54 (1974), where we pointed out that the denial of jail time solely because of the indigency of the defendant amounts to an unconstitutional discrimination based on wealth, absent some "compelling government interest."

Reversed and remanded with directions to give credit for jail time.

Ruth H. BARDWELL, Administratrix of
The Estate of Emmett D. BARDWELL, Deceased
v. Jerry McLAUGHLIN

74-269 520 S.W. 2d 277

Opinion delivered March 10, 1975

Brick, Wallin and Rainey, for appellant.

Spears and Sloan and *Skillman, Durrett & Davis*, for appellee.

FRANK HOLT, Justice. Appellant, administratrix of the estate of Emmett Bardwell, brought this action against appellee alleging that appellee negligently drove a pickup truck which struck and killed appellant's decedent. A jury denied recovery by finding the comparative negligence of appellee was 10% and appellant's decedent 90%. The sole issue on appeal is the propriety of the trial court instructing the jury as to "sudden emergency" (AMI [Civil] 614). It is argued that under the facts and circumstances it was prejudicial to give the instruction and we agree.

At approximately 3:50 a.m., the appellee, who was an off-duty state policeman, found the decedent's truck wrecked on an interstate highway. Appellee could not locate a telephone in the vicinity. He drove back to the scene of the accident and, because of insufficient light, was unable to determine if the driver of the wrecked vehicle was in the vicinity. Appellee returned to his truck, left the interstate and drove down the lateral service road to find assistance. Cars driving in the opposite direction on the interstate caused appellee to drive with his headlights on lowbeam. He was in his proper lane of traffic driving 70 miles per hour, the speed limit being 60, when he suddenly saw the decedent 50 feet ahead in appellee's lane. This was approximately one mile from the scene of the decedent's wrecked vehicle. The decedent was walking two feet from the center line in the same direction as appellee was traveling. Appellee testified that the combination of lights from the approaching vehicles on the interstate and the clothing the decedent was wearing prevented him

from seeing decedent until he was 50 feet from him. Appellee didn't think anyone would be walking on the access road. Appellee testified that he did not have sufficient time to take evasive action or apply his brakes before he struck the decedent. Thereafter, the truck skidded several hundred feet, stopping in a field. There is substantial evidence that the decedent was intoxicated at the time of the fatal accident.

The instruction given to the jury is AMI (Civil) 614 (Sudden Emergency) which reads:

> A person who is suddenly and unexpectedly confronted with danger to himself or others *not caused by his own negligence* is not required to use the same judgment that is required of him in calmer and more deliberate moments. He is required to use only the care that a reasonably careful person would use in the same situation. (Emphasis added.)

The appellee contends that this instruction was proper in the circumstances. Appellee's argument is that appellant's decedent created an emergency situation which originated and continued from the time he left his wrecked automobile one mile distant from the fatal accident and that appellee was reacting to this emergency situation created by the decedent. Therefore, the appellee was not guilty of any negligence which created the emergency situation.

As previously indicated, we cannot agree that the emergency instruction is applicable in the factual situation here. The appellee's reactions to his discovery of the decedent's wrecked vehicle certainly did not create a continuing sudden emergency. The appellee had time to seek a telephone in the vicinity, to return to the scene of the wrecked vehicle, and to decide to seek assistance elsewhere. Thus there was no sudden emergency that caused the appellee, in the stress of the situation, to drive at a speed of 70 miles an hour with his lights dimmed.

Nor was a sudden emergency, within the meaning of the AMI instruction, involved when the appellee saw the decedent walking down the highway. Appellee was admittedly

driving 70 miles per hour and first saw the decedent 50 feet from the impact point. Appellee was traveling at a rate of approximately 102.6 feet per second and had less than ½ a second to react. The perception/reaction distance of a driver of a car traveling 70 miles per hour is 77 feet.[1] Therefore, as appellee testified, he had no chance to swerve or brake his vehicle.

The basis of the sudden emergency doctrine is that the driver be in a stressful situation which dictates a quick decision as to possible courses of conduct.

> The law does not require of the actor more than it is reasonable to expect of him under the circumstances which surround him. Therefore, the court and jury in determining the propriety of the actor's conduct must take into account the fact that *he is in a position where he must make a speedy decision between alternative courses of action* and that, therefore, he has no time to make an accurate forecast as to the effect of his choice. (Emphasis added.)

Restatement, Second, Torts § 296 Comment (b).

The sudden emergency instruction given to the jury in the case at bar is cast in terms of "judgment." The driver must be aware of the danger in a situation where he has a choice of action. In *Howard* v. *Tri-State Ins. Co.*, 253 Ark. 405, 486 S.W. 2d 77 (1972), we held it error for the trial court to give a sudden emergency instruction where there was "not one iota of testimony of either driver finding himself in an emergency situation and taking action accordingly." There, neither driver perceived a situation in sufficient time to indicate an emergency and make a decision between alternative courses of action. Likewise, in the case at bar, it was physically impossible for appellee to make a decisional act after seeing the decedent. Only the instructions on comparative negligence are applicable in this factual situation.

Reversed and remanded.

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[1]Uniform Table of Driver Stopping Distances, Including Perception-Reaction Distance, Am. Jur. 2d, Desk Book at 456.

FOGLEMAN and JONES, JJ., dissent.

JOHN A. FOGLEMAN, Justice, dissenting. I agree with the majority that the "emergency" in which appellee was acting, i.e., his search for one who was apparently the victim of a very serious automobile accident, was not the type of emergency envisioned by AMI, Civil, 614. This evidence was, of course, admissible in order for the jury to determine whether appellee exercised "the care a reasonably careful person would use under circumstances similar to those shown by the evidence in this case." But I disagree with the majority as to the circumstances under which the "sudden emergency" instruction is to be given.

The "sudden emergency" principle is nothing more or less than an extension or special application of the definition of simple negligence. The emergency is only one of the circumstances to be considered in determining what a reasonably careful person would do in that particular situation. Prosser, Torts, 2d ed., 169; 1 Blashfield, Automobile Law and Practice, 3rd ed., 342, § 51.9; 57 Am. Jur. 2d 439, § 91. The actor's conduct is not to be judged by the jury according to the circumstances as they appeared to him. The proper test is how the circumstances ought to have appeared to him in the exercise of ordinary care.

The most analogous case of which I am aware is *Baker* v. *Alt*, 374 Mich. 492, 132 N.W. 2d 614 (1965). It is an automobile accident case in which a 7-year-old bicyclist was injured when his bicycle collided with an automobile driven by Alt. The collision occurred at a street intersection controlled by a "flasher" light which flashed red to the boy who was pursuing his youthful companions, also on bicycles, who had preceded him through the intersection. The light was flashing yellow to Alt. All of the youths were on the wrong side of the street. The Michigan court said:

> Plaintiff assigns error also on the ground that the trial court injected into the case the "emergency" doctrine which had not been pleaded and for which no factual basis existed. We cannot agree. Defendant testified that he observed and was relying upon the red flasher

controlling Hall street traffic. When he was about 100 feet from the intersection, the 2 older boys came through the red light. They passed, according to his estimate, within 15 feet of his car. They testified at variance with their earlier deposed version, but, under either, it is apparent that the driver's attention was diverted by their appearance. Mr. Alt admits not having seen Billy nor having applied the brakes until the moment of impact. Whether his observations would have been different in focal point of attention, or whether his management of the vehicle would have been different had the older boys not entered the intersection at the time and under the circumstances they did, were proper considerations for the jury under the instructions as given. Appellant urges strongly that because defendant did not see plaintiff until the moment of impact no emergency in fact existed. We think this argument fails to take into account whether it could have been *because* of the appearance of the 2 cyclists in the wrong lane and the driver's natural retention of his attention upon them for some period that may have caused his failure to see the third youngster before he did. In actuality, the doctrine of "sudden emergency" is nothing but a logical extension of the "reasonably prudent person" rule. The jury is instructed, as was done here, that the test to be applied is what that hypothetical, reasonably prudent person would have done under all the circumstances of the accident, whatever they were. The trial judge here was meticulous in instructing the jury that the "emergency" rules could not be considered if defendant in any manner negligently contributed to causing the "emergency", and further, that he had to be making proper and reasonable use of his senses under the circumstances that had been testimonially described.

We do not here dilute the doctrine, which is our settled law under the cases cited by appellant, that the injection of an issue into a case not properly present under either the pleading or the evidence is reversible error.

In this instant case the defendant claimed the

> benefit of the "emergency" rule and requested instruction to cover it. There was evidence from which the jury could have found the instruction applicable or inapplicable. The instruction as given was correct.

To my way of thinking there are two distinct categories of cases, into either of which this case might fall, depending upon the jury's view of the facts. The first is the case in which there is no time for action, i.e., where the awareness of the actor and the impact are simultaneous, and the other is when there is only a split second for action. For this reason, I find no basis for the application of *Howard* v. *Tri-State Insurance Co.,* 253 Ark. 405, 486 S.W. 2d 76, as a matter of law. In that case, neither of the drivers involved was ever aware of the presence or existence of the other until the instant of the impact. Much more applicable is the case of *Johnson* v. *Nelson,* 242 Ark. 10, 411 S.W. 2d 661, where we held that the instruction was correctly given, rejecting the argument that the instruction was not justified in that case. The background facts were stated and are pertinent. They were:

> Appellee was driving east on Ninth Street in Little Rock, and when she had crossed or was in the act of crossing Cumberland Street she saw three boys (one being appellant) walking west along the sidewalk on the south side of Ninth Street. Suddenly appellee saw one of the boys (later identified as appellant) step or fall into the street. Appellee allegedly promptly tried to stop her car but could not do so before she hit and injured appellant.

One witness, whose testimony was critical on the point, was asked to tell where the driver's car was when one of the youths slipped or stumbled into the street, answered,

> Well, she looked like she was right on him. Just like it was going — that was it — she hit him.

When the emergency arises under the circumstances leaving no time within which to act, at least other than instinctively or intuitively, the actor cannot be negligent, unless he is shown to be unfit to act in such an emergency. *Miller* v.

Daniels, 86 N.H. 193, 166 A. 30 (1933); *Roberts* v. *Knorr*, 260 Wis. 288, 50 N.W. 2d 374 (1951); *Gross* v. *Gross*, 169 F. 2d 199 (7 Cir., 1948). See also, *Hasselbrink* v. *Speelman*, 246 F. 2d 34 (6 Cir., 1957); *Hormovitis* v. *Mutual Lumber Co.*, 120 So. 2d 42 (Fla. App., 1960). The emergency rule excuses inaction as well as improper action. *Hoehne* v. *Mittelstadt*, 252 Wis. 170, 31 N.W. 2d 150 (1948). See also, *Roberts* v. *Knorr*, supra.

I think the proper rule governing the application of the doctrine is stated in *Geis* v. *Hirth*, 32 Wis. 2d 580, 146 N.W. 2d 459 (1966), viz:

> There are two procedures which are used to apply the emergency doctrine. The court may apply the emergency doctrine as a matter of law, thereby absolving a party of all negligence in the action. The doctrine is generally applied as a matter of law when the time interval is so short that the reaction is practically instinctive or intuitive. However, the time element may not be so short as to constitute an emergency as a matter of law, yet it may be short enough to warrant a jury finding that an emergency existed. The *Cook Case*[1] clearly contemplates that the application of the doctrine may be for the jury.

In the same case, language stating the rule governing the giving of an instruction on the doctrine was quoted from an annotation at 80 ALR 2d 5, 20. It is peculiarly applicable here. It reads:

> "In determining whether an instruction on the doctrine of sudden emergency is warranted by the evidence, the testimony must be viewed in the light most favorable to the party invoking the doctrine. In making such determination, the court is not necessarily limited to or controlled by the testimony of or on behalf of such party."

In evaluating the situation at hand, every reasonable inference that a jury might draw from the evidence must be considered, keeping in mind that the testimony as to the time

[1] *Cook* v. *Thomas*, 25 Wis. 2d 467, 131 N.W. 2d 299 (1964).

when Bardwell appeared before McLaughlin's vehicle and the distance it traveled before striking Bardwell is that of McLaughlin. The jury was free to accept or reject any part of this testimony and could have concluded that the time interval or distance could have been greater, but still concluded that there was a sudden emergency created by Bardwell in walking in the service roadway facing traffic on the interstate lanes with headlights shining to his rear, and that, under all the facts and circumstances, McLaughlin was not negligent in contributing to the existence of the emergency, and his "inaction" was excusable.

If, in any view of the evidence the jury could have found a "sudden emergency" as defined in AMI 614, the instruction was proper. I feel that it was, and would affirm the judgment.

I would agree, however, that "sudden emergency" should not be an absolute defense and that comparative negligence instructions would be applicable and appropriate in any event.

I am authorized to state that Mr. Justice Jones joins in this dissent.

Allen A. RONE, Administrator of
The Estate of Ricky Lee RONE *v.*
Mildred G. MILLER, Administratrix of
The Estate of Edward Lee FLOYD

74-274 520 S.W. 2d 268

Opinion delivered March 10, 1975

Daggett, Daggett & Van Dover, for appellant.

Roscopf & Epes, P.A., by: *Charles B. Roscopf*, for appellee.

FRANK HOLT, Justice. Appellee, administratrix of the estate of Edward Lee Floyd, brought a wrongful death action against appellant, administrator of the estate of Ricky Lee Rone. A jury awarded appellee $17,071.04. From the judgment on that verdict comes this appeal.

In answer to appellee's complaint, the appellant denied that Ricky Lee Rone was the driver of the vehicle and alleged the affirmative defenses of joint venture, assumed risk and that the contributory negligence of the decedent equalled or

exceeded that of appellant's intestate. To substantiate these affirmative defenses, the appellant proffered evidence as to who drove the car, their activities, and the manner in which the automobile was driven preceding the accident. The court excluded the evidence. Appellant contends this was error and we agree.

There were no eye witnesses to the fatal accident in which appellee's decedent, appellant's decedent and another youth were instantly killed. In chambers preceding the trial, appellant's counsel made a proffer of proof in which he stated:

> I had purported to show that the fourth boy in the car, Allen Rone, was with these boys from approximately 8 o'clock until 12 to 12:30 that night; that during the course of the evening I would offer testimony from Allen Rone as to what they did, where they went, the manner in which the car was driven, who drove the car, speeds at which the car was driven, and that there were no protests by any passengers in the car as to the way the car was driven. There were no requests to be let out, and there were no admonitions to the driver during this course of time. **** [t]hat the car was driven in excessive speeds on numerous occasions, that the car was skidded to stop, jack rabbit starts, spinning out, and that the plaintiff's decedent was the principal driver of the car and principal person driving it in such a manner; that by the testimony of Gary Shelton, the defendant would show that at approximately 2:45 to 3 a.m., on the morning of September 2, 1972, the morning of the accident, the plaintiff's decedent, Eddie Floyd, drove through the Town of Elaine, through the main streets of Elaine at a high rate of speed, slammed his brakes on and slid to a stop in the main street of town, revving up his engine and then spun out in a direction toward the Town of Lambrook; that Gary Shelton, then taking this as a signal to want to race, started his car and drove behind in an attempt to catch Eddie Floyd at speeds of 75 to 80 to 85 miles per hour; that he was unable to do so, and that he lost sight of the Atkinson vehicle in that it outran him; that he then returned to Elaine about 3

> o'clock, proceeded toward his home at Oneida, and when he made the turn at Old Town Lake to go to Oneida, the car passed him and the wreck ensued approximately three miles from that corner.

When the court refused the proffer of proof, the appellant objected and the court agreed there would be continuing objections throughout the trial. Consequently, appellant made no further effort to adduce the proffered proof.

In *Hooten* v. *DeJarnatt*, 237 Ark. 792, 376 S.W.2d 272 (1964), we said:

> . . . . [w]here the sequence of events is not too remote in distance and time, then the preceding act or occurrence is admissible for the purpose of showing one continuing act or the probability that the circumstances of the preceding occurrence continued to exist at the time of the subsequent occurrence. Therefore, such preceding occurrence has some relation to the actual mishap.

Testimony as to acts of driving was permitted to show a course of conduct. See *Scott* v. *Shairrick*, 225 Ark. 59, 279 S.W.2d 39 (1955); *Madding* v. *State*, 118 Ark. 506, 177 S.W. 410 (1915); and *Carden* v. *Evans*, 243 Ark. 233, 419 S.W. 2d 295 (1967). In the case at bar, we are of the view that the rejected proffer of evidence was relevant to the affirmative defenses of joint venture, assumption of risk and the degree of contributory negligence by appellee's decedent. The proffered evidence tended to show that the appellee was aware, as a joint participant, of the asserted dangerous and reckless driving that had occurred during the evening and made no protests.

Appellant next contends that the trial court erred in refusing to permit evidence that Floyd, appellee's decedent, had been drinking during the evening and was intoxicated at the time of the accident. The proffered testimony of Allen Rone was that Floyd purchased and drank a six-pack of beer and ½ pint of whiskey during the evening. Further, a police officer would testify that the results of blood alcohol tests made on Floyd showed a content of 0.15%. The trial court

also refused appellant's requested instructions pertaining to intoxication and a passenger's standard of care.

Appellee recognizes that a passenger in an automobile must use ordinary care for his own safety. Appellee contends, however, that it would be speculative for the jury to find that Floyd's intoxication was a proximate cause of his death. In *Elmore, Admr.* v. *Dillard*, 227 Ark. 260, 298 S.W.2d 338 (1957), we cited 65A C.J.S. § 152:

> While an occupant of a vehicle is not required to exercise the same watchfulness as the driver, it is his duty to exercise ordinary care, including a reasonable use of his faculties of sight, hearing, and intelligence, to observe and appreciate danger or threatened danger of injury, and if he fails to do so, and such failure contributes to the injury complained of as a proximate cause, he is guilty of contributory negligence.

In the case at bar, although evidence of intoxication *alone* would not necessarily be sufficient to show that Floyd's negligence, as a guest, was the proximate cause of his death, it is, however, a circumstance to be considered by the jury along with all the other facts and circumstances as to whether Floyd exercised ordinary care as a passenger for his own protection. Appellant, of course, would be entitled to appropriate instructions based upon the evidence which actually is adduced in this respect.

Appellant next asserts the court erred in admitting a witness' testimony as to the speed of the vehicle, which he did not see in motion and was based solely upon the sounds made by the vehicle. Willie Shelton, who lives adjacent to the highway and near the crash site, was in bed and awake the night of the accident. His attention was attracted when the lights of the car "flashed in" his bedroom window. When asked, "[W]hen you first heard it what did it sound like?" Shelton responded "[L]ike somebody was overspeeding, and they was, to my knowledge." Further, it sounded like the car was being driven "real fast" because of the "noise of the engine." "Sounded like somebody had cranked up and was racing the engine. That is just the way it sounded." Several of

the cases cited by appellant hold such testimony inadmissible when the witness attempts to establish the speed in terms of miles per hour. Significantly, here the witness merely stated that from the sound of the engine it was "overspeeding" or being driven "real fast."

In *Pierson* v. *Frederickson*, 102 N.J. Super. 156, 245 A.2d 524 (1968), where the court approved similar testimony, it was aptly stated:

> Visual perception is not the exclusive sensory means of gaining personal knowledge; it can also be attained by means of auditory perception.

Likewise, in the case at bar, we are of the view that the testimony was admissible.

Appellant next contends the evidence was insufficient that Rickey Rone was driving the car and, therefore, the court erred in refusing appellant's motion for a directed verdict. We cannot agree. We affirm if there is any substantial evidence, viewed in the light most favorable to appellee, to support the verdict. *Members Mutual Ins. Co.* v. *Blissett*, 254 Ark. 211, 492 S.W.2d 429 (1973). The evidence shows that the car did not turn over as it skidded towards a tree. A witness who ran to the scene of the crash testified that none of the occupants appeared alive. They remained in the same positions until the police arrived. An officer testified that Ricky Rone's feet were pinned down by the emergency brake and the firewall. Of the three individuals in the car, there was evidence that he was the nearest to the driver's side. When viewed most favorably to the appellee, these physical facts constitute substantial evidence from which the jury could find Rickey Rone was the driver of the car.

Neither can we agree that the trial court should have directed a verdict because there was no substantial evidence of willful and wanton misconduct as is required by our guest statute. Ark. Stat. Ann. § 74-913 (Repl. 1957). In *Splawn, Admx.* v. *Wright*, 198 Ark. 197, 128 S.W.2d 248 (1939), we said:

> This court has laid down the rule that in order to sustain a recovery under our Guest Statute, *supra*, the negligence must be of a greater degree than even gross negligence, that it must be willful or wanton.

We quoted with approval:

> 'To be willfully negligent, one must be conscious of his conduct, and, although having no intent to injure, must be conscious, from his knowledge of surrounding circumstances and existing conditions, that his conduct will naturally or probably result in injury.' . . . .'Willful negligence means a failure to perform a manifest duty in reckless disregard of the consequences as affecting the life or property of another.'

This issue must be resolved from the facts and circumstances of each individual case. *McCall* v. *Liberty*, 248 Ark. 618, 453 S.W.2d 24 (1970).

The accident occurred at approximately 3 a.m. The speed limit on the level highway was 60 miles per hour and a sign warned drivers of the existence of an "S" curve. The weather was clear. Apparently, the first turn was negotiated. However, the car was in the southbound lane of the last turn traveling north when the car started to skid. The skid marks show the car went 114 feet then left the highway and skidded another 131 feet down a ditch. At this point the car slid another 84 feet across a side road and again entered the highway. The car slid sideways down the highway another 158 feet and off the highway on to an embankment. The car continued to slide sideways down the embankment 68 feet until it hit a tree. One witness testified that the car was "wrapped" around the tree to such an extent that one could almost touch the front and rear bumpers with outstretched arms. Photographs show the mangled condition of the car bent into a horseshoe shape around the tree. The three occupants were killed instantly.

Appellant argues that speed alone does not constitute sufficient evidence of willful and wanton negligence. In the case at bar, there are elements other than speed. A sign on

the highway warned the driver about the "S" curve he was approaching. It appears that appellant's decedent lived in the vicinity and had some familiarity with the highway. The car was on the wrong side of the road when the driver lost control. Furthermore, the late hour is a factor which the jury could consider. In *McCall* we found substantial evidence based on the following elements: abruptness of the curve, familiarity with the curve, tremendous speed, the late hour and appellant's drinking. As pointed out by the appellee, the only factor missing here is a drinking driver since the evidence is that appellant's decedent was not drinking. We have said that wanton conduct is:

> . . . . [a] mental attitude shown when a person, notwithstanding his conscious and timely knowledge of an approach to an unusual danger and of common probability of injury to others, proceeds into the presence of danger, with indifference to consequences and with absence of all care.

Carden v. *Evans*, 243 Ark. 233, 419 S.W.2d 295 (1967). In *Turner* v. *Rosewarren*, 250 Ark. 119, 464 S.W.2d 569 (1971), the court noted that drinking was not present in that case as in the *McCall* case; however, we said ". . . . racing would be an equivalent circumstance to show an attitude of arrogant or heedless recklessness." The facts in the case at bar present elements from which a jury might find "a conscious failure to perform a manifest duty in reckless disregard of natural or probable consequences to the life or property of another." *McCall* v. *Liberty*, *supra*.

Appellee asserts that the guest statute is unconstitutional. This contention was determined adversely to appellee recently in *White* v. *Hughes*, 257 Ark. 627, 519 S.W. 2d 70 (1975).

Appellant also asserts that the court erred in refusing to instruct the jury as to assumption of risk and joint enterprise. This argument is based primarily upon the admissibility of the proffered proof of previous reckless driving and intoxication, which we have previously discussed in points one and two. Appellant would be entitled to appropriate instructions

upon these affirmative defenses whenever evidence is adduced to justify them.

Appellant's final contention relates to the trial court giving the A.M.I. (Civil) 901 "rules of the road" instruction. Appellant does not object to the instruction other than it be modified. He asks that it be modified by striking the last paragraph or in the alternative by adding at the end of the paragraph ",but which may not necessarily be willful and wanton negligence." We think the proffered addition is correct except the word "misconduct" should be used instead of "negligence." See Ark. Stat. Ann. § 75-915 (Repl. 1957); *Harkrider* v. *Cox*, 230 Ark. 155, 321 S.W.2d 226 (1959); *Spence* v. *Vaught*, 236 Ark. 509, 367 S.W.2d 238 (1963); and *Shearer, Adm'r* v. *Newson, Spec. Adm'r*, 250 Ark. 33, 463 S.W.2d 642 (1971). Otherwise, in the case at bar, we can find no merit in the requested modifications.

Reversed and remanded.

DALLAS COUNTY PULPWOOD COMPANY et al *v.* F. J. STRANGE

74-281 520 S.W. 2d 247

Opinion delivered March 17, 1975

Shackleford, Shackleford & Phillips, by: *Norwood Phillips*, for appellants.

Huey and Vittitow, for appellee.

GEORGE ROSE SMITH, Justice. In this workmen's compensation case the Commission found (a) that the claimant Strange was an employee of the appellant pulpwood company at the time he was accidentally injured and (b) that the claimant's injuries arose out of and in the course of his employment. The circuit court affirmed. For reversal the appellant employer contends that there is no substantial evidence to support either of the Commission's findings of fact. We cannot agree.

Upon the first issue the proof shows that the appellant was supplying pulpwood to Continental Can Company. The appellant had some fifteen haulers who, like the claimant, cut the pulpwood (with the assistance of their own crews) and delivered it by truck to Continental's yard. The claimant had ostensibly purchased his truck from the appellant. The contract, not in writing, required the appellee to pay for the truck, plus the cost of liability insurance, at the rate of $3.00 per cord of wood. The employer's testimony indicated that the claimant's truck would be taken away if he hauled for anyone else. The Commission, upon adequate substantial evidence, made the following findings of fact upon the issue of the claimant's status as an employee:

> The Commission is convinced that the relationship in this case is definitely one of employee-employer. The respondent exercised complete control over the claimant. The claimant did not purchase the uncut timber

> with his own money and he was certainly not independent from the respondent for the very reason that he would lose his truck if he hauled pulpwood to any other dealer. The respondent had control of the cutting, loading, and hauling of the logs and, on occasion would travel to the cutting sites to make sure that correct procedures were used in the cutting and hauling process. There is no hard and fast rule to determine whether a person undertaking to do work for another is an employee or an independent contractor, and each case must be determined by its own particular facts and we are convinced that the particular facts in this case reveal that the claimant was, indeed, an employee.

The significant difference between this case and the case of *Pearson* v. *Lake Lawrence Pulpwood Co.*, 247 Ark. 776, 447 S.W. 2d 661 (1969), cited by the appellant, is that in *Pearson* the Commission found that the claimant was not an employee of the pulpwood company. We sustained the Commission's decision, because it was supported by substantial evidence. In the case at hand we again sustain the Commission's decision, for the same reason. That conclusion makes it unnecessary for us to consider the Commission's additional finding that the appellant is estopped to deny its workmen's compensation coverage of the appellee.

The second question is whether the Commission was justified by the evidence in finding that Strange's injuries arose out of and in the course of his employment. Here the facts are not really in dispute. On the day of his accidental injury Strange was engaged in buying a tractor for snaking logs out of the woods in his work for the appellant. During the morning Strange borrowed the $200 down payment from his employer, an individual doing business as Dallas County Pulpwood Company. Strange arranged to finance the rest of the purchase at a bank in Warren. Having completed those arrangements Strange went home to get his truck (the one he was using in his work) and tow the tractor to the worksite in the woods, where he would resume cutting timber the next morning. As Strange was backing out of his driveway he brushed against some limbs, fell to the ground, and was run over by one wheel of the truck.

There is ample authority to sustain the Commission's finding of fact that Strange was injured in the course of his employment. Blair states the general rule in his Reference Guide to Workmen's Compensation, § 9.32 (1974): "Preliminary preparations by an employee, reasonably essential to the proper performance of some required task or service, are generally regarded as being within the scope of employment and any injury suffered while in the act of preparing to do a job is compensable."

In *Fels* v. *Industrial Commission*, 269 Wis. 294, 69 N.W. 2d 225 (1955), the claimant was injured while repairing his own dump truck with the intention of taking it to the jobsite so that it would be ready to be loaded the following morning. The court upheld an award of compensation. In *McBride* v. *Preston Creamery Ass'n*, 228 Minn. 93, 36 N.W. 2d 404 (1949), the claimant was sanding an icy hill on a private road leading to his farm so he could drive his truck to work the next morning, to haul milk for his employer. In upholding the award the court said: "Here, it is undisputed that employee's employment required the use of the private road which he was attempting to sand at the time of his injury. Such work was in preparation for his employment the following day and was work which was clearly a necessary part thereof." Other pertinent cases include *Sieck* v. *Trueblood*, 485 P. 2d 134 (Colo. App., 1971); *Stapleton* v. *State Highway Commn. of Kansas*, 147 Kan. 419, 76 P. 2d 843 (1938); *Frandsen* v. *Industrial Commn. of Utah*, 61 Utah 354, 213 P. 197 (1923).

We do not imply, of course, that all injuries sustained by an employee in preparing for work are compensable. But here Strange was purchasing a tractor to be used in his work, his employer had approved the purchase by advancing the down payment, the whole transaction occurred during working hours, and Strange was injured while preparing to take the tractor to the jobsite. Those facts are substantial proof supporting the award.

Affirmed.

J. Fred Jones, Justice, dissent. I do not agree with the majority opinion in this case. As I view the majority opinion,

it comes close to nullifying a long line of our previous decisions wherein we have held that the Workmen's Compensation Act does not call for general accident insurance. See *Birchett* v. *Tuf-Nut Garment Mfg. Co.*, 205 Ark. 483, 169 S.W. 2d 574; *Barrentine* v. *Dierks Lbr. & Coal Co.*, 207 Ark. 527, 181 S.W. 2d 485; *Conatser* v. *D. W. Hoskins Truck Service*, 210 Ark. 141, 194 S.W. 2d 680, and the many other digested cases, too numerous to mention.

As I view the majority opinion in the case at bar, it goes beyond the outer limits in finding substantial evidence to support the findings of the Commission. When this court no longer distinguishes between substantial evidence and just any or some evidence in compensation cases, there will be little reason or need for appellate review.

It is my opinion in the case at bar, that there was substantial evidence Mr. Strange was an independent contractor but there was no substantial evidence he was an employee. In determining whether a workman is an employee or an independent contractor, we have heretofore considered the time for which he is employed; the right to terminate employment without liability; the method of payment for service, and the employer's obligation to furnish necessary tools and equipment. *Parker Stave Co.* v. *Hines*, 209 Ark. 438, 190 S.W. 2d 620. We have held that the most important test in determining whether a person is to do certain work as a contractor or a servant is the control reserved by the employer. *Parker Stave Co.* v. *Hines, supra.* We have held that if there is nothing in the employment contract showing intent of the employer to retain control or direction of manner or methods by which a party shall perform work, and no direction relating to physical conduct of such party or his employees in execution of work, the relation of independent contractor is created; but, if the employer retains control not only of the result, but also of the means and manner of performance, then the relation of master and servant is created. *Massey* v. *Poteau Trucking Co.*, 221 Ark. 589, 354 S.W. 2d 959. Mr. Strange testified that he and a Mr. Hooks were partners in the pulpwood business and that he had been in the business of hauling pulpwood about five years.

It appears rather inconsistent to me when practically the same evidence is found substantial in supporting opposite results or decisions. A comparison of the evidence in the case at bar with that in the case of *West* v. *Lake Lawrence Pulpwood Co.*, 233 Ark. 629, 346 S.W. 2d 460,[1] is a good illustration of what I mean. The primary difference in the relationship between Strange and Smith in the case at bar and that of West and Lawrence in the *West* case, was that West borrowed the money from the dealer Lawrence with which to purchase the timber he was hauling exclusively to Lawrence at the time of his injury; whereas, Strange had borrowed money from the appellant-dealer Smith with which to purchase the truck in which he had started to get a tractor he had recently purchased for himself, when he was injured.

Mr. Strange said his only purpose in contacting Mr. Smith relative to hauling pulpwood was the fact he and his partner Mr. Hooks already had some pulpwood cut and had no way to haul it. He said he and Hooks talked to Mr. Smith about a truck and Mr. Smith agreed to assist him in purchasing one. He said he agreed to haul his pulpwood to Mr. Smith and Mr. Smith agreed to hold out $3.00 on each cord of pulpwood hauled to him until the truck was paid for. He said that after acquiring the truck he and Mr. Hooks hauled to Smith the pulpwood they had already cut from timber they had purchased. He said he purchased pulpwood timber from a Mrs. Wilson who lived in front of his house, and also from a Mrs. Earnest under the same arrangement. He said that when he purchased timber, Mr. Smith would hold out of his pay the purchase price of the timber and would pay it to the owner direct. He said Smith would hold out $3.00 per cord to apply on the payment for the truck, and that Mr. Smith would then pay him the remainder on the basis of the number of cords he hauled. He said he had been hauling from Potlatch property about a month when he was injured; that Mr. Smith took him to the Potlatch tract and told him he could cut pulpwood anywhere he could get it off the tract. He said Mr. Smith requested them to haul twenty cords per week if they could get it. He said it was understood that if he hauled his pulpwood to some dealer other than Mr. Smith with

[1]Additional facts in *West* are set out in dissenting opinion.

the truck he was purchasing from Mr. Smith, that Mr. Smith would repossess the truck.

As to the circumstances surrounding the injury, Mr. Strange's testimony, as abstracted, is as follows:

> "On July 17, 1973, I was injured about three thirty, I guess. That day, I had come over here (to Warren) and bought a tractor. There was a fellow with me till I got back to my house. I saw Mr. Smith that day; we went to the bank and got the money to pay for the tractor. Mr. Smith met me out at Mr. Burgess Williams. I called him. The purpose of buying the tractor was that I was going to move it up there where we was at and snake wood with it. I needed it in my employment. I talked with Mr. Smith about buying a tractor. He lent me some money to make the downpayment on it. He did not co-sign my note. I went and got my wife to sign the note. He loaned me two hundred or two hundred and fifteen dollars to make the downpayment. I went home to get my truck to come back and hook on the front end of it with the loader, pick it up and carry it over yonder where he was working, was where I was started when the accident happened."

Mr. Strange said as he started to back the truck out of the driveway at his home, the limb on a tree caused him to fall out of the truck and a truck wheel rolled over him.

On cross-examination Mr. Strange testified as to how he and Mr. Hooks had some pulpwood cut and were unable to get it hauled when they went to see Mr. Smith. As abstracted, he then testified in part as follows:

> "It was sometime in January or February, 1973, when Marion Hooks and I went to see him. Marion Hooks and I were buying, paying for it together. We acquired the stumpage together and cut it together and we were looking for a way to haul it. I had seen Mr. Smith before at town but I never had talked with him prior to the time I talked with him in January or February, 1973. We talked at his house in Fordyce. Mr. Hooks and I were

> going in partners on the truck. It was our agreement that Mr. Smith would buy the truck and let us pay it out by the cord. We were going to pay him $1,850.00 for the truck. I guess it was our agreement that after the $1,-850.00 was paid, he would transfer the title to us. I more or less felt like I was renting the truck. I used it. I took it home with me at night. I bought gasoline for it. I paid for the maintenance on it like the tires, if it needed tires. I was going to get legal title to it when I paid off the $1,-850.00. Mr. Hooks and I dissolved our working relationship in July, 1973, shortly before the accident."

Mr. Strange said he hired some people to work for him when he was cutting pulpwood and that he paid them out of what he received. He said that when he cut a load of pulpwood, he would haul it to the woodyard where it was scaled and he was paid so much per cord. He said he furnished his own chainsaws and that Mr. Smith did not furnish anything but the truck that he was buying. He said he bought his own gasoline and maintained his truck and chainsaws. He said he hired his own employees and paid them. He said that Mr. Smith did not hold out anything from his pay for Social Security or for workmen's compensation insurance. He said Mr. Smith would come by where they were working in the woods occasionally but did not tell him how to cut, or how to load, or how to haul the pulpwood. He said that all Mr. Smith wanted was wood and if he did not haul and deliver the wood, he did not get paid. He said that on the day he was injured he did not haul any pulpwood but on that day he had gone to Warren and purchased a tractor. He said he wanted to buy a tractor and "use it in my businesss." He said he met Mr. Smith in Warren and told Smith he needed to borrow some money to make the downpayment on the tractor. He said Mr. Smith went with him to look at the tractor and loaned him $215.00. He said that James Vines, who had been helping him cut pulpwood, went to Warren with him and went with him to look at the tractor, but that he did not go to the bank with him. He said he borrowed the balance of the money for the tractor from the bank; that Mr. Smith did not sign his note but did drive him out to where his wife worked, and that she signed the note with him. He said when he obtained the money from the bank and took it, together with

what he had borrowed from Mr. Smith, he paid the tractor company for the tractor and obtained the title to it. He said the bank did not require the title after he got his wife to sign the note with him. He said Mr. Vines drove him home and that he went directly to "crank up" his truck and after he got the truck started, Vines left. He said he intended to use the winch on the back of the truck to lift the front end of the tractor and intended to haul the tractor to Calhoun County where he had been cutting pulpwood, but did not intend to haul it that day. He said the accident occurred as he backed the truck out of his driveway.

Mr. Smith testified that he was a pulpwood dealer for Continental Can, who owned the yard where his pulpwood was delivered, and that all the pulpwood delivered to their yard had to come through him as their dealer. He said he had approximately fifteen haulers who hauled to his yard; that these haulers employed their own help and paid their own help, and that Mr. Strange was no different from the others. He said he was selling Mr. Strange a truck under an arrangement whereby the truck would be placed in Strange's possession and that the bank would retain title to the truck in Smith's name. He said the bank retained a lien against the truck and when it was paid for at $3.00 per cord, the bank would then transfer the title to Mr. Strange. He said $3.00 per cord was withheld from the amount owing to Mr. Strange and he in turn paid it to the bank on the truck indebtedness. He said the $3.00 per cord also covered the liability and collision insurance on the truck. He said that after Mr. Strange was injured, Mr. Strange's crew continued to haul pulpwood with his truck.

As I view the evidence in this case, the nearest Mr. Strange came to making out a case of employee-employer relationship was the fact that Mr. Smith required him to deliver twenty cords of wood per week *if he could do so,* and that Mr. Smith required that he sell his pulpwood to him as long as he was paying on the truck Smith had sold him. In the *West* case, *supra,* the substantial evidence upon which the majority opinion was based is stated as follows:

"In the present case the evidence shows that appellee,

> Lake Lawrence Pulpwood Company, exercised no control over the details of the work. West's job was to haul pulpwood to the railhead at Norman where he was paid. The loading and hauling of the logs were left solely to the discretion of West. The evidence further shows that West did the cutting of the timber without the supervision of Lake Lawrence Pulpwood Company. The proof further shows that West furnished his own tools for the cutting and hauling of the logs, employed and paid his own employees and that he, West, was injured upon land leased by him for timber cutting. There is no evidence that West was required to work for any certain time or on any particular day and the method of payment to him was by the cord. The stipulated amount was paid for each cord of wood hauled, the price varying with the distance of the haul. The evidence does not show that the hauling of pulpwood was a part of the Lake Lawrence Pulpwood Company's operation, in fact the evidence indicates that the aforesaid company purchased only from haulers. The only evidence in any way contradicting this is that West testified that he *thought* he was covered by workmen's compensation."

The dissenting opinion pointed out, however, as follows:

> ". . . Tom West was not cutting timber upon land owned or rented in fact by him. The evidence shows that Lake Lawrence, through use of a straw man, had actually rented this land to avoid certain government regulations on cutting other parcels before completion of another. I find it even more significant that not only Tom West thought he was covered by workmen's compensation but evidently Lake Lawrence thought so too. Corroborated evidence was presented in the record to the effect that Lake Lawrence deducted a fixed sum per cord of wood cut for workmen's compensation insurance."

I find no substantial evidence that Strange was an employee of Smith or the pulpwood company, neither do I find any substantial evidence that the claimant's injury arose out of and in the course of his employment. Even if I could

agree that Strange was an employee, and that the injury he sustained as he started to drive the truck he was purchasing to pick up a tractor he had purchased and paid for with money he had personally borrowed, arose out of his employment, certainly I find no substantial evidence that the injury occurred while in the course of his employment. Strange was not being paid by the hour and he testified that he cut or hauled no pulpwood that day. He did say he had been to the woodyard but did not say what for. Certainly there was no evidence that Smith was paying Mr. Strange anything for looking at and purchasing the tractor. Mr. Strange simply went to town with another person and decided to buy a tractor. He found Mr. Smith in town and borrowed enough money to make the downpayment on the tractor and then went to the bank and borrowed the remainder of the purchase price of the tractor on his and his wife's note. He rode back home with the individual he had ridden to town with and was injured when he started back to town to pick up the tractor he had purchased.

I would reverse the judgment in this case.

STATE FARM FIRE AND CASUALTY COMPANY *v.* Phillip H. SWITZER and Roderick D. SWITZER

74-302 520 S.W. 2d 245

Opinion delivered March 17, 1975

Mays and Landers, for appellant.

Switzer & Switzer, for appellees.

LYLE BROWN, Justice. This action involves the issue of auto theft liability under a contract issued to appellees Phillip H. Switzer and Roderick D. Switzer, by appellant, State Farm Fire and Casualty Company. The chancellor held that the auto had been stolen by Hazel, wife of Roderick, and removed by her to Yakima, Washington. Based on the finding of theft, judgment was rendered in favor of Phillip Switzer for the lien he claimed against the truck as a result of his sale of the truck to Roderick Switzer.

There is little dispute about most of the essential facts. Roderick Switzer orally purchased the truck from his brother, Phillip, in July, 1972. It was agreed that Ovid Switzer, father of Roderick, would pay Phillip $1,000 on behalf of Roderick's interest in the truck; also, Roderick would pay to Phillip the amount of an indebtedness owed to GMAC, being approximately $1,000. Roderick was to repay Ovid after Roderick had finished paying the balance owed

GMAC. Shortly thereafter, Phillip and Roderick made application to appellant's local agent for insurance. On that instrument Roderick showed that he was to be the operator "100 per cent"; however, he also listed his wife, Hazel, as an operator.

Subsequent to the issuance of the policy domestic difficulties arose between Hazel and Roderick Switzer. On or about September 19, 1972, Hazel packed her belongings in the truck and drove from Crossett to Yakima, Washington, the previous home of the couple. The trip was made without prior notice to Roderick. There were later telephone conversations between the couple, Hazel making no pretense to conceal her location. No serious effort was made to seek return of the truck. A divorce was granted Roderick in November, 1972.

Phillip paid GMAC the balance owed the latter on the truck and took an assignment of GMAC's lien. Of the $1,000 which Ovid Switzer agreed to pay Phillip for his equity in the truck, Ovid Switzer made two payments totaling $200.00; that left an unpaid balance of $800 and Ovid Switzer made no further payments after the truck was removed to Yakima, Washington. Totaling the amount paid GMAC and the $800 unpaid by Ovid Switzer, the trial court found that Phillip suffered a loss of $1,592.27, for which he had an equitable lien on the truck, and entered judgment against appellant in that amount. Roderick dismissed his complaint at the close of the case.

Phillip testified that he notified the National Automobile Theft Bureau about the taking of the car. He said he looked for the truck in El Dorado, Arkansas, with the help of the police. He testified that he found out about the truck being kept in Yakima; he conceded he made no effort to get it back.

Roderick testified he notified the local sheriff of the taking of the vehicle. He said he gave Phillip two addresses at which Hazel might be found in Yakima. One of those addresses was the motel at which Hazel was working as manager. About Hazel's use of the truck, he conceded he listed Hazel as one of the users. He said he told the insurance

agent "that Hazel Switzer would drive the truck occasionally. As far as I was concerned and as far as State Farm is concerned, she was an authorized operator of that vehicle." Subsequent to arrival in Yakima, Hazel called and told Roderick she wanted to keep the truck. "I assumed she was claiming an interest in the truck. I made no effort to get the truck". Hazel Switzer wrote the checks for the payments made to GMAC, apparently on the joint bank account of husband and wife.

The parties to this action agree that the principal crucial question around which liability of State Farm revolves is whether the taking of the truck by Hazel Switzer and the removal thereof to Yakima, Washington, amounted to a theft. Hazel claimed some interest in the truck. She testified that she took the truck to Washington "because she had gone into her marriage with a car which she no longer had and with more than she was taking out of it [the marriage]". Thus she asserted a claim of right and asked Roderick to mail the registration papers to her. Also, the vehicle was not entirely within the classification of "the personal property of another". Additionally, the legal title to the truck was never changed from Phillip; the payment from Roderick and Hazel and the payment from Ovid for the benefit of Roderick gave Roderick and Hazel an equitable interest in the vehicle. Hazel's right to drive the truck without restriction was listed in the application for insurance by Roderick. Apparently a warrant was never issued against Hazel for theft. And, finally, there was no effort to repossess the truck made by either of the Switzers, notwithstanding they were apprised of the exact location of the vehicle. Under the peculiar circumstances of this case it is more reasonable to assume that Hazel took the truck under a claimed right than it is to assume her taking constituted a felonious theft. This being a chancery case, we try it de novo.

Reversed and dismissed.

PINE BLUFF NATIONAL BANK *v.*
Kenneth KESTERSON et al

74-231 520 S.W. 2d 253

Opinion delivered March 17, 1975

Jones, Matthews & Tolson, for appellant.

Owens & Fikes, for appellees.

JOHN A. FOGLEMAN, Justice. This litigation was commenced on May 12, 1971, by Kenneth Kesterson and Harold Norton, who, along with W. A. Harris, were trustees of Pine Bluff Memorial Park Cemetery Permanent Maintenance Fund (to which we will hereafter refer as Trust Fund). Their complaint was against Harris, the sole owner, president and manager of Pine Bluff Memorial Park Cemetery, and against Pine Bluff National Bank to recover for funds allegedly withdrawn from the bank account of the Trust Fund by W. A. Harris, with the approval and consent of Bank, in violation of the trust and without proper authority. They sought an accounting.

Bank answered and made Pine Bluff Memorial Park Cemetery, Inc., (which we will call the cemetery corporation) Arkansas Memorial Gardens, Inc. and Tommy H. Russell, Trustee, third party defendants. The defenses pleaded were the statute of limitations, laches, and the bar of Ark. Stat. Ann. § 85-4-406 (Add. 1961). Appellant alleged that it had promptly mailed statements of the account of Trust Fund to the address designated along with all items paid out of the account by it, all of which it contended it had paid in good faith. Bank also alleged that any unauthorized withdrawal by Harris had been ratified by the plaintiffs (who are appellees here) and by the State Cemetery Board. The allegations relating to ratification by the Cemetery Board were that this board had authorized the third party defendant Arkansas Memorial Gardens, Inc. (which we will call Memorial Gardens), to operate the cemetery owned by the cemetery corporation upon the consideration that it would restore the trust fund. Memorial Gardens denied these allegations generally but,

admitting that it had agreed to restore the Trust Fund, denied that its agreement relieved the bank from liability. Russell, as Trustee, admitted the transfer to him by Harris of certain assets to apply toward restoration of the Trust Fund, but denied that they were sufficient to do so and resisted a marshalling of assets.

Appellee Fikes, as receiver of Trust Fund, then intervened alleging that Kesterson and Norton were guilty of breaches of their duties as trustees in that they failed to keep themselves informed of the condition and status of the Trust Fund and failed to protect it from loss. He sought to recover $30,000 from them. The intervenor also sought recovery of $11,000 from appellant bank based upon their alleged negligence in permitting Harris on October 16, 1967 to withdraw $11,000 deposited in the Trust Fund on that date by check bearing his signature alone. He alleged that this deposit consisted of the proceeds of three certificates of deposit issued by Bank to Trust Fund which had been endorsed only by Harris. The signature card for both the checking account and the certificates of deposit required the signatures of all three trustees. The receiver also sought to recover $8,000 from Memorial Gardens and Russell, and impress a constructive trust on the cemetery corporation, Memorial Gardens, and any funds received by Russell for restoration of Trust Fund.

To all intents and purposes, Bank pleaded the same defenses to the intervening receiver's complaint. During the course of the litigation, Harris died and a special administrator was appointed to defend, and the receiver's complaint against Russell was dismissed with prejudice. Before trial, the receiver amended his complaint to allege, in the alternative, breach of contract by Bank.

The chancery court rendered judgment against Bank for $11,000 for permitting the certificates of deposit to be cashed on the signature of Harris. The case was tried upon an agreed statement of facts along with the testimony of several witnesses.

Most of the facts are undisputed and there is little dis-

pute about any of them. The three trustees purchased a certificate of deposit for $8,900 on June 2, 1965, at which time they signed signature cards for it and for the cemetery corporation checking account requiring signatures of all three on behalf of the Trust Fund. No address was given for the Trust Fund on the signature card, but the Depositor's contract included this clause: "The bank is authorized to mail statements and cancelled checks to the last address known to the bank." All three trustees signed a check for $1,100 on the Trust Fund checking account for the purchase of another certificate of deposit on October 11, 1965. This check accompanied the October 1965 bank statement. Statements of the account were mailed by Bank on November 30, 1965, January 31, February 28, March 31, April 29, May 31, August 31, November 30, and December 31, 1966. On November 22, 1966, the checking account was increased from $135 to $1,400.66 to bring the total Trust Fund up to $19,400.66, the amount that should have been paid into it according to an audit for the Arkansas Cemetery Board. The other assets of the fund were the two certificates of deposit which have previously been mentioned, and a deposit in Guaranty Federal Savings & Loan Association at Pine Bluff amounting to $8,000.

On December 13, 1966, a check signed only by Harris was used to purchase a certificate of deposit for $1,100. On December 21, the bank paid a check on the account to W. A. Harris for $400 signed by Harris only. This check and the one for the $1,100 certificate of deposit accompanied the statement mailed at the end of the month which showed the balance to be $0.66. On January 3, 1967, a check of Guaranty Federal Savings and Loan Association for $8,000, bearing the Trust Fund's endorsement by W. A. Harris, trustee and Charles Arnold, trustee, was deposited to the checking account. On the same day a check on the account for the same amount signed only by Harris was deposited to the operating account of the cemetery corporation and used for proper purposes except for $750 used to pay individual income taxes of Harris. The check on the Trust Fund was included in its bank statement for that month.

There were no other transactions involving the Trust Fund account until October 16, 1967, when the proceeds of the certificates of deposit issued by Bank for $1,000, $1,100 and $8,900 were deposited to the Trust Fund checking account on endorsement by Harris only. A check on the account for $11,000 payable to the cemetery corporation signed by Harris only was paid on the same date. A statement showing the deposit to the Trust Fund Account and the payment of the check, along with the check itself was mailed to the usual address at the end of the month. It showed a balance of $0.66. There were no further transactions involving this account until March 12, 1970, when it was closed. All bank statements, at least since August 1966, were mailed to 6707 Dollarway Road, Pine Bluff at which the cemetery corporation office was located. This address for Trust Fund was shown on the certificate of deposit issued December 13, 1967 and on Bank's ledger sheet and statements at all times after September 30, 1965. The address shown on the ledger sheet was the address used for mailing statements which were folded so that the address thereon was exposed through the window envelope by which the statement was transmitted.

An audit report made by an auditor employed by the Arkansas Securities Division showed a liability of the cemetery corporation to the Trust Fund of $32,195.94 as of June 24, 1970. The last previous audit had shown a liability of $27,875.06 on September 16, 1969. There was no other audit or examination after that of November 1966. The $19,400.66, shown to be the amount due the Trust Fund then was the only money or assets which ever came into the Trust Fund. The auditor's review of the payroll account of the cemetery corporation into which the $11,000 deposit had been made on October 16, 1967, showed that except for three or four transfers made to other cemeteries and a check for $3,008 to Bank the money was expended for routine cemetery expenses. It was stipulated that only $5,160.77 of the $11,000 was expended for improper purposes.

The office of the cemetery corporation was located at 6707 Dollarway Road. The two trustees who instituted the

action first learned of the problems relating to the Trust Fund account about March 10, 1970, when Norton was present at a meeting of the Arkansas Cemetery Board, after having read a newspaper report about alleged irregularities. He called his attorney from the meeting and directed him to file suit. Norton testified that he never received or requested a statement of the bank account, although he knew they would be rendered and assumed they would go to the cemetery corporation office.

Russell appeared before the Arkansas Cemetery Board on March 10, 1970, on behalf of Memorial Gardens to obtain a permit to continue the operation of the cemetery. He then agreed on behalf of Memorial Gardens to pay a total of 25% of sales proceeds, rather than the required 15%, to Trust Fund, in order to reestablish it. As a result, the permit was issued and Memorial Gardens has continued to operate the cemetery. On March 25, 1970, Harris executed three deeds conveying property to Russell, as Trustee. Russell testified that Memorial Gardens had once owned the lands of the cemetery corporation and had foreclosed the Harris company on an indebtedness which appears to have amounted to $55,000. He stated that from accounts receivable of the cemetery corporation and other funds put into the Trust Fund about $20,000 of a deficit of approximately $40,000 had been restored. A part of this was attributable to the property Harris deeded to Russell, as Trustee, which Russell, in turn, deeded to the receiver. Russell said the receiver realized some $11,355.92 net from the Harris equity, a substantial part of which was payable in monthly installments of $176.53. Another $5,000 was contributed by Memorial Gardens. He disavowed any agreement to relieve the bank or any trustee of any liability to the Trust Fund.

Jim Hood, a director of Bank, who also attended the Arkansas Cemetery Board meeting in an effort to purchase the business and operate it, testified that Russell's agreement would have relieved the bank of liability.

The chancellor found no evidence of wrongdoing on the part of the trustees, that $5,260.77 of the $11,000 tran-

saction on October 16, 1967 was misappropriated by Harris, but that the evidence seemed to indicate the remainder was properly used; that there was no evidence that Russell agreed to exonerate the bank.

On appeal, Bank contends that the claim of the trustees and the receiver was barred by the absolute time limit of Ark. Stat. Ann. § 85-4-406 (Add. 1961), by the statute of limitations and by laches. The statute reads:

> Customer's duty to discover and report unauthorized signature or alteration.
>
> (1) When a bank sends to its customer a statement of account accompanied by items paid in good faith in support of the debit entries or holds the statement and items pursuant to a request or instructions of its customer or otherwise in a reasonable manner makes the statement and items available to the customer, the customer must exercise reasonable care and promptness to examine the statement and items to discover his unauthorized signature or any alteration on an item and must notify the bank promptly after discovery thereof.
>
> (2) If the bank establishes that the customer failed with respect to an item to comply with the duties imposed on the customer by subsection (1) the customer is precluded from asserting against the bank
>
> (a) his unauthorized signature or any alteration on the item if the bank also establishes that it suffered a loss by reason of such failure and
>
> (b) an unauthorized signature or alteration by the same wrongdoer on any other item paid in good faith by the bank after the first item and statement was available to the customer for a reasonable period not exceeding fourteen (14) calendar days and before the bank receives notification from the customer of any such unauthorized signature or alteration.

(3) The preclusion under subsection (2) does not apply if the customer establishes lack of ordinary care on the part of the bank in paying the item (s).

(4) Without regard to care or lack of care of either the customer or the bank a customer who does not within one (1) year from the time the statement and items are made available to the customer (subsection (1)) discover and report his unauthorized signature or any alteration on the face or back of the item or does not within three (3) years from that time discover and report any unauthorized indorsement is precluded from asserting against the bank such unauthorized signature or indorsement or such alteration.

The following committee comment is enlightening:

5. Whether the preclusion rule of subsection (2) operates or does not operate depends upon determinations as to ordinary care of the customer and possibly of the bank. However, subsection (4) places an absolute time limit on the right of a customer to make claim for payment of altered or forged paper without regard to care or lack of care of either the customer or the bank. In the case of alteration or the unauthorized signature of the customer himself the absolute time limit is one year. In the case of unauthorized indorsements it is three years. This recognizes that there is little excuse for a customer not detecting an alteration of his own check or a forgery of his own signature. However, he does not know the signatures of indorsers and may be delayed in learning that indorsements are forged. The three year absolute time limit on the discovery of forged indorsements should be ample, because in the great preponderance of cases the customer will learn of the forged indorsements within this time and if in any exceptional case he does not, the balance in favor of a mechanical termination of the liability of the bank outweighs what few residuary risks the customer may still have. In thirteen of the existing statutes there are

> limitations on the liability of a bank for payment of items bearing forged indorsements which limitation periods range from thirty days to two years. In the remaining twenty-seven no provision is made for forged indorsements.

If there be any doubt about the applicability of the staute, it is easily resolved by the comment.

The principal question to be resolved is whether the checks drawn on Trust Fund checking account were paid on unauthorized signatures. Appellee Fikes contends they were not, because no signatures were forged and the signature of Harris was authorized. From reading the statute, the committee comment and the U.C.C. definition, we conclude that the coverage of § 85-4-406 is much broader than that and that the check was paid upon an "unauthorized signature." The authorized signature of Trust Fund required the joint signatures of three trustees. Any purported signature of Trust Fund with fewer signatures was an unauthorized signature. See, Ark. Stat. Ann. § 85-1-201 (28), (30), [Supp. 1973]; 85-3-403 (1), (3) [Add. 1961]. One of the purposes of the section was to replace existing state statutes which varied considerably in their applicability to unauthorized signatures as distinguished from forgeries. See Committee Comment 1. An unauthorized signature is one without actual, implied or apparent authority and includes a forgery. Ark. Stat. Ann. § 85-1-201 (43) [Add. 1961). It includes a signature made by an agent in excess of his authority. Comment 1 Ark. Stat. Ann. § 85-3-404 [Add. 1961]. The intention to extend the statute to cover unauthorized signatures beyond those which are forgeries seems clear to us. See *W. P. Harlin Construction Co.* v. *Continental Bank & Trust Co.*, 23 Utah 2d 422, 464 P. 2d 585 (1970); *Stauffer* v. *Oakwood Deposit Bank*, 19 Ohio App. 2d 68, 4800 2d 127, 249 N.E. 2d 848 (1969); *Salsman* v. *National Community Bank of Rutherford* v. *Breslow*, 102 N.J. Super. 482, 246 A. 2d 162 (1968). It also seems clear that the signature which was "unauthorized" is that of Trust Fund. For this reason, we disagree with the reasoning and result of *Wolfe* v. *University National Bank*, 270 Md. 70, 310 A. 2d 558 (1973) relied upon by appellees.

The trustees could not and the receiver cannot, as he attempts to do, shift the responsibility to the bank because Harris was regularly at the office of the cemetery company to which the bank statements were mailed, but the other trustees were not. A depositor is not excused from the discharge of his duty to examine the statement of his bank account with reasonable dispatch and care and to inform the bank of any errors by entrusting its performance to an incompetent or dishonest agent in the absence of reasonable diligence in supervising his conduct. The depositor must be held chargeable with knowledge of all the facts a reasonable and prudent examination of his bank statement and the accompanying items would have disclosed if made by one who had not participated in unauthorized withdrawals from the account. *Huber Glass Co.* v. *First National Bank of Kenosha,* 29 Wis. 2d 106 (1965), 138 N.W. 2d 157 (1965); *Morgan* v. *United States Mortgage & Trust Co.*, 208 N.Y. 218, 101 N.E. 871, LRA 1915 D 741 (1913) and accompanying annotation; *Bank of Thomas County* v. *Dekle,* 119 Ga. App. 753, 168 S.E. 2d 834 (1969); *Myrick* v. *National Savings & Trust Co.,* 268 A. 2d 526 [D.C. Ct. Ap. (1970)]; *Exchange Bank & Trust Company* v. *Kidwell,* 463 S.W. 2d 465 [Tex. Civ. App. (1971)]; see also, *Westport Bank & Trust Co.* v. *Lodge,* 164 Conn. 604, 325 A. 2d 222 (1973); *Faber* v. *Edgewater National Bank,* 101 N.J. Super. 354, 244 A. 2d 339 (1968); *Rainbow Inn, Inc.* v. *Clayton National Bank,* 86 N.H. Super 13, 205 A. 2d 753 (1964); *Screenland Magazine* v. *National City Bank,* 42 N.Y.S. 2d 286 (1943).[1]

It has also been held that the failure of joint depositors to discuss among themselves or inquire of their bank regarding their failure to receive bank statements over a three month period of time was evidence of negligence on the part of the depositors. *Terry* v. *Puget Sound National Bank,* 80 Wash. 2d 157, 492 P. 2d 534 (1972).

Section 85-4-406 (4) is not a statute of limitations. It creates an absolute bar because it is a rule of substantive law which is a condition precedent to an action. *Billings* v. *East River Savings Bank,* 33 A.D. 2d 997, 307 N.Y.S. 2d 606 (1970);

[1]We are not unaware of *Jackson* v. *First National Bank of Memphis,* 403 S.W. 2d 109 (Tenn. App. 1966) which appears to be contra, but feel that the rule stated is far preferable and more nearly in harmony with the express purpose of § 85-4-406 (4).

Stauffer v. *Oakwood Deposit Bank*, 19 Ohio App. 2d 68, 249 N.E. 2d 848 (1969). See also *Gennone* v. *Peoples Nat'l Bank*, 51 Pa. D. & C. 2d 529, 9 U.C.C. Rep. 707 (1971); *Dobbins* v. *National Union Ins. Co.*, 70 Misc. 2d 1087, 335 N.Y.S. 2d 480 (1972); *Terry* v. *Puget Sound National Bank*, 80 Wash. 2d 157, 492 P. 2d 534 (1972).

Since items on which the complaint is based were paid by Bank on unauthorized signatures, the one year statutory period applied to the liability of Bank on the checks written by Harris. The endorsements on the certificates of deposits should also have been discovered by the trustees by reason of their deposit to the Trust Fund checking account. Suit was not filed for more than three years thereafter, but there is evidence that some report was made to Bank within the three year statutory period relating to endorsements. No loss was sustained by Trust Fund, however, by reason of the endorsements, because the proceeds were deposited to the Trust Fund account. *Starkey Construction, Inc.* v. *Elcon, Inc.*, 248 Ark. 958, 457 S.W. 2d 509. See also, *Davis Aircraft Products Co., Inc.* v. *Bankers Trust Co.*, 319 N.Y.S. 2d 379 (1971). The misappropriation by Harris resulted from the payment of checks on his signature alone.

There was no evidence of lack of good faith on the part of the bank, so intervenors' action is clearly barred by § 85-4-406 (4). *Mansfield* v. *Jimden Realty Corp.*, 36 A.D. 2d 623, 319 N.Y.S. 2d 381; *Hardex-Steubenville Corp.* v. *Western Pa. National Bank, 446 Pa. 446, 285 A. 2d 874 (1971).*

Appellee - intervenor, in endeavoring to avoid the impact of Ark. Stat. Ann. § 85-4-406, argues that the cause of action on the certificates of deposit did not accrue until demand was made by the depositor and was not barred until five years later. Neither the trustees nor the receiver based the action against Bank on the certificates of deposit. The cause of action finally stated in the "Amended Intervention Complaint" is based entirely upon the payment of the $11,000 check drawn on the account with the signature of Harris only on October 16, 1967. We have previously pointed out that there was no loss occasioned by the deposit of the proceeds of the certificate of deposit in the bank account.

Appellee contends that the ordinary rules should not be applied to a trust fund. There is no exception made in any of the pertinent U.C.C. provisions. Furthermore, our case law does not support that argument. It is true that where a bank permits a trustee to withdraw funds from the bank account of the trust with notice that the trustee is commiting a breach of trust, it is liable for participation in the breach. *Drainage Dist. No. 7* v. *Citizens Bank*, 205 Ark. 435, 170 S.W. 2d 60. But this liability does not attach in the absence of notice of an intention on the part of the trustee to misappropriate the trust fund. *City of Helena* v. *First National Bank of Helena*, 173 Ark. 197, 292 S.W. 140; *Church of God in Christ* v. *Bank of Malvern*, 212 Ark. 971, 208 S.W. 2d 770. There is nothing to indicate that the bank had any notice that Harris intended to misappropriate funds withdrawn from the Trust Fund checking account and paid to the cemetery corporation. This would be a normal procedure in accomplishing the purposes of the trust.

The only evidence relied upon by appellee to show that Bank had notice of an intention on the part of Harris to misappropriate funds is testimony showing that sometime after the transfer of $11,000 from Trust Fund to the cemetery corporation account a check for $3,008 payable to Bank was drawn on the cemetery corporation account. Appellee contended that this testimony was sufficient to charge the bank with notice, when coupled with evidence that in December 1966, Bank honored a check on the Trust Fund account for $400 payable to Harris individually and that, after a transfer of $8,000 from the Trust Fund account to the cemetery corporation account in January 1967, $750 from the cemetery corporation account was used to pay personal income taxes of Harris. There was no evidence relating to the purpose for which the check for $3,008 was drawn. It was not shown that it went to pay personal obligations of Harris. We do not agree with appellee and find the evidence insufficient to charge the bank with notice of the intention of Harris to misappropriate trust funds.

We think the claim of the trustee and receiver was also barred by laches. If a claim had been timely asserted, the bank might have recovered losses from the assets of Harris or from the cemetery corporation.

Appellees concede that the point raised on cross-appeal need not be considered unless we agree with their view of the law on the direct appeal. Since we do not, we consider the cross-appeal to be mooted.

The decree is reversed and the cause dismissed.

HARRIS, C.J., not participating.

DIVERSA, Inc., Employer, COTTON BELT INSURANCE COMPANY, Insurance Carrier
v. Lee DAVIS, Employee

74-307 520 S.W. 2d 243

Opinion Delivered March 17, 1975

Killough & Ford, by: *Robert M. Ford,* for appellants.

Pickens, Boyce, McLarty & Watson, by: *James A. McLarty,* for appellee.

J. FRED JONES, Justice. This is a workmen's compensation case. Lee Davis, the claimant-appellee, sustained a ruptured disc in the course of his employment by the appellant-employer, Diversa, Inc. Following surgical intervention Davis filed a claim for workmen's compensation benefits and the claim was controverted in its entirety by the employer and its

compensation insurance carrier. Upon hearing, the Referee found the injury compensable and awarded compensation including a thirty per cent permanent partial disability to the body as a whole. The full Commission on review adopted the findings and award of the Referee and the circuit court affirmed the Commission.

On appeal to this court the appellants rely on the following point for reversal:

> "The award of the referee, that has been affirmed by the full commission and the circuit court, for permanent partial disability in the amount of thirty percent (30%) to the body as a whole commencing on May 19, 1973, and continuing forward for one hundred thirty-five (135) weeks, as a result of said alleged accident, is not supported by substantial evidence introduced and presented at the hearing."

We agree with the appellants that there was no substantial evidence to support the award of thirty per cent permanent partial disability to the body as a whole. As already stated, the appellee sustained a ruptured disc as a result of his injury and following conservative treatment for a period of time, a lumbar laminectomy was performed by Dr. Ray Jouett in Little Rock and an extruded nucleus pulposus was removed from the L5-S1 level on the left.

Dr. Jouett's final report was submitted on May 24, 1973, and this report in pertinent parts reads as follows:

> "Mr. Davis was seen in the office on May 18, 1973.
>
> He continues to make fine progress since his surgery and at the present time is essentially without difficulty. In fact, all of his pain has disappeared.
>
> Neurologically, he has no evidence on walking of any weakness and there is no limp. He can bend forward and touch his toes. Hyperextension and lateral rotation were thought full. His reflexes revealed diminished ankle jerk bilaterally. His knee jerks were thought

within normal limits. There was no sensory abnormality and no evidence of atrophy.

I think this man has had a very fine result from his surgery. Some three months have passed and I feel he has had a good period of healing and he may now return to work. I feel that he needs to be cautious for at least another three to six months about bending over and picking up 50 to 60 pound weights, but aside from that I feel he can be at work.

This man had a large extrusion of the nucleus pulposus and I feel that even though he is relatively asymptomatic that this man should be considered for some permanent partial residual disability affecting the body as a whole, perhaps in the range of 10 per cent."

As to the only point presented on this appeal, we are of the opinion that this case is controlled by our decision in *Ray* v. *Shelnutt Nursing Home,* 246 Ark. 575, 439 S.W. 2d 41, rather than such cases as *Johnson County* v. *Timmons,* 249 Ark. 1106, 463 S.W. 2d 365, and *Wilson & Co.* v. *Christman,* 244 Ark. 132, 424 S.W. 2d 863, apparently relied on by the Referee and the Commission. The *Timmons* and *Christman* cases are easily distinguishable on their facts from *Shelnutt* and the case at bar. In the case at bar there was simply no evidence in support of an award for permanent partial disability in excess of Dr. Jouett's estimate of "perhaps in the range of 10 per cent."

The compensability of the injury was hotly contested before the Commission and, as the attorney for the appellee points out in his brief, most of the evidence in this case was directed toward proof of the compensability of the injury rather than the extent and duration of the disability. Apparently a good job was done in this connection as evidenced by the fact that the appellants have only appealed in connection with the permanent partial disability award.

As to his physical condition following his surgery, Mr. Davis testified as follows:

"Q. Tell us in your own words how your back is getting along following your discharge from Dr. Jouett?

A. It is doing all right.

Q. Do you notice any particular pain or any impairment in your back at the present time?

A. No, I don't."

Mr. Davis said he continues to be cautious about lifting. He also said he had not been able to find employment that he could do but did not state what he felt he could or could not do. He said he had not attempted to return to his former employment but he did not say why. Mr. Davis did not mention anything he has attempted to do and gave no reason for not being able to find employment in something he could do.

Mrs. Billie Davis, the wife of the appellee, testified as to her husband's disability, apparent pain and symptoms prior to his surgery, and she testified he was getting no better until he underwent the surgery. She then testified as follows:

"Q. Has he appeared to have a fairly satisfactory recovery following his discharge from the hospital down there and his surgery?

A. Yes, he is doing just fine now."

In the case at bar there was simply no evidence in the record, other than the medical report above referred to, that the appellee had sustained any permanent disability at all as a result of his injury. The burden, of course, was on the claimant to prove that he had permanent disability and the extent of it.

The judgment of the trial court is reversed and this cause remanded with directions to remand to the Commission for entry of an award of ten per cent permanent partial disability.

Reversed and remanded.

James E. GARRETT, Social Security No. 430-32-2620 *v.* Dale CLINE, Director of Labor

74-312 520 S.W. 2d 281

Opinion delivered March 17, 1975

Shaw & Ledbetter, for appellant.

Herrn Northcutt, for appellee.

J. FRED JONES, Justice. This is an appeal by James E. Garrett from a circuit court judgment sustaining a decision of the Arkansas Employment Security Division Board of Review, which denied appellant Garrett's claim for benefits under the Arkansas Employment Security Act [Ark. Stat. Ann. § 81-1101 et seq. (Supp. 1973)].

The facts are not in dispute in this case and only a question of law is involved. The facts are these: Mr. Garrett sustained an industrial injury on August 17, 1971, while in the employment of Delrod Enterprises. The injury was compen-

sable under the Arkansas Workmen's Compensation Law and he was paid workmen's compensation benefits during the course of his temporary disability extending from the date of his injury on August 17, 1971, through June 7, 1973, when he was released from further medical treatment. On June 19, 1973, Mr. Garrett was awarded some permanent partial disability under the Workmen's Compensation Law as a result of his injury.

The evidence indicates that in June, 1973, Mr. Garrett notified his former employer that he had been released by the doctors as able to return to his regular employment and that he was available and physically able to return and perform the work he had previously done. When Mr. Garrett was not put back to work by his former employer, he filed the claim here involved for unemployment benefits and the claim was denied upon the basis that during his base period, April 1, 1972, through March 31, 1973, he received no wages and performed no personal services within the meaning of the Arkanaas Employment Security Act. The circuit court affirmed and on his appeal to this court Mr. Garrett has designated the point he relies on for reversal as follows:

> "The trial court was in error in denying claims for benefits under the Arkansas Employment Security Act to an individual who left his last employment because of injury and disability."

The question of law involved is broader than the mere question of disqualification from receiving benefits under the Act. The question involved in this case is whether Mr. Garrett was eligible for benefits under the Act and, if so, whether he was disqualified from receiving benefits under the Act. Apparently the decision of both the Appeals Referee and the Board of Review was based on the proposition that during the required base period from April 1, 1972, through March 31, 1973, Mr. Garrett received no wages since he performed no personal services and he was thus ineligible for benefits under § 2 (n) of the Employment Security Act, which defines wages as "All remuneration paid for personal services."

It was apparently Mr. Garrett's contention before the

Referee and Appeals Board, that the workmen's compensation benefits he received during the period of his disability constituted, and should be considered as, "wages" in so far as wages apply to the required base period and, that Mr. Garrett was entitled to benefits under § 81-1106 (a) which provides that no worker shall be disqualified for benefits who was required to leave his work because of illness, injury or disability.

Mr. Garrett correctly points out in his brief that in construing a statute, every effort must be made to give effect to the legislative purpose in enacting the statute and that strict and literal meaning of any section of a statute ought not to prevail where it is opposed to the intention of the Legislature; that the Arkansas Employment Security Act is remedial in nature and must be liberally construed in order to accomplish its beneficent purpose and, he argues that in accomplishing the legislative purpose in the cases here involved, the judgment of the circuit court should be reversed. Mr. Garrett then complains that the trial court, in denying benefits, applied a very strict construction to the statutory definition of wages (§ 2 [n] of the Act) and construed the term to mean "all remuneration paid for personal services." He argues that this interpretation is not only against the express legislative intent to provide compensation to individuals who are involuntarily unemployed, but is in direct contravention of § 5 (a) of the Act, Ark. Stat. Ann. § 81-1106 (a) (Supp. 1973), which provides that:

> ". . . no individual shall be disqualified . . . if after making reasonable effort to preserve his job rights, *he left his last work because of illness, injury or disability.*" (Appellant's emphasis).

He argues that even under strict construction of the statute an ambiguity would still be apparent because the legislative intent is clearly set forth in the Act to be " . . . for the benefit of persons unemployed through no fault of their own." Citing Ark. Stat. Ann. § 81-1101 (Repl. 1960). The appellant then argues that the express legislative intent when coupled with § 5 (a) of the Act clearly shows that no individual could be more entitled to benefits than the appellant — involuntarily

unemployed because of severe injuries he sustained while on the job.

The appellant then points out what he considers to be discriminatory and inequitable results permissible under the statute as interpreted by the trial court and argues that a claimant who suffers injuries in the course of his employment which render him totally disabled for a period of only nine months, could qualify for unemployment benefits; whereas, a claimant who suffered a more severe injury and becomes totally disabled for a period of 22 months, would not be eligible for unemployment compensation because he received no "wages" during his "base period."

We are not unsympathetic to the appellant's view as to this apparent unequitable result and we agree that legislative intent should be considered in statutory construction where the legislative intent is important to the decision and is unclear. We are of the opinion, however, that the appellant may have confused his *eligibility* under the Act with his *disqualifications* to receive benefits, but we are of the opinion that the Legislature did not share that confusion. As to liberal interpretation to accomplish the legislative intent, in 76 Am. Jur. 2d, § 6, at p. 880, is found the following language:

> "[I]n the liberal construction to be accorded an unemployment insurance statute so as to afford all the relief that its language indicates the legislature intended to grant, the interpretation should not exceed the limits of the statutory intent. Similarly, a court is not at liberty to read into the statute provisions which the legislature did not see fit to incorporate, nor may it enlarge the scope of its provisions by an unwarranted interpretation of the language used."

In 76 Am. Jur. 2d, § 32, at p. 916, is found the following:

> "The purpose of the eligibility and disqualification provisions of an unemployment compensation statute is to protect the state unemployment compensation fund against claims of individuals who would prefer benefits to jobs. The eligibility and disqualification provisions,

being in pari materia, are to be construed together. Some acts provide that no employee is entitled to benefits unless he is suffering total unemployment as defined therein, and unless wages amounting to a specified sum have been paid to him within his base year, and unless he has registered as unemployed and reported for work as required by the act, is not customarily 'self-employed,' and has not been discharged for certain specified reasons. With respect to the issue of whether an individual has earned sufficient wages in a given period to qualify for unemployment compensation benefits, it has been held that wages actually paid, rather than wages earned, within a statutory base period control eligibility for unemployment benefits."

Ark. Stat. Ann. § 81-1105 (Repl. 1960 and Supp. 1973), as it applies to the question here involved, provides as follows:

"An insured worker shall be eligible to receive benefits with respect to any week only if the Commissioner finds that— * * *

(e) He has during his base period been paid wages for insured work equal to not less than thirty [30] times his weekly benefit amount and has wages for insured work in at least two [2] quarters of his base period."

Ark. Stat. Ann. § 81-1103 (Supp. 1973) provides as follows:

" * * *

(a) On and after July 1, 1972, 'Base Period' means the first four (4) of the last five (5) completed calendar quarters immediately preceding the first day of the benefit year. . . .

(c) On and after July 1, 1972 'benefit year' with respect to any individual means the twelve (12) consecutive month period beginning the first day of the calendar quarter in which he first files a valid claim for benefits in accordance with Arkansas Statutes. . . . "

Ark. Stat. Ann. § 81-1104 (Supp. 1973) provides as follows:

"(b) For all benefit years beginning on and after July 1, 1971, an insured worker's weekly benefit amount shall be an amount equal to one-twenty-sixth [1/26] of his total wages for insured work paid during that quarter of his base period in which such wages were highest.
No weekly benefit amount shall be less than $15.00.
No maximum weekly benefit amount shall be greater than: Sixty per cent [60%] of the State average weekly wage for insured employment for the calendar year 1970, effective for benefit years beginning July 1, 1971 through June 30, 1972. Sixty per cent [60%] of the State average weekly wage for insured employment for the calendar year 1970, effective for benefit years beginning July 1, 1972 through June 30, 1973. Sixty-six and two-thirds per cent [66 2/3] of the State average weekly wage for insured employment for the previous calendar year for benefit years beginning July 1, 1973 and on each July 1 thereafter.

Weekly benefit amounts which are not in even multiples of one dollar [$1.00] shall be computed to the next higher multiple of one dollar [$1.00].
On the first day of June of each year the Commissioner shall determine the average weekly wage of the preceding calendar year in the following manner:

(1) The sum of the total monthly employment reported for the calendar year be divided by twelve [12] to determine the average monthly employment.

(2) The sum of the total wages reported for the previous calendar year shall be divided by the average monthly employment to determine the average annual wage.

(3) The average annual wage shall be divided by 52 to determine the average weekly wage.

(c) For all claims filed on and after July 1, 1971, any insured worker who is unemployed in any week as defined in Section 2 (m) [§ 81-1103 (m)] *and who meets the eligibility requirements of Section 4 [§ 81-1105]* shall be paid with respect to such week an amount equal to his weekly

benefit amount less that part of the remuneration (if any) payable to him with respect to such week which is in excess of forty (40) per cent of his weekly benefit amount. * * *" (Emphasis added).

In 81 C.J.S. § 106, p. 156, is found the following:

"In order to be eligible to receive unemployment compensation, the worker must have earned or received wages in the amount required by statute during the base period for the year in which he claims benefits. Thus there is no right to compensation for unemployment unless, within the statutory base period, remuneration to the amount stated has been earned, including only wages with respect to which contributions have been paid or are payable."

And again in 81 C.J.S. § 246, p. 360, is found the following:

"Under the various unemployment compensation statutes the payment of benefits during a benefit year is dependent on earnings within the base year, and an employee is not entitled to benefits if he is without qualifying wages in the applicable base year. Where claimant has qualifying wages in one base year to justify the payment of compensation in the applicable benefit year following, but he fails to file his claim in time for such benefit year, the base year in which qualifying wages have been earned may not, in the absence of statutory authorization, be used to justify an award of benefits for a subsequent benefit year. In determining to which quarter of the base year wages are to be allocated, the actual date when wages are paid pursuant to a definitely assigned pay roll period controls rather than when such wages are earned."

Mr. Garrett had not received wages for work performed for almost two years when he filed his claim on July 5, 1973, and his contention is predicated upon Ark. Stat. Ann. § 81-1006 (Supp. 1973) which provides as follows:

"For all claims filed on and after July 1, 1973, 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 . . . or, if after making reasonable efforts to preserve his job rights, he left his last work because of his illness, injury or disability."

Then follow other exceptions such as one spouse following the other to a new living area and a wife voluntarily leaving her employment due to pregnancy. Under succeeding subsections a claimant worker may be disqualified if he is discharged because of misconduct in connection with his work and failing to accept available suitable work when offered, etc.

Of all the exceptions made and recited in the Employment Security Act, including § 81-1105 (f) pertaining to loss of employment "by reason of a labor dispute other than a lockout . . .," physical disability even under the Workmen's Compensation Law when it extends over and beyond a base period, is not among the exceptions made by the Legislature, and we are unable to read such exception into the provisions of the Act.

We are of the opinion, and so hold, that Mr. Garrett was not eligible for benefits under the Act, consequently, we do not reach the question of whether he was disqualified from receiving benefits because of his extended disability.

The judgment is affirmed.

Loree Cavin WILLIAMS, Widow of Ralph Hollis WILLIAMS, deceased, *v.* C. T. EDMONDSON, M.D. and H. W. WARD, M.D.

74-169 250 S.W. 2d 260

Opinion delivered March 17, 1975

Frierson, Walker, Snellgrove & Laser, by: *David N. Laser*, for appellant.

Smith, Williams, Friday, Eldredge & Clark and *Putman, Davis & Bassett*, for appellees.

CONLEY BYRD, Justice. This medical malpractice action was filed by appellant Loree Cavin Williams, on April 6, 1973, in Benton County, as executrix of the Estate of Ralph Hollis Williams on behalf of both the estate of the decedent and the widow and next of kin. It was alleged that the decedent died February 18, 1973. The complaint in so far as here pertinent with respect to appellee C. T. Edmondson alleged:

> "The defendant, C. T. Edmondson, M.D., is a resident of Washington County, Arkansas and is a licensed and practicing physician specializing in the field of radiology and said physician practices among other places, in Benton County, Arkansas, on or about the 7th through the 9th days of April, 1971, at which time said defendant did read and interpret an X-ray taken of the chest of plaintiff's decedent at the Bates Memorial Hospital, Bentonville, Arkansas as further described hereinafter."

The allegation with respect to appellee H. W. Ward is as follows:

> "The defendant, H. W. Ward, M.D., is a licensed and practicing physician specializing in the field of radiology and practicing his profession in Benton and Washington Counties, among other places, and did at all times hereinafter mentioned, practice his specialty in taking, reading and interpreting X-rays, particularly X-rays of plaintiff's decedent's chest made at Bates Memorial Hospital, Bentonville, Benton County, Arkansas, on or about 31st day of March 1970, through the 1st day of April 1970."

The complaint then alleges that Dr. Ward failed to adhere to that degree of care and skill expected and required of him in reading an X-ray of the chest of the decedent Ralph Hollis Williams made in April 1970. A like allegation was made with respect to a chest X-ray read by Dr. Edmondson on April 7, 1971.

Appellant caused summons to be issued and delivered to the sheriff of Washington County. The summons upon Dr. Ward was promptly served at his home in Washington County. The summons issued for Dr. Edmondson was returned unserved on April 11, 1973, with the notation: "Unable to serve. Subject lives in Benton County. per Deputy Colvard." On April 19th, the sheriff's office wrote to appellant's counsel:

> "Dear Mr. Williams:
>
> "We are this date returning to Benton County Clerk's office Summons in Circuit Court ref C. T. Edmondson, M.D. defendant in above mentioned case.
>
> Dr. Edmondson does not maintain an office in Washington County. He has a residence in Benton County, 3/4 mile west of Little Wheel Grocery, and comes into Springdale on Tuesdays and Thursdays to read x-rays at the Springdale Memorial Hospital.

However, when we tried to reach him this day, we were advised by Dr. Ward that Dr. Edmondson is on vacation for two weeks.

Yours very truly,

By: /s/ Marjorie Roberts
Civil Process Office

:mr
P.S. The Little Wheel Grocery is on Hwy. 71, north of Springdale."

On April 13, 1973, appellant caused another summons to be issued for Dr. Edmondson directed to the sheriff of Benton County which was served on April 16th.

On July 2, 1973, the trial court sustained Dr. Ward's demurrer to the complaint on the ground that the controlling statute of limitation, Ark. Stat. Ann. § 37-205 (Repl. 1962), had run during decedent's lifetime. On the same day the trial court sustained Dr. Edmondson's motion to quash the summons issued on April 6, 1973, to the sheriff of Washington County.

On July 31, 1973, appellant filed an amended complaint essentially repeating the allegations of the original complaint in so far as the individual acts and omissions of the doctors are concerned but added an allegation that the doctors were partners — by answers subsequently filed the latter allegation is admitted. The trial court sustained a demurrer of Dr. Edmondson to any action on behalf of the estate of the decedent but left standing the action for wrongful death on behalf of the widow and next of kin. A demurrer was sustained on behalf of Dr. Ward as to all allegations except those relating to his vicarious liability for the acts or omissions of Dr. Edmondson under Lord Campbell's Act. Appellant elected to stand upon the pleadings and the trial court entered a dismissal of all actions except as to the wrongful death action by the widow and next of kin against Dr. Edmondson and Dr. Ward's vicarious liability therefor. For reversal appellant raises the issues hereinafter discussed.

POINT I. Appellant here contends that her action filed on April 6, 1973, was properly commenced as against Dr. Edmondson and tolled the applicable statute of limitations, Ark. Stat. Ann. § 37-205 (Repl. 1962). That statute provides:

> "Hereafter all actions of contract or tort for malpractice, error, mistake, or failure to treat or cure, against physicians, surgeons, dentists, hospitals, and sanitoria, shall be commenced within two (2) years after the cause of action accrues. The date of the accrual of the cause of action shall be date of the wrongful act complained of, and no other time."

Ark. Stat. Ann. § 27-301 (Repl. 1962), with reference to commencement of actions provides:

> "A civil action is commenced by filing in the office of the clerk of the proper court a complaint *and causing a summons to be issued thereon, and placed in the hands of the sheriff of the proper county or counties. . . .*" [Emphasis ours.]

Obviously before Dr. Edmondson can prevail on statute of limitations, he must show that Washington County was not a proper county for the service of the summons. In this connection Ark. Stat. Ann. § 27-330 (Repl. 1962), as to method of service provides that the method of service shall be by personally delivering a copy of the summons to the defendant or by leaving a copy of the summons at the usual place of abode of the defendant with some member of the defendant's family over 15 years of age. Of course, where a summons is directed to a county other than the defendant's residence, we have recognized that actual service will relate back to the date of issuance but that unless the summons is issued to the sheriff of a county where it may be served the issuance thereof does not toll the statute of limitation until it is actually served, *Sims* v. *Miller*, 151 Ark. 377, 236 S.W. 828 (1922). Furthermore, Ark. Stat. Ann. § 27-309 (Repl. 1962), provides:

> "The summons shall be made returnable twenty (20) days after the issuance thereof unless otherwise ordered by the court."

In *J. H. Hamlen & Son* v. *Allen*, 186 Ark. 1104, 57 S.W. 2d 1046 (1933), we held that a summons served after the return date thereof, was properly quashed.

However we do not agree that the action of the circuit court in quashing the original summons issued to Washington County on April 6, 1973, was proper. Dr. Edmondson moved to quash the summons, so the burden of proving facts supporting the motion was upon him. *Nix* v. *Dunavant*, 249 Ark. 641, 460 S.W. 2d 762 (1970). In other words, it was up to him to show that Washington County was not a proper county to which the summons could be issued in order to commence the action. The record discloses that the return day of the summons was twenty days after the date of issuance, and that Dr. Edmondson regularly came to the Springdale Memorial Hospital on Tuesdays and Thursdays to read X-rays, but when the Washington County sheriff tried to reach Dr. Edmonson there on April 19, Dr. Ward advised him that Dr. Edmondson was on a two-week vacation. There is no information in the record as to the terminal dates of the vacation. Between April 6, 1973, and April 26, 1973, Tuesdays fell on the 10th, 17th and 24th and Thursdays fell on the 12th, 19th and 26th. It was reasonable to be anticipated that Dr. Edmondson could have been served with summons on any of these dates. The return on the summons was dated April 11 but it remained in the hands of the sheriff of Washington County until he sent it to the attorneys for appellants by letter dated April 19. Since the terminal dates of the vacation were not shown, it is only reasonable to assume that the summons could have been served on Dr. Edmondson on the 10th, 12th or 17th, if that is important. It is also entirely possible that if the summons had not been returned prematurely, it could have been served on the 24th. The point is, there was nothing to show that it was unreasonable for appellants to believe that the summons could be served on Dr. Edmondson in Washington County between April 6 and April 26, 1973. Furthermore, the sheriff was not told that Dr. Edmondson was on vacation until April 19.

In considering the words in the statute now before us [Ark. Stat. Ann. § 27-301 (Repl. 1962)], in only a slightly different context we said that the term "proper county"

(proper court?) used in the statute had been "defined to mean the county of defendant's residence or where the defendant may be served with process." *Sims* v. *Miller,* 151 Ark. 377, 236 S.W. 828 (1922). There we were determining the "proper county" insofar as filing the complaint in a transitory action was concerned. The General Assembly amended the statute by Act 32 of 1961. Prior thereto, and when *Sims* was decided, the pertinent part of the statute read: "A civil action is commenced by filing in the office of the proper court a complaint and causing summons to be issued thereon." The amendment added at the end of this sentence the words "and placed in the hands of the sheriff of *the proper county or counties.*" (Emphasis ours.) In choosing the words "proper county" it certainly should be presumed that the legislature knew the meaning ascribed by us to these words in considering the very statute they were amending. *Brown* v. *Davis,* 226 Ark. 843, 294 S.W. 2d 481 (1956); *Lumbermen's Mut. Cas. Co.* v. *Moses,* 224 Ark. 67, 271 S.W. 2d 780 (1954); *Terral* v. *Terral,* 212 Ark. 221, 205 S.W. 2d 198 (1947); *Texarkana Special School Dist.* v. *Consolidated School Dist. No. 2,* 185 Ark. 213, 46 S.W. 2d 631 (1932). In addition, that body's insertion of the plural as an alternate clearly shows that it was cognizant of the fact that under that definition there could be more than one "proper county." This being so, it is clear in an action that is not transitory, but "local," as this one is, the "proper county" is either the county of defendant's residence or the county where he may be served with process.

In *Roach* v. *Henry,* 186 Ark. 884, 56 S.W. 2d 577 (1933), Roach had filed a motion to quash a garnishment issued in an action against him. He contended that the garnishment was void because no suit had actually been commenced at the time it was issued. He alleged that the sheriff of Chicot County (in which the action had been filed) had failed to find him in the county and had served the summons on a man who was in charge of some equipment for Roach, that the plaintiff's attorney had subsequently caused other process, *i.e.,* a warning order to be issued and that Roach was not a resident of Chicot County, but of the city of Memphis. The respondent stated, under the statements of the complaint and of plaintiff's counsel, which were not denied, that Roach was engaged in levee work in Chicot County and that before and since

filing of the suit, Roach had been in the county from time to time. We held that the filing of the complaint and issuing of summons constituted commencement of the suit and rejected the argument that the garnishment simultaneously issued was void because the defendant had not been served. We also rejected the argument that the subsequent issuance of a garnishment constituted abandonment of the effort to get personal service, saying that one might be a resident of a county and still evade personal service.

Although the record is rather sparse, it is clear that Dr. Edmondson was served with process on April 16, three days before the date of the Washington County sheriff's letter returning the first summons. It is difficult to say whether the information given the sheriff about the vacation was untrue, or the vacation had either ended or not commenced on April 16. In any event, there was an appropriate basis for appellants to believe, in good faith, that Dr. Edmondson could have been served in Washington County within 20 days of the issuance of the first summons, and he probably could have, had the sheriff not first concluded that the summons should have been served in Benton County. Certainly the second summons was not an abandonment of efforts to obtain service. The acts or omissions of the sheriff to whom the writ is directed should and do have no effect in determining whether the action has been commenced. *King* v. *Circuit Court of Conway County*, 239 Ark. 653, 391 S.W. 2d 24 (1965); *Fitzsimmons* v. *Rauch*, 197 Okla. 426, 172 P. 2d 633 (1946).

In *St. Louis, A. & T. Ry. Co.* v. *Shelton*, 57 Ark. 459, 21 S.W. 876 (1893), it was held that even though the service of a summons issued upon filing of a complaint within the prescribed period of limitation was fatally defective and a second summons was issued after the expiration of the period of limitation, the action was not barred because it was commenced when the first summons was issued. This case was cited with approval in *King* v. *Circuit Court of Conway County, supra; Bridgman* v. *Drilling*, 218 Ark. 772, 238 S.W. 2d 645 (1951). It is the issuance of a summons and placing it in the hands of the sheriff of the proper county, not its service, that determines the time of commencement of an action. *King* v. *Circuit Court of Conway County, supra.*

The tolling of the statute by the commencement of the action is, of course, not perpetual, but conditional. The extent to which the statute is tolled seems to depend upon the good faith of the plaintiff in commencement of the action and his diligence in thereafter obtaining service of process, whether in the same county or another. *Emanuel* v. *Richards,* 426 S.W. 2d 716 (Mo. App., 1968); *Korby* v. *Sosnowski,* 339 Mich. 705, 64 N.W. 2d 683 (1954); *Myers* v. *Warren,* 275 Mass. 531, 176 N.E. 600 (1931); *Comen* v. *Miller,* 41 F. 2d 292 (M. D. Pa. 1930).

Finally appellant asserts that the amendment to the complaint alleging a partnership between Dr. Edmondson and Dr. Ward relates back to the filing of the original complaint. Of course, if it does, the complaint would be good as against Dr. Ward's demurrer as to his vicarious liability for the acts of Dr. Edmondson on April 7, 1971.

The general rule seems to be that although made after the expiration of the period of limitations, an amendment to a complaint changing the allegation as to the capacity in which a defendant is sued is permissible, and unless a new cause of action is stated the amendment relates back to the filing of the original complaint. See Annotation 8 ALR 2d 153, § 76. We have permitted such amendments to be made as to both plaintiffs and defendants, *Foster-Holcomb Investment Company* v. *Little Rock Publishing Company,* 151 Ark. 449, 236 S.W. 597 (1922). The only authority that we have been able to find involving an amendment alleging that the parties already sued were partners is *TAORMINA Corporation* v. *Escobedo,* 254 F. 2d 171 (5th Cir. 1958). There the court permitted the amendment to relate back to the date of the filing of the original complaint as to the individual partners before the court upon the original complaint but dismissed as to any of the partners brought in after the statute of limitations had run.

The law with reference to amendment of pleadings was stated in *Bridgman* v. *Drilling,* 218 Ark. 772, 238 S.W. 2d 645 (1951), in this language:

> "Our cases hold that where there is an amendment to a complaint stating a new cause of action or bringing

in new parties interested in the controversy, the statute of limitations runs to the date of the amendment and operates as a bar when the statutory period of limitation has already expired. In other words, if the plaintiff amends his complaint after commencement of the suit by introducing a new cause of action, the statute continues to run until the filing of the amendment which does not relate back to the commencement of the suit. *Wood* v. *Wood,* 59 Ark. 441, 27 S.W. 641, 28 L.R.A. 157; *Buck* v. *Davis,* 64 Ark. 345, 42 S.W. 534; *Love* v. *Couch,* 181 Ark. 994, 28 S.W. 2d 1067. If, however, the amendment to the complaint does not set forth a new cause of action, but is merely an expansion or amplification of the cause of action already stated, then the amendment relates back and takes effect as of the date of the commencement of the original action. *Little Rock Traction & Electric Co.* v. *Miller,* 80 Ark. 245, 96 S.W. 993; *Western Coal & Mining Co.* v. *Corkville,* 96 Ark. 387, 131 S.W. 963.

In the case of *Paris Purity Coal Co.* v. *Pendergrass,* 193 Ark. 1031, 104 S.W. 2d 455, we approved the rule stated in 37 C.J. 1068 as follows: 'An amendment of a declaration, petition or complaint which sets up no new cause of action or claim, and makes no new demand relates back to the commencement of the action, and the running of the statute against the claim so pleaded is arrested at that point. This is in substance the language of the statute in some jurisdictions, and the rule applies, although the limitation is by contract and not by statute; and courts have been liberal in allowing amendments expressly to save a case from the statute of limitations when the cause of action is not totally changed.' See, also, 54 C.JS., Limitations of Actions, § 279a; 34 Am. Jur., Limitation of Actions, § 260."

While parts of the original complaint would indicate that Doctors Ward and Edmondson were intended to be sued individually, other parts of the 10 page complaint allege as follows:

"6. By way of an arrangement, either written or

oral, between the defendant doctors and the Bates Memorial Hospital and/or its staff physicians, said radiologists did agree and bind themselves to furnish treatment and to conduct examinations and interpretations of X-rays of patients in said hospital (in-patient and out-patient) and did on the dates aforesaid serve as the physicians of Ralph Hollis Williams, deceased for the purpose of taking, developing, reading, studying and interpreting and reporting relative to his chest X-rays, and the said defendant doctors did hold themselves out to possess that degree of skill possessed by other radiology specialists and did, in undertaking to handle the radiological portion of decedent's medical care, bind themselves to adhere to that degree of care and skill of a specialist in radiology similarly situated, and did agree to use their best judgment in the administration of said care and skill.

* * *

"7. (c). Both defendant doctors, Dr. Ward and Dr. Edmondson, failed to abide by recognized and established procedures, check lists and protocols relative to their handling of the radiological aspects of plaintiff's decedent's care, and they did fail to comply with the rules, regulations and practices as set out by Specialty Boards in the field of radiology by the Joint Commission on Accreditation of Hospitals and said Commission's rules relative to hospital staff, and they did fail to properly and skillfully furnish to plaintiff's decedent medical care and treatment expected and required of them and reasonably necessary to preserve and protect his health, life and chances of survival at the times heretofore mentioned, and they did further, by their failure to detect radiological evidence of plaintiff's decedent's true condition, cause said evidence of the cancerous condition to be concealed from plaintiff's decedent and his treating physician so that said condition was not discovered until approximately May, 1972; at which time the disease was too widespread to arrest or eradicate.

* * *

"9. As a result of the negligence of these defendants as aforesaid, during the lifetime of plaintiff's decedent as result of the undetected spread of disease in his body, he did suffer extreme pain, . . . "

Thus as against a demurrer, we conclude that the trial court erred in ruling that the statute of limitations had run as to Dr. Ward's vicarious liability for the acts of Dr. Edmondson.

POINT II. Appellant here contends that since neither the acts or omissions alleged to constitute malpractice nor the injury to plaintiff's decedent was discovered nor reasonably discoverable by plaintiff's decedent until May 1972, the statute of limitations did not begin to run until time of discovery. We find that we so construed our statute of limitation in malpractice cases prior to Act 135 of 1935. See *Burton* v. *Tribble,* 189 Ark. 58, 70 S.W. 2d 503 (1935). Since the enactment of Acts 1935, No. 135, following *Burton* v. *Tribble, supra,* we have construed our statute as beginning to run from the date of the wrongful act irrespective of the knowledge or discovery thereof by the patient, *Steel* v. *Gann,* 197 Ark. 480, 123 S.W. 2d 520 (1939). For cases from other jurisdictions reaching the same results, see the annotation in 80 ALR 2d 368, 379.

Appellant alleges that the negligence of the doctors effectively concealed the disease from her deceased husband until other physicians discovered the disorder thereby delaying the commencement of the running of the statute of limitations until the discovery. Appellant also suggests that the negligent interpretation of X-ray films is a continuing tort sufficient to prevent the statute of limitations from beginning to run until appellees had effectively discharged their duty. We do not find sufficient allegations to support the contention that appellees concealed their tort. It is pointed out in the annotation 80 ALR 2d 368, 406 that knowledge of the wrong done on the part of the physician is a necessary prerequisite to a tolling of the statute. We so held in *Crossett Health Center* v. *Croswell,* 221 Ark. 874, 256 S.W. 2d 548 (1953).

The continuing tort theory best addresses itself to the General Assembly who has the responsibility for establishing

the public policy on that issue. Needless to say the only thing alleged is that the appellees were negligent in reading the X-rays and that they were thereafter filed away. Thus by the allegations, the wrong, if any, was completed at the time of the reading.

Appellant also contends that appellees are estopped to plead the statute of limitations because of the fiduciary relationship between the doctor and the patient. Since the nature of the relationship between a physician and his patient was well known to the Legislature at the time of the enactment of the two year statute of limitations, it would appear that the acceptance of appellant's contention would amount to an outright repeal of the statute of limitations. This we do not propose to do.

POINT III. Appellant here for the first time contends the statute of limitations applicable to malpractice actions is unconstitutional. We do not reach a constitutional issue raised for the first time on appeal. Even if we did reach the issue it would appear that we would hold contrary to appellant's position. See *Carter* v. *Hartenstein*, 248 Ark. 1172, 455 S.W. 2d 918 (1970), where we upheld the constitutional validity of a four year statute of limitations applicable to deficiencies in the design, planning and supervision of construction of improvements to real estate.

POINT IV. Appellees suggest that the order of the trial court is not an appealable decree. In so doing they rely upon *Independent Insurance Consultants Inc.* v. *First State Bank of Springdale*, 253 Ark. 779, 489 S.W. 2d 757 (1973). We do not agree with appellees that the order is not appealable because the practical effect of the order was to dismiss all claims of the estate of the decedent from the action. In *Flanagan* v. *Drainage Dist. No. 17*, 176 Ark. 31, 2 S.W. 2d 70 (1928), we held that an order was final and appealable where a distinct and severed branch of the case is finally determined, although the suit is not ended.

In *Matthews* v. *Travelers Indem. Ins. Co.*, 245 Ark. 247, 432 S.W. 2d 485 (1968), we recognized that the malpractice action asserted on behalf of the decedent was a separate cause

of action from the wrongful death action asserted on behalf of the spouse and heirs.

Reversed and remanded.

MID-AMERICA DEVELOPMENT CORPORATION *v.* ARKANSAS SAVINGS & LOAN ASSOCIATION

74-324 520 S.W. 2d 238

Opinion delivered March 24, 1975

Smith, Williams, Friday, Eldredge & Clark, by: *Larry W. Burks,* for appellant.

Stubblefield & Matthews, for appellee.

GEORGE ROSE SMITH, Justice. The appellant, being indebted to the appellee upon a $1,200,000 note, payable in monthly installments, was charged a $4,402.20 penalty for the privilege of prepaying the principal balance after only six installments had come due. The appellant paid the penalty under protest and brought this action for its recovery. The circuit judge, hearing the case upon stipulated facts, found the terms of the note to be unambiguous and the penalty to be proper. For reversal the appellant contends in substance that the note is ambiguous, so that parol evidence (the tenor of which is not disclosed) should have been permitted to explain the intention of the parties.

The trial judge was right. Two provisions of the note, which was prepared upon the appellee's printed form, are pertinent. First, the only language specifying the time of payment recites that the maker promises to pay $1,200,000, with interest at 9% per annum, as follows: "Ten Thousand Nine Hundred Twenty and no/100 Dollars on the 1st day of April, 1972; and Ten Thousand Nine Hundred Twenty and no/100 Dollars, on the first day of each succeeding month, until said indebtedness is fully paid," with a reduction as necessary in the final payment. Each installment is to be credited first to the payment of interest upon the unpaid balance and then to the payment of principal. The second pertinent provision, which was deleted by agreement before the note was executed, originally read as follows:

> In the event of prepayment by Makers of all or any part of the loan indebtedness evidenced by this note, the association may require, as a penalty, payment to it by Makers of an amount equal to not more than six months' advance interest on that part of the aggregate amount of all prepayments made on the loan indebtedness in any year which exceeds twenty percent (20%) of the original principal amount of the loan indebtedness.

There is no ambiguity in the maturity dates of the monthly installments. When the privilege of prepayment is contemplated, the usual procedure is to make the installments payable "on or before" specified dates. No such

language appears in this note. The second pertinent provision, just quoted, would have allowed prepayment, but that paragraph was stricken by agreement. After that deletion the note contained nothing even suggesting a prepayment privilege. Hence parol evidence could not possibly have explained an ambiguity, for none existed. An omission in a contract cannot be supplied by parol proof. *Arkansas Trust Co.* v. *Bates,* 187 Ark. 331, 59 S.W. 2d 1025 (1933); *Bradley Gin Co.* v. *J.L. Means Mach. Co.,* 94 Ark. 130, 126 S.W. 81 (1910).

The appellant does not question the theoretical validity of the prepayment charge. It is quite evident that the appellee, after having incurred the expenses incident to making a $1,200,000 loan that was to have been repaid over a period of many years, might reasonably have found it necessary to make a prepayment charge to avoid a loss on the transaction. We have held that if an installment contract would not be usurious if paid according to its terms, the debtor's voluntary election to prepay the debt in full does not make the transaction usurious, even though the creditor thereby receives a sum exceeding the principal and the maximum legal rate of interest. *Eldred* v. *Hart,* 87 Ark. 534, 113 S.W. 213 (1908). In the case at bar the $4,402.20 penalty amounted to less than fifteen days' interest at the agreed rate of 9% and, if added to the interest received by the appellee from the date of the loan, August 20, 1971, to the date of prepayment, would still not have provided the appellee with a 10% return upon its investment.

Affirmed.

Felix GREEN *v.* John D. TONEY et al

74-346 520 S.W. 2d 290

Opinion delivered March 24, 1975

O. M. Young and *Wayne W. Owen,* for appellant.

Wright, Lindsey & Jennings, for appellees.

GEORGE ROSE SMITH, Justice. Felix Green appeals from a verdict and judgment awarding the two appellees, John D. Toney and Block Realty Company, a $10,000 real estate broker's commission for having procured the purchaser for a 20-acre tract of land sold by Green. Green contends primarily that he was entitled to a directed verdict, on the ground that there was no substantial evidence that the brokers' services contributed to the ultimate sale of the property. We agree with the trial judge's conclusion that the proof presented a jury question.

The facts are not essentially in dispute. In 1970 John B. May, the eventual purchaser of the land, was a contractor engaged in building apartments. Harold Dreyfuss, an associate or employee of Block Realty Company, had previously assisted May in finding property suitable for development. In the spring of 1970 May was in the market for an apartment-complex site. He turned to Dreyfuss for assistance.

Dreyfuss discussed the matter with Toney, another real estate broker, who was acquainted with Green and knew that Green owned a suitable 38-acre tract. On May 22, 1970, the parties signed an option agreement, pursuant to which May paid $1,000 for a six-month option to purchase 20 acres of Green's land for $100,000. The agreement obligated Green to pay a $10,000 commission to Toney and Block upon the exercise of the option.

It was May's practice to obtain an option upon a piece of land and then attempt to arrange financing for its purchase and development. In this instance he was unable to obtain financing within the six months. Shortly before the expiration of that period Green called May and learned that he would not be able to exercise the option.

Dreyfuss died before the expiration of the option. After that Toney continued his efforts to sell the property and found two prospective buyers. He testified that on January 7 or 8, 1972, he submitted an offer for the entire 38 acres that met all of Green's stipulations. Green, according to Toney, declined that offer for "personal reasons." Green (who is himself in the real estate business) testified that if he had sold the property to Toney's prospect he would have paid a commission. Green was not asked to explain his personal reasons for rejecting the offer. Only four or five days later, on January 12, Green agreed to sell the 38-acre tract to May for $200,000, which Green admits to have been his price all along for the whole tract. The appellees' $10,000 commission, however, is based only upon the twenty acres covered by the option.

Green, in the trial court and again here, disclaims liability upon the twofold basis that the sale was not completed

within the six-month term of the option and that the brokers' efforts were not a factor in the final sale. As to the first aspect of the argument, May's failure to exercise his option is not conclusive. If May had bought the property five minutes after the expiration of the option the brokers' right to a commission could hardly be disputed, while if the purchase had been made five years later Green's position would be equally strong. Between the extremes there is a middle ground that falls within the jury's province.

A parallel situation involving an option agreement was considered in *Cole* v. *Crump*, 174 Mo. App. 215, 156 S.W. 769 (1913). There the broker found a prospect who agreed to a 65-day option to purchase the land at $60 an acre, but that prospect did not actually buy the property until four months after the expiration of a one-year extension of the option, and then he paid an increased price. In holding that a jury question was presented the court declared that though the broker "did not personally obtain the extension of the option, and though he was not actively participating when the deal was finally closed, and though the final conveyance was made after the option had expired as an enforceable obligation, he is nevertheless entitled to his commissions if it appears to the satisfaction of the jury that he was the procuring cause of the sale, and defendants received the benefit of his services thereabout. This is true, even though defendants subsequently consummated the transation with the purchaser under a modified agreement with him whereby the original price of $60 per acre was advanced to $65." Another similar case, recognizing the broker's right to recover although the sale was made after the expiration of the option to purchase, is *Freeman* v. *Kinston Mfg. Co.*, 233 F. 58 (4th Cir. 1916).

As to the second phase of Green's argument, there is substantial evidence to support the jury's conclusion that the brokers were the procuring cause of the sale to May. It is undisputed that the brokers first brought May into the picture, as a prospective buyer. The jury may have concluded that Green's unexplained rejection of one of the brokers' prospects, followed by his acceptance of another within a few days, was an effort to avoid the payment of a commission. Inasmuch as the appellees claim compensation only with

regard to the original 20 acres, it is immaterial that the final sale included other property. *Belyeu* v. *Hudson,* 179 Ark. 657, 17 S.W. 2d 865 (1929); *Chandler* v. *Gaines-Ferguson Realty Co.,* 145 Ark. 262, 224 S.W. 484 (1920).

We do not consider our decision in *Johnson* v. *Knowles,* 169 Ark. 1089, 277 S.W. 868 (1925), to be controlling. There the broker's prospect positively rejected the property at first and changed her mind later after she had occupied it as a tenant. Our conclusion was: "The sale in the present suit did not result from any act or course of conduct whatever of the plaintiff." No such unequivocal statement can be made upon the proof in the case at hand. The controlling issue was for the jury's determination.

We find no error in the trial court's instructions to the jury. Instruction 6 submitted the issues essentially as we have discussed them; there was no request that there be included an explanation of the possibility that the brokers had abandoned their efforts to sell the land to May. Green also complains of the court's refusal to give two of his proffered instructions. Both of them, however, suggested that the brokers could not recover unless May exercised his option to purchase within the six months allowed. We have already seen that such a contention is not sound.

Affirmed.

BYRD, J., not participating.

The Estate of OLEN SPANN, Dec'd.,
Creed SPANN, Exec'tr. of The Est.
of Olen SPANN, Dec'd. et al *v.*
W. H. KENNEDY & SON, INC.

74-288 520 S.W. 2d 286

Opinion delivered March 24, 1975

Coleman, Gantt, Ramsay & Cox, for appellants.

Bridges, Young, Matthews & Davis, for appellee.

LYLE BROWN, Justice. Appellants here, who were defendants below, are the estate of Olen Spann, deceased; Creed Spann, Executor of the Estate of Olen Spann, deceased; Wendle Adcox, John L. Vassaur, and Joe Hickerson. The latter three are tenants of the Spann estate. The appellee here and plaintiff below is W. H. Kennedy & Son, Inc., cotton-brokers. The interpleader is Federal Compress & Warehouse Company.

The principal issue before the chancellor was whether a written contract between a cotton farmer (Olen Spann) and a cotton merchant (Kennedy) is of a personal nature so as to be terminated by death of one of the parties (Spann). The chancellor held that death did not terminate the contract and ordered the interpleader to deliver the cotton to Kennedy & Son, Inc.

Appellants here contend (1) that the court erred in finding the contract between the late Olen Spann and W. H. Kennedy & Son required Olen Spann estate to plant any cotton, and (2) erred in finding that the contract was enforceable against the tenants of the estate of Olen Spann.

The facts are largely undisputed. During his lifetime Olen Spann entered into a contract dated January 30, 1973, for the sale by Spann and the purchase by Kennedy of "all and only those bales of cotton produced and ginned from approximately 375 acres located on the farm owned by Spann". The contract was styled "PURCHASE AGREEMENT 1973-74". Spann died on April 20, 1973 before any cotton had been planted and his son, Creed Spann, Executor, was appointed personal representative of the estate. In due time the executor entered into a lease agreement with Adcox and Vassaur, and they, in turn, sublet a portion of the Spann lands to Joe Hickerson. The cotton was actually produced far in excess of 375 acres referred to in the contract and is now in the possession of Federal Compress & Warehouse Company, the interpleaders here.

We come now to the principal question, that is, whether the executor and his tenants are legally obligated to perform under the contract and deliver the cotton in the warehouse for the use and benefit of appellee, Kennedy & Son, Inc. It should be here stated that the executor was aware of the contract before planting time, and the lessees and their subtenant were aware of the contract before they accepted the agreement to plant and harvest the crop for the executor.

Our attention is first directed to Ark. Stat. Ann. § 62-2410 (Repl. 1971): "Unless a testator shall otherwise direct by his last will and testament, a personal representative shall have authority to continue any business in which his decedent may have been engaged at the time of his death, for a period not exceeding one month following the date of the granting of his letters, without obtaining an order of the court; and if such business be that of conducting farming operations he may so continue the same for a period of three months or until the end of the calendar year in which the death of the decedent occurred, whichever shall be longer." The foregoing statute indicates that the probate law favors the completion of a work contract in force on the death of the testator.

In the field of the subject matter before us we find this statement in 3 Williston on Contracts, § 411: "In the absence

of express agreement to the contrary there will be no such requirement [of personal performance] if the duty is of such character that performance by an agent will be substantially the same thing as performance by the obligor himself. The performance in such a case is indeed in legal contemplation rendered by the original obligor, who is still the party liable if the performance is in any respect incorrect."

Applying the above stated general principle to the facts of this case, we cannot escape the conclusion that the contract between Spann and Kennedy is binding upon Spann's personal representative. First, the evidence reflects that the cotton lands in Jefferson County, particularly in the area of the Spann lands, are some of the best in the mid-south. This creates a situation where there is a demand for good cotton acreage. Second, even though the testimony indicates that confidence is an important factor in the cotton-producer and cotton-merchant relationship, and that Kennedy had this confidence in Spann, the testimony also reflects that there are many other cotton producers living or having interests in the general vicinity of the Spann lands that are competent and reliable growers, including the two tenants of the Spann estate for 1973. J. W. Kennedy, President of W. H. Kennedy & Son, Inc., testified that he had individual contracts with both defendants, Vassaur and Adcox whereby they agreed to sell and he agreed to buy their cotton for the 1973 crop year. The evidence is rather conclusive that, even though the personal representative was not a skilled cotton farmer, he had no difficulty in securing capable and reliable tenants to farm the land and fully and completely comply with the contract his father had made. There is certainly no question raised by the parties to this litigation that the tenants were not thoroughly competent. In fact, they produced more cotton than was called for in the contract with Kennedy.

Of course it is true that the identity of the producer is important to the cotton buyer at the time he enters into the contract to purchase cotton. It is without doubt important, just as it is important to know with whom one is dealing whenever any contract is entered into. It is important that the farm has good land which will produce the quality of cotton contemplated; to know that he has the equipment, or can get

it, to produce the crop; that he is responsible financially and can secure adequate financing; and basically all the considerations that are relevant to any contract. But these considerations do not make it a "personal service" contract. For example, those same considerations were present in the following situations where the contracts were enforced against the estate of the deceased contracting party:

> *National Surety Company* v. *George E. Breece Lumber Company,* 60 F. 2d 847 (CCA 10th, 1932) (Contract to carry on logging operation); *Burch* v. *Bush & Co.,* 181 N.C. 125, 106 S.E. 489 (1921) (Contract to cut timber and manufacture it into lumber according to specifications); *Cates* v. *Cates,* 268 Ala. 6, 104 So. 2d 756 (1958) (Contract to haul milk); *In Re Burke's Estate,* 198 Cal. 163, 244 P. 340 (1926); *MacKay* v. *Clark,* 5 Cal. App. 2d 44, 42 P. 2d 341 (1935) (Building contracts); *Whidden* v. *Sunny South Packing Co.,* 162 So. 503 (Fla. 1935) (Planting, cultivating and harvesting citrus fruit); *Calif. Packing Corp.* v. *Lopez,* 279 P. 664 (Cal. 1929) (Asparagus cropping contract).

Further factual evidence that the contract in question was not a contract which could be performed only by Olen Spann, is the fact that the appellee, W. H. Kennedy & Son, Inc., entered into the same type contract with literally hundreds of cotton farmers in the cotton producing areas in Arkansas and Louisiana. The proof is that Kennedy purchased on forward cotton contracts approximately 92,000 acres of cotton production which would represent several hundred contracts. John Tharp, cotton merchant, with Harlow Sanders & Co., Inc., cotton merchant of Pine Bluff, testified that his firm negotiated in the neighborhood of 500 contracts of this type in 1973. Charles E. Hart, president of Hart Cotton Company, Inc., a cotton merchant of Pine Bluff, estimated that his firm was involved in some 700 contracts for the 1973 crop year. It is safe to say, therefore, that cotton merchants in Pine Bluff alone entered into literally thousands of contracts of the very same type as the Kennedy contract for the 1973 cotton crop.

Appellant next argues that if there was a contract between the Spann estate and Kennedy, it does not reach the

tenants of the estate on the lands of Olen Spann. In other words it is argued that the tenants are in no manner bound to make delivery of the cotton. The tenants Adcox, Vassaur and Hickerson, testified, and were corroborated by Creed Spann, that all of them were aware of the Spann-Kennedy contract when they leased the land. The court made specific findings in regard thereto and they are fully supported by the testimony of the named witnesses. The sum and substance of the testimony was that the tenants considered themselves bound by the contract if the estate was bound. Here is what the court said: "In other words, defendants, Adcox, Vassaur and Hickerson, entered into a lease contract with the personal representative with full knowledge of the Spann-Kennedy contract and they agreed to deliver the cotton from the lands to Kennedy if it should be determined that the Spann-Kennedy contract was valid."

Finally, appellant makes this argument: "The second consideration upon which the court might have concluded that the estate of Olen Spann was obligated for cotton grown by its lessees on the estate lands would have to do with the theory of title to the goods contracted for. To some degree, the Uniform Commercial Code bears on this issue."

Appellants cite Ark. Stat. Ann. § 85-2-105, 106, and 107 and conclude from those sections of the UCC "it is apparent that 'growing crops' are goods within the meaning of the Code and are susceptible to contracts for sale".

Also, crops which have not been planted may be included in the definition of "future goods". Ark. Stat. Ann. § 85-2-105 (2) [Add. 1961]; 85-2-501 [Add. 1961]; 2 Anderson, Uniform Commercial Code (2d ed.) 63, Sales, § 2-501:9, 501:10. The only effect in this case, however, would be that the contract, instead of constituting a present sale, would operate as a contract to sell at a future time. Ark. Stat. Ann. § 85-2-105 (2), 106. When a decedent has entered into a contract for sale of personal property which has not been performed, his executor may be compelled to execute a bill of sale pursuant to the terms of the contract. Contractual obligations which survive the death of the obligor are binding on his executor in his representative capacity and enforceable

against the estate, and it is the duty of the executor to carry out such contracts and compliance may be enforced unless they are personal in nature and personal performance by the decedent is of the essence of the contract. 31 AM JUR 2d § 158, Executors and Administrators, § 318; 33 CJS 1168, Executors and Administrators § 189.

Even if the UCC provisions are applied, the issue remains the same, i.e., whether there was a contractual obligation enforceable against his estate. We have said there was.

Affirmed.

HARRIS, C.J., not participating.

HOLT, J., not participating.

Eugene PFEIFER III *v.* E. F. DUNN et al

74-310 520 S.W. 2d 718

Opinion delivered March 24, 1975

Eichenbaum, Scott, Miller, Crockett and Darr, by: *James E. Darr Jr.*, for appellant.

Rose, Nash, Williamson, Carroll & Clay, P.A. and *Catlett & Henderson*, for appellees.

LYLE BROWN, Justice. The plaintiff and intervenors, E. F. Dunn and the trustees of the Kinkead estate sought and were granted a private easement for the uninterrupted use of a road crossing defendant's property. The road then ran north across plaintiff's property, thence north across the property of the Kinkead (trustee) estate. Appellant Eugene Pfeifer III contends the appellees' use of the property was at all times permissive and did not ripen into an easement.

The essential facts are substantially undisputed. The setting of the farm lands to which access is involved is along the Arkansas River near the rural community of Natural Steps. The latter community is on high ground and a number of farmers cultivating the lands adjacent to the river live at Natural Steps.

There is an all-weather road running north along the river bank and serving from south to north, the Pfeifer acreage, then the Dunn acreage, then the Kinkead acreage. The road has an interesting history. A county road and bridge which for years had served the farms washed into the river. In 1963 the United States Engineers built an all-weather road along the river bank to gain access to a bank stabilization program. That road adjoins, in fact runs through the edges of, all the litigants' properties. The government moved out in 1964. Dunn, the Kinkeads and some six other farmers on the north end of the road continued to use the road as farm access. Immediately the farmers were faced with a multitude of problems. The new road, the stabilized banks and other improvements attracted fishermen, picnickers, vandals and party groups. Serious vandalism was committed to farm equipment left in the fields overnight. To combat the undesirables, E. L. Kinkead, on the road just south of the Olive Moreland property, erected a gate which was locked. Keys were furnished all the land owners and their tenants. That was in 1964. Not many months thereafter the gate was moved approximately 100 feet north along the road and erected on the land of Olive Moreland, to which action Miss Moreland had no objection. A culvert installed by the

government contractors under the road where it was crossed by Mill Bayou was inadequate and a wider one was placed and maintained by Pulaski County. The entire road has since its inception been maintained by Pulaski County with the knowledge of all affected landowners. The maintenance foreman of Pulaski County was furnished with a key to the gate.

In the spring of 1973, appellant Eugene Pfeifer III, became the successor in title to Miss Olive Moreland relative to the land upon which the gate was located. Mr. Pfeifer, on June 25, 1973, changed the lock on the gate for which appellee and others using the road possessed a key. Of course the effect of the changing of the lock was to preclude ingress and egress by parties other than Mr. Pfeifer.

On July 26, 1973, appellee E. F. Dunn instituted suit, praying that appellant Pfeifer be ordered to open and leave open the above mentioned gate and permit the appellee, his tenants and employees free and uninterrupted use of the road across the land of appellant. The trustees of the Kinkead estate did on the same day file an intervention praying for practically the same relief as sought by appellee Dunn. At a preliminary hearing the court granted a temporary injunction enjoining Pfeifer from denying appellees the use of the road. Pfeifer was ordered to make available keys to the gate to appellees and all other persons and their agents and employees who had previously utilized the gate and roadway and ordered appellant to permit those individuals free and uninterrupted use of the roadway. On December 14, 1973, at a hearing on the merits, the court decreed that the temporary injunction should be made permanent.

In upholding the final order of the court, we repeat, in order to avoid any misunderstanding of our ruling, the court's finding:

> The temporary order of this court entered on July 31, 1973, shall be and the same hereby is made permanent and the defendant be and he hereby is ordered to make available to the plaintiff and the intervenors keys to any lock he has placed or will place on the gate at the

southern boundary of the servient estate, and is further ordered to permit free and uninterrupted use of the roadway across the servient estate as has been made of said roadway in the past, by the plaintiff, intervenors, their agents, and employees, and the beneficiaries of Ewing L. Kinkead Trust No. 1, and Ewing L. Kinkead Trust No. 2.

We have inserted the finding of the court in order to make certain of no misunderstanding. In upholding the trial court we are not deciding that the public has acquired an easement across said road; therefore the substantial body of our law applying to public easements has no application as respects the case at hand.

There are several factors which, when combined, lead us to the conclusion that the court acted properly in sustaining the private easement. First, although it might be said there was an element of permissiveness in Miss Moreland's allowing the construction of the gate near the entrance to her land, it was a common gate for a common purpose, namely, to protect against vandalism.

In the case of *Fullenwider* v. *Kitchens,* 223 Ark. 442, 266 S.W. 2d 281 (1954), there was no consideration for the use of the passageway. Consequently, the use of the passageway originated strictly as a permissive right. We point up that distinction in *Fullenwider* because we think it is important to our holding. As just pointed out, it was for the common good of all the landowners to have a common gate to protect against vandalism. Also, it can be said that the new road served as a substitute for a county road which had been washed into the river. The fact that the road had been kept in good condition and the maintenance performed by county employees should have placed any doubtful property owner upon inquiry. All that has been done, including the erection of the gate, the distribution of keys, and the upkeep of the road, would serve to notify any interested person that the common property owners were recognizing a right to a common road, being a private easement.

Affirmed.

HOUSING AUTHORITY of the City of LITTLE ROCK, ARKANSAS *v.* ARKANSAS LOUISIANA GAS COMPANY

74-314 520 S.W. 2d 215

Opinion delivered March 24, 1975

Smith, Williams, Friday, Eldredge & Clark, by: *William L. Terry*, for appellant.

Baker & Probst, P.A., by: *Charles W. Baker*, for appellee.

J. FRED JONES, Justice. This is an appeal by the Housing Authority of the City of Little Rock, Arkansas, from a chancery court decree in favor of the appellee, Arkansas Louisiana Gas Company (Arkla), in which the chancellor held that the Housing Authority is responsible for the cost in the stipulated amount of $78,986.19 incurred by the appellee in adjusting its gas lines within street rights-of-way in connection with appellant's Neighborhood Development Program Urban Renewal Project within the City of Little Rock.

The Urban Renewal Project consists of widening, curbing and guttering several public streets in the area, and the

installation of storm sewers and drainage facilities. On appeal to this court the appellant designates the following points upon which it relies for reversal:

> "The trial court erred in finding that the determination of the issue as to responsibility for adjustment costs is governed by the Swaggerty Branch decision in Arkansas Louisiana Gas Co. v. City of Little Rock, et al, 256 Ark. 112, 506 S.W. 2d 555 (1974).
>
> The trial court erred in finding that the removal of the City of Little Rock, Arkansas as a party plaintiff from these proceedings does not alter the legal issues involved.
>
> The trial court erred in finding that there were no factual differences in this case which make the legal issue any different from those involved in the Swaggerty Branch decision.
>
> The trial court erred in finding that Housing Authority must bear the cost of the adjustment work (agreed to by the parties as $79,986.19 [sic] plus accrued interest); that under the applicable law in the State of Arkansas, there being no specific statutes or franchise provisions governing the issue in this proceeding, the utility company must bear the expense."

We are of the opinion that the chancellor was correct in holding that this case is controlled by our recent decision in *Ark. La. Gas Co.* v. *City of LR*, 256 Ark. 112, 506 S.W. 2d 555 (1974). That case involved the channelization of a small stream or "branch" inside the city limits of Little Rock. The project included installation of storm sewers and drainage facilities, and also the construction and pavement of streets and bridges where the streets crossed the branch. It was necessary that Arkla remove and relocate some of its gas lines within existing street rights-of-way and the crucial question was whether the Housing Authority or Arkla was to bear the cost of relocating the gas lines within the street limits. The Housing Authority in that case filed suit to require Arkla to relocate the lines without cost to the Housing Authority

and the city was joined as party plaintiff. The trial court found that the burden of cost fell on Arkla on the theory that the Housing Authority was in fact an agent of the city. In reversing the decree in that case, we traced the legislative history of the Housing Authority and in that case we said:

> "The main reason for holding as we do is that historically the housing authorities throughout the country have consistently been held to be separate and independent bodies corporate. The housing authorities acts heretofore enumerated are very extensive, a recitation of which would unduly lengthen this opinion. Summing up, the statutes demonstrate that the housing authorities are autonomous entities that have the power to act in every field related to their work independently of the cities.
>
> * * *
>
> From a study of the statutes, and in view of the cited authorities, we conclude that it was not the intention of the General Assembly that the urban renewal projects be carried out by the housing authority in some type of principal-agent relationship whereby the authority would be acting under the direction and control of subservient to, the wishes of the local governing body. Once the governing body of the municipality approves a proposed urban renewal project and executes a cooperation agreement, the authority is free to develop the project according to the plans and without direction from the municipality. Incidentally, the cooperation agreement relative to the subject (Swaggerty Branch) nowhere intimates that the project shall be carried on with the City as principal and the Housing Authority as agent."

And, in that case, we concluded as follows:

> "We hold that the redevelopment project in litigation was in actuality the project of Housing Authority; that Housing Authority was the moving force in causing the gas lines to be altered; that so much of the deposit as is

necessary to reimburse Arkla for actual cost should be paid over to it; and that the costs in the trial court should be assessed against appellees."

The appellant argues that in *Ark. La. Gas Co.* v. *City of LR, supra*, the City of Little Rock was a party plaintiff and the question involved on appeal was the principal-agent relationship between the city and the Housing Authority. The appellant seems to argue that since the city is not a party to the case at bar, and since agency is not involved, we should somehow reach a different result from our decision in *Ark. La. Gas Co.* v. *City of LR, supra*. We do not agree. It is true that the trial court in *Ark. La. Gas Co.* v. *City of LR* did find that the burden of cost fell on Arkla on the theory that the Housing Authority was an agent of the city, and on appeal we stated that in order to affirm the chancellor's decree, it would be necessary for us to find likewise. But we did not so find. We simply found that the Housing Authority was an entirely separate entity from the city and was responsible for Arkla having to remove its gas lines and was liable to Arkla in connection therewith. Certainly we would have reached the same conclusion in *Ark. La. Gas Co.* v. *City of LR, supra*, and we can reasonably assume the chancellor would have reached the same conclusion that we did, if the city had never been made a party in that case and the principal-agent relationship question had never been raised.

In *Ark. La. Gas Co.* v. *City of LR, supra*, we, in effect, held that since there was no principal-agent relationship between the Housing Authority and the city, the Housing Authority was liable to Arkla for the necessary cost in making the required adjustments in its gas lines. The effect of the appellant's contentions, as we understand them in the case at bar, is that since there was no principal-agent relationship between the Housing Authority and the city in this case, we should reverse our decision in *Ark. La. Gas Co.* v. *City of LR, supra*. We find no material difference in the improvements involved in the case at bar and those involved in *Ark. La. Gas Co.* v. *City of LR, supra*, and we find no reason to reverse our decision in that case.

As to the appellant's fourth point, we adhere to our previous findings in *Ark. La. Gas Co.* v. *City of LR, supra*, that

"The appellant Arkansas Louisiana Gas Company (Arkla) is a privately owned gas distribution utility; its franchise covers the city of Little Rock."

The decree is affirmed.

Gerald HOLMES *v.* STATE of Arkansas

CR 74-153 520 S.W. 2d 715

Opinion delivered March 24, 1975
[Rehearing denied April 21, 1975.]

Max Bowie and *Sam Boyce,* for appellant.

Jim Guy Tucker, Atty. Gen., by: *Gary Isbell,* Asst. Atty. Gen., for appellee.

CONLEY BYRD, Justice. Early on March 29, 1972, it was discovered that the Baron Camper Company building owned by Black Rock Development Corporation and located just west of Black Rock had been burglarized. Appellant, Gerald Holmes, and Ernest Kisling, were arrested that same day and on March 31, 1972, entered pleas of guilty to burglary and grand larceny. As a result of that plea appellant received a sentence of 21 years with 14 years thereof suspended. On May 15, 1974, Holmes' conviction was vacated and set aside by the United States District Court for the Eastern District of Arkansas with the requirement that appellant be put to trial not later than the first day of the next term of the Circuit Court of Lawrence County which was June 17, 1974. On

June 17, 1974, appellant was again tried and the jury found him guilty of burglary and grand larceny and fixed his punishment at 8 years for each count. The trial court after considering his pre-arrest record and the report filed by the county probation officer directed that the sentences should run consecutively. For reversal appellant raises the issues hereinafter discussed.

POINT I. The record shows that the burglary occurred on a wet rainy night. There were two sets of footprints leading from the door of the camper plant to a place where an automobile, which had different types of tread on the two front tires, had been parked. Darvin Stow, a deputy sheriff, determined that appellant and one Ernest Kisling had recently made applications and had given as their address, room 25, Skyway Courts, Pocahontas, Arkansas. Upon arriving at the Skyway Courts, Deputy Stow found an automobile with front tires matching the tracks he had previously found in the vicinity. He also saw clay mud, comparable to the area where the car had been parked, inside the car and footprints leading from the car up into room 25. After obtaining a search warrant, a search of room 25 produced the tools and equipment that had been taken in the burglary. In the search they also found a pair of wet brown shoes with mud around the soles and on the wedge of the heels and a pair of dingo boots that matched the footprints leading from the burglarized building to the parked automobile.

Of course, this evidence alone was sufficient to sustain appellant's conviction. In addition, however, it was shown that appellant had stated to the officers that he would go before the judge and plead guilty. He also stated that he did commit the crime and was caught redhanded.

POINT II. Appellant now contends that his statement, that he was caught redhanded and would plead guilty when he went before the judge, should have been suppressed. We find no merit in this contention. The record made at the "Denno hearing" shows that he signed a waiver of rights form after being given the *Miranda* warnings and from the totality of the evidence given at the "Denno hearing", we agree with the trial court that appellant's statement was voluntary.

POINT III. We find no merit in appellant's contention that officer Stow had no probable cause to go before the municipal judge to obtain a search warrant. The record shows that he explained to the municipal judge in affidavit form the information he found at the site of burglary and at room 25, Skyway Courts.

POINT IV. Appellant contends that the trial court erred in permitting the prosecution to call Ernest Kisling as an adverse witness and then impeach his credibility by showing prior convictions. We find no merit in this contention since appellant's defense was an alibi and since both he and Kisling had originally pled guilty, the prosecution could certainly call Kisling to show the absurdity of the alleged alibi defense.

POINT V. Appellant contends that the trial court erred in permitting witness Callahan, general manager of Baron Camper, to be recalled to the stand. The record shows that the prosecution attempted to show by witness Callahan that either Kisling or appellant had made some incriminating statements in front of Callahan on the day of the arrest. In view of Ark. Stat. Ann. § 28-710 (Repl. 1962), which permits the recall of a witness with leave of the court, and the fact that the trial court sustained objections to all the testimony offered, we can find no merit in appellant's contention.

POINT VI. Neither do we find any merit in appellant's contention that the trial court erred in permitting the officers to describe the similarity between the front tires on appellant's vehicle and the tracks made near the scene of the burglary. Furthermore, we see no error in the trial court's permitting the witness to testify that the metal filings and sawdust found in appellant's car appeared to be similar to that found on the tools and equipment and in the plant of the Baron Camper Company.

POINT VII. Less than 30 days before the trial appellant changed his plea of not guilty to a plea of not guilty by reason of insanity and moved that he be committed to the State Hospital for a period of 30 days. This would have run appellant's trial beyond the date set forth in the order of the Federal District Court, requiring his discharge if he was not

tried by a certain date. Furthermore, after the trial, the trial court did commit appellant to the State Hospital for 30 days before sentencing him and the State Hospital found that appellant was without psychosis. Consequently, we can find no error in the trial court in refusing to commit him beforehand, but should somehow it be considered as error, then the error obviously could not be prejudicial.

POINT VIII. Since appellant received a concurrent sentence of 21 years on both charges of burglary and grand larceny when he pled guilty with 14 years thereof suspended, he now contends that the consecutive 8 years sentences assessed by the trial court amount to excessive, cruel and unusual punishment and that such sentence is not permissible under *North Carolina* v. *Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L. Ed. 2d 656 (1969). The allegation that the sentences are excessive, cruel and unusual has no merit. See *Hooper & Westlin* v. *State*, 257 Ark. 103, 514 S.W. 2d 394 (1974). Neither do we find anything in *North Carolina* v. *Pearce*, *supra*, or in *Chaffin* v. *Styachcombe*, 412 U.S. 17, 93 S. Ct. 1977, 36 L. Ed. 2d 714 (1973), that would prevent the trial court from running the two sentences consecutively. The record shows that the trial court took into consideration a pre-sentencing report and the defendant's arrest record. It takes two pages of the record to list appellant's arrest record from September 23, 1960 through March 29, 1972. The probation report shows that following appellant's original plea of guilty and prior to the district court's order, appellant at one time escaped from prison. This alone would have been sufficient to revoke the 14 years suspended in the first trial. While at the prison he had a fight with an inmate, was disrespectful to the officers and was described by the classification officer at Cummins Prison Farm as a nuisance. After the return to the jail in Walnut Ridge, the officers had to separate him from a fight with Ernest Kisling, that he initiated, and in doing so, appellant bit one of the officers. He also invited the officer to fight with him and continually threatened them with the Federal Judge. Furthermore, the Federal District Judge in entering his order recognized that appellant might receive a longer sentence upon a retrial and in effect warned him of that risk. In light of this record the trial court obviously had other and valid reasons for imposing a consecutive sentence on appellant and

consequently we cannot say that the trial court did so from a spirit of vindictiveness or to discourage meritless post-conviction appeals.

Affirmed.

Brady WATSON *v.* STATE of Arkansas

CR 75-149 521 S.W. 2d 205

Opinion delivered March 31, 1975
[Rehearing denied May 5, 1975.]

Harold L. Hall, Public Defender, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Robert A. Newcomb*, Asst. Atty. Gen., and *Lee A. Munson*, Pros. Atty., by: *John Wesley Hall Jr.*, Dep. Pros. Atty., for appellee.

CARLETON HARRIS, Chief Justice. Brady Watson, appellant herein, along with Jethro Baker, was tried for the crime of robbery, it being alleged that appellant and Baker robbed Walter Strangways in the early morning hours of January 12, 1974, in Pulaski County, Arkansas. The jury found the defendants guilty and fixed appellant's punishment at five years imprisonment. From the judgment so entered, appellant brings this appeal. For reversal, it is asserted that the court erred in permitting the State to ask a witness for appellant the question, "Would you shade the truth a little bit to keep someone you love out of the penitentiary?", and it

is also asserted that the court erred in denying appellant's motion for a new trial.

Vanessa Smith testified that she went to a motel with Watson and was with him during the night of January 11 and early morning hours of January 12; that they had "made love" that night and that she was in love with Watson. The record then reflects the following testimony on cross-examination by the State's attorney.

> "Q Miss Smith, would you shade your truth a little bit to keep someone you love out of the penitentiary?
>
> A Would I do what?
>
> Q Would you shade the truth a little bit to keep someone you love out of the penitentiary?
>
> MR. HAYNES:
>
> I will object to that, Your Honor. It's improper.
>
> THE COURT:
>
> Overruled. Proceed. Answer the question.
>
> A Answer the question. Me answer? Yes.
>
> Q You would?
>
> A If I knew anything to say, I would."

The court's ruling constituted error. In *Moore* v. *State,* 256 Ark. 385, 507 S.W. 2d 711 (1974). Moore was being tried on a charge of assault with intent to kill and was asked, on cross-examination, if he "would lie to stay out of the Arkansas State Penitentiary". Moore, in effect, replied that he would not. On appeal, though finding that no proper objection had been made, we said:

> "If a proper objection had been made, it would have called the matter to the court's attention and allowed

> the court the opportunity to rule upon it. Therefore, we do not reverse since a proper objection was not made to the question now challenged on appeal."

However, we took occasion to point out that such inquiry was not within the proper scope of cross-examination, stating:

> "Even though objection was not made to the question propounded in the case at bar, we take this opportunity to firmly state our view that the inquiry is not deemed within the proper scope of cross-examination. It amounted to a supposition and was argumentative. If this conjectural approach is permissible on cross-examination, then there would be no limit to speculative and argumentative inquiries of witnesses on cross-examination in every case. In view of the absence of an objection and the appellant's anwer to the question, the asserted error was rendered harmless."

While the question in *Moore* was propounded to the defendant himself, this is, of course, a distinction without a difference and it will be noted that the quoted language refers to "witnesses". That opinion, as previously shown, was delivered on April 8, 1974, which was a month before the present case against Watson was tried, and there thus had been ample notice that this line of questioning was improper. Accordingly, under *Moore,* the judgment of conviction must be reversed.

Appellant's second point is now, of course, moot, since the effect of the reversal on Point 1 is to give Watson another trial.

Because of the court's error, set out herein, the judgment is reversed, and the cause remanded to the Pulaski County Circuit Court.

It is so ordered.

Booker T. McDONALD *v.* STATE of Arkansas

CR 74-137 520 S.W. 2d 292

Opinion delivered March 31, 1975

Harold L. Hall, Public Defender, by: *Jewel Brown,* Dep. Public Defender, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Robert A. Newcomb,* Asst. Atty. Gen., for appellee.

GEORGE ROSE SMITH, Justice. This is a postconviction petition under Criminal Procedure Rule 1. In 1967 the appellant McDonald was charged with first degree murder in the shooting of a Little Rock police officer. McDonald, represented by three retained attorneys, entered a negotiated plea of guilty, the prosecutor having waived the death penalty. A jury, empaneled pursuant to Ark. Stat. Ann. § 43-2152 (Repl. 1964), fixed McDonald's punishment at life imprisonment.

Almost seven years later McDonald filed the present

petition, asserting that he was denied the effective assistance of counsel. At the Rule 1 hearing McDonald testified in his own behalf. The State introduced the testimony of two of McDonald's former attorneys and of two officers who were present when McDonald made a confession of guilt soon after his arrest. After the Rule 1 hearing the trial judge made detailed findings of fact and concluded that there was no merit in the petition. This appeal is from that ruling.

McDonald's present attorneys argue primarily that this court, in measuring the effectiveness of counsel, should adopt a standard of reasonable competence instead of the standard that we have previously approved, as in *Clark* v. *State,* 255 Ark. 13, 498 S.W. 2d 657 (1973): "A charge of this sort [ineffective representation] can prevail only if the acts or omissions of the attorney result in making the proceedings a farce and 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."

There are two answers to the appellant's contention. First, not all of the federal courts have abandoned the "mockery of justice" standard. For example, in a recent case, *United States* v. *Hager,* 505 F. 2d 737 (1974), the Court of Appeals for the Eighth Circuit explained that the mockery of justice standard "is not meant to be an impenetrable obstacle to any meaningful analysis of the facts of the particular case." The court then quoted with approval this language from its earlier opinion in *McQueen* v. *Swenson,* 498 F. 2d 207 (1974):

> Stringent as the "mockery of justice" standard may seem, we have never intended it to be used as a shibboleth to avoid a searching evaluation of possible constitutional violations; nor has it been so used in this circuit. It was not intended that the "mockery of justice" standard be taken literally, but rather that it be employed as an embodiment of the principle that a petitioner must shoulder a heavy burden in proving unfairness.

Secondly, McDonald has not met the burden of proving ineffective representation, no matter what standard is

applied. At the Rule 1 hearing McDonald did not deny having killed the officer; in fact, his testimony did not even touch upon the circumstances surrounding the homicide. McDonald merely stated that he did not really want to plead guilty, that he was persuaded by his attorneys to do so, and that they did not explain the possibility of his being convicted of murder in the second degree. It is also argued now that the defense lawyers were at fault in not interviewing every witness for the State.

The overwhelming weight of the proof is contrary to McDonald's testimony. One of his former attorneys testified that the State's case had been one of the strongest he had ever seen: McDonald admitted having shot the officer without warning; witnesses heard the shot and saw McDonald leaving the scene; the ballistics report was affirmative. Capital punishment was then in effect. McDonald had a criminal record. The attorneys interviewed some of the officers and had copies of the witnesses' statements. There is no showing whatever that additional interviews would have revealed facts favorable to McDonald.

For from two to three weeks the attorneys spent most of their time working on the case — preparing for trial and seeking a waiver of the death penalty, which was all that McDonald was interested in. The prosecutor repeatedly refused to make that concession unless the police department would agree to it. According to the attorneys, McDonald was thrilled and pleased when the negotiations were finally successful. It is also significant that McDonald waited almost seven years, and until after the Supreme Court's invalidation of existing capital punishment statutes, before expressing his dissatisfaction with his lawyers' handling of his case. Upon the record now before us we must conclude that the trial judge's findings are supported by the great preponderance of the proof.

Affirmed.

JONES, J., not participating.

DESOTO, INC *v.* Lawrence A. CROW

74-333 520 S.W. 2d 307

Opinion delivered March 31, 1975

Dobbs, Pryor & Hubbard, for appellant.

Sanford and *Pate,* for appellee.

LYLE BROWN, Justice. This is an appeal from an order of the trial court denying a motion to vacate a judgment against DeSoto, Inc. as garnishee and in favor of appellee Crow in the amount of $3,022.10. The essence of DeSoto's argument is

that notice was never given to DeSoto that such a judgment might be entered.

Two identical writs of garnishment were issued against DeSoto. The first writ was dated June 25, 1974 and reads as follows:

> "THE STATE OF ARKANSAS TO THE SHERIFF OF PULASKI COUNTY:
>
> "Whereas, Lawrence A. Crow on the 16th day of May, 1974, in the Circuit Court obtained a Judgment against John Pless and Johnny M. Pless for $3,022.10 debt and damages, and court costs, which Judgment remains unsatisfied; and it being represented to the Court by said plaintiff that the Garnishee, DeSoto Incorporated is indebted to said defendant or has in its hands or possession goods, chattels, moneys, credits or effects belonging to said defendant;
>
> "NOW, THEREFORE, you are hereby commended to summon the said DeSoto, Incorporated to appear in this Court within 10 days from the date of service hereof and then and there to answer what goods, chattels, moneys, credits or effects it may have in its hands or possessions belonging to said defendant to satisfy said Judgment, and to answer such further interrogatories as may then and there be exhibited against it; and you will make due return of this writ into said court without delay."

Another writ was issued under date of July 10, 1974. The only difference between the two writs is the date of the issue and the date of service. The writs of garnishment have two fatal defects. First, there is no notice that failure to answer could result in a judgment against garnishee. The writ merely advises garnishee to appear and answer questions propounded and to be propounded. Ark. Stat. § 29-107 (Repl. 1962) provides: "All judgments, orders, sentences, and decrees, made, rendered, or pronounced, by any of the courts of the State, against any one without notice, actual or constructive, and all proceedings had under such judgments, orders, sentences, or decrees, shall be absolutely null and void".

The writ of garnishment served the purpose of a summons. Ark. Stat. Ann. § 27-306 (Repl. 1962) provides: "The summons shall be directed to the sheriff of the county, and command him to summon the defendant or defendants named, therein to answer the complaint filed by the plaintiff, giving his name, at the time stated therein, under the penalty of the complaint being taken for confessed, or of the defendant being proceeded against for contempt of court on his failure to do so. The summons shall be dated upon the day it is issued, and signed by the clerk".

Under our holding in *Wilson* v. *Overturf*, 157 Ark. 385, 248 S.W. 898 (1923), the garnishee did not state a good cause of action.

In the case of *Ware* v. *Phillips*, 468 P. 2d 444 (Wash. 1970) the court said: "It is fundamental that a notice to be meaningful must apprise the party to whom it is directed that his person or property is in jeopardy."

The second defect is that the garnishee is required by the writ to appear and answer the same within ten days. Ark. Stat. Ann. § 31-504 provides: "Such writs [of garnishment] shall be directed, served and returned in the same manner as writs of summons".

Ark. Stat. Ann. § 27-308 provides: "In all civil actions the time fixed in the summons for the defendant to answer shall be within twenty [20] days after service when the summons is directed within the State, and thirty [30] days when it is directed outside the State". Section 27-309 provides: "The summons shall be made returnable twenty (20) days after the issuance thereof unless otherwise ordered by the court".

It is argued that Arkansas has a ten-day statute for the answering of garnishment. We are referred to Ark. Stat. Ann. § 31-512 [1962 Repl.]: "If any garnishee, after having been served with a writ of garnishment ten [10] days before the return day thereof, shall neglect or refuse to answer the interrogatories exhibited against him on or before the return day of such writ, the court of justice before whom such matter

is pending shall enter judgment against such garnishee for the full amount specified in the plaintiff's judgment against the original defendant, together with costs". Ark. Stat. Ann. § 31-512 is no longer the law as it pertains to circuit courts. It is true the annotated statutes do not show an amendment, but the facts are that it was amended by implication. §§ 27-308, 27-309, *supra.*

We are urged by appellant to declare some of the garnishment statutes unconstitutional. We decline to so hold. The effect of our rulings herein is to hold that the garnishment forms do not meet constitutional due process, and that the garnishee is entitled to twenty (20) days notice.

Reversed and Dismissed.

Leonard PONDER and WEST & Co., INC.
v. Hazel WATERS

74-252 520 S.W. 2d 302

Opinion delivered March 31, 1975

Coleman, Gantt, Ramsay & Cox, for appellants.

W. P. Switzer, for appellee.

JOHN A. FOGLEMAN, Justice. Appellee Hazel Waters brought this sut alleging that she was physically assaulted by Leonard Ponder, manager of the department store of West & Company at Crossett, at which she was an employee. This appeal was taken from an $18,000 judgment in her favor resulting from a jury trial. We reverse and remand for a new trial.

Dr. R. L. Sabb of Crossett had been Mrs. Waters' physician for a number of years. He treated her for injuries she alleged were inflicted by appellant Ponder. He expressed his opinion as to the cause of the condition he diagnosed and treated. On cross-examination appellant's attorney asked to see a report Dr. Sabb had in his pocket. The witness replied that this report had not been subpoenaed and that it was hospital property. Even when the examiner insisted on seeing the doctor's own records, the witness responded that they had not been subpoenaed. Throughout his direct examina-

tion the witness had refreshed his memory from his office records and a report from a Dr. Hartmann.

It seems to be generally accepted by respected writers and by the weight of authority that where a writing is used by a witness on the stand to refresh his memory while testifying, the cross-examiner is entitled, upon request, to inspect the writing as a protection against imposition, and as a means of detecting circumstances not appearing on the surface, of searching out discrepancies, and of detracting from the credibility of the witness and the weight of his testimony, through cross-examination. III Wigmore on Evidence (Chadbourn Rev.) 136, § 762; 4 Jones on Evidence (6th Ed.) 258, § 27:4; McCormick on Evidence (2d Ed.) 17, § 9; Annot 82 ALR 2d 557 (1962).

We have recognized that it is error to refuse to allow the cross-examiner to inspect a writing used by a witness to refresh his memory while on the stand, although we have found that the refusal may not be reversible error where the right was waived or where it was manifestly not prejudicial. *Collins* v. *State,* 200 Ark. 1027, 143 S.W. 2d 1; *McNutt* v. *State,* 201 Ark. 313, 144 S.W. 2d 1094. We have also recognized that when the witness has, before testifying, refreshed his memory but an out-of-court inspection of memoranda or records but does not use or have the writings in court, the matter of requiring the witness to produce them for inspection lies within the sound judicial discretion of the trial judge whose action will not be reversed unless there has been an abuse of that discretion. *Peters* v. *State,* 248 Ark. 134, 450 S.W. 2d 276.

The trial judge in this case had no discretion in the matter and there was no waiver of the right. It is to be assumed that the error was prejudicial, unless it manifestly was not or is shown not to be. The lack of prejudice is neither manifest nor established.

Although the error on this score mandates reversal of the judgment, appellant has raised another point that merits discussion as one likely to arise on a new trial. During the course of the trial, and on direct examination, Mrs. Waters was ask-

ed if she was drawing disability social security and, when she answered in the affirmative, she was asked when she was declared totally disabled by the Social Security Administration. When objection was made, appellee's attorney urged that the anticipated testimony was relevant to alleged loss of earning capacity resulting from the alleged assault on December 9, 1971, and to show that Mrs. Waters was totally disabled. The circuit judge permitted the inquiry to be pursued, stating that he would instruct the jury to disregard the testimony unless it was "tied in" with the complaint. After Mrs. Waters again testified that she was drawing disability social security and stated the amount, the objection was renewed but the testimony was permitted when appellee's attorney stated that he did not care about the adjudication of disability but only wanted to show the difference in income from her salary with West and the amount she was receiving from social security at the time of trial.

Of course, appellee could show the difference in her income, but the question whether she was disabled as a result of the alleged assault was very much in issue. The testimony of the representative of the Social Security Administration making the determination of disability that such a finding had been made would probably have been inadmissible as hearsay. Either a statement of such a witness not based upon his own knowledge or the testimony of appellee that she had been found to be disabled by such an agency would derive its value, not from the credit to be given the witness testifying, but from the veracity, competency and knowledge of some other person or persons. *Southern Farm Bureau Casualty Insurance Co.* v. *Reed,* 231 Ark. 759, 332 S.W. 2d 615; *Roberts* v. *Roberts,* 216 Ark. 453, 226 S.W. 2d 579; *Progressive Life Insurance Co.* v. *Hulbert,* 196 Ark. 352, 118 S.W. 2d 268; *Rice* v. *Moudy,* 217 Ark. 816, 233 S.W. 2d 378; *Lee Rubber & Tire Co.* v. *Camfield,* 233 Ark. 543, 345 S.W. 2d 931; *Southern Insurance Co.* v. *Floyd,* 174 Ark. 372, 295 S.W. 715. *Sloan* v. *Newman,* 166 Ark. 259, 266 S.W. 257; *Mason* v. *Mason,* 167 Ark. 304, 267 S.W. 772. See also, *Southern Farm Bureau Casualty Insurance Co.* v. *Pumphrey,* 256 Ark. 818, 510 S.W. 2d 570 (1974); *Farm Bureau Mutual Insurance Co. of Arkansas* v. *Horne,* 256 Ark. 642 510 S.W. 2d 70 (1974); *Barnes and York* v. *State,* 215 Ark. 781, 223 S.W. 2d 503; *New Empire Insurance Co.* v. *Taylor,*

235 Ark. 758, 362 S.W. 2d 4; *Higgins* v. *General Motors Corp.*, 250 Ark. 551, 465 S.W. 2d 898. Showing that Mrs. Waters had been found to be disabled for social security purposes is improper.

The judgment is reversed and the cause remaded for a new trial.

FORREST CITY MACHINE WORKS INC *v.*
G. B. COLVIN, Jr., Judge of the Tenth
Judicial Circuit, Ashley County, Arkansas

74-342 521 S.W. 2d 206

Opinion delivered March 31, 1975
[Rehearing denied May 5, 1975.]

Shackleford, Shackleford & Phillips, for petitioner.

Switzer & Switzer, for respondent.

J. FRED JONES, Justice. This is an original petition for a writ of prohibition filed by Forrest City Machine Works, Inc. to prohibit the trial of a suit filed against it in the Ashley County Circuit Court by Mr. and Mrs. Lawson because of improper venue.

The facts are as follows: The petitioner, Forrest City Machine Works, Inc., is an Arkansas corporation domiciled in St. Francis County and is engaged in the business of manufacturing soil pulverizing farm equipment in that county. Mr. J. L. McCain, an Ashley County farmer, purchased one of the pulverizing machines from the Chicot Implement Company and while it was being assembled on his Ashley County farm by one of his employees, Laven Lawson, one of the two-row wing units on the implement fell from its stabilized vertical position and injured Mr. Lawson.

Mr. and Mrs. Lawson filed their suit in Ashley County where they lived and where the accident occurred. They obtained service on the petitioner by service of summons issued out of the Ashley County Circuit Court, directed to, and served by, the sheriff of St. Francis County. The petitioner, Forrest City Machine Works, Inc., filed motion to quash service because of lack of venue in Ashley County; the motion was overruled, hence the present petition for prohibition.

The petitioner contends that the venue in this case is fixed by Ark. Stat. Ann. § 27-605 (Repl. 1962) and the respondents contend that Ark. Stat. Ann. § 27-610 (Repl. 1962) applies. Section 27-605 provides as follows:

> "An action, other than those in sections 84, 85 and 90 [§§ 27-601—27-603], against a corporation created by the laws of this State may be brought in the county in which it is situated or has its principal office or place of business, or in which its chief officer resides; but if such corporation is a bank or insurance company, the action may be brought in the county in which there is a branch of the bank or agency of the company, where it arises out of a transaction of such branch or agency."

Section 27-610 is the general venue statute for personal injury and death action cases and provides as follows:

> "All actions for damages for personal injury or death by wrongful act shall be brought in the county where the accident occurred which caused the injury or death or in the county where the person injured or killed resided at

> the time of injury, and provided further that in all such actions service of summons may be had upon any party to such action, in addition to other methods now provided by law, by service of summons upon any agent who is a regular employee of such party, and on duty at the time of such service."

In the 1941 case of *Ft. Smith Gas Co.* v. *Kincannon, Judge,* 202 Ark. 216, 150 S.W. 2d 968, the plaintiff was a resident of Sebastian County where he sustained an injury occasioned by the alleged negligence of the Fort Smith Gas Company. He filed suit in Crawford County and obtained service on the gas company in Sebastian County on November 4, 1940, the injury having occurred on July 22, 1940. On petition for writ of prohibition in that case, we pointed out that Act 314 of 1939 (§27-610) was a venue Act "and its purpose and effect is to localize personal injury action." We pointed out in that case that the trial judge felt that the venue Act did not apply because the suit was filed and service had in accordance with the law as it existed prior to the passage of Act 314, and in that case we said:

> "Here, the legislative will is that for one to recover damages to compensate a personal injury he must sue therefor either (a) in the county in which he was injured or (b) in the county in which he resided at the time of his injury; and there is no exception or saving clause in favor of pending suits."

We concluded that the Crawford Circuit Court was without jurisdiction to proceed with the trial and the petition for writ of prohibition was granted.

In the case of *Terminal Oil Co.* v. *Gautney, Judge,* 202 Ark. 748, 152 S.W. 2d 309, we again granted a writ of prohibition to the Poinsett Circuit Court. In that case the Terminal Oil Company was a domestic corporation domiciled in Mississippi County, with a resident agent for service in Poinsett County. Two personal injury actions were brought against it in Poinsett County, service being had on the resident agent in that county. The plaintiffs alleged in their complaint that they were residents of Pulaski County, and that they were in-

jured in an automobile collision with a Terminal Oil Company vehicle in Mississippi County. On the return day of the writ, the petitioner Terminal Oil Company appeared specially in each case and filed motions to dismiss because of improper venue under § 27-610, *supra*. The motions were overruled by the trial court and in granting petition for prohibition in this court, we said:

> "We think the court erred, not in overruling the motions to dismiss, but in not treating them as motions to change the venue, and in not transferring them to either Pulaski county, where plaintiffs reside, or did reside at the date of the injury, or to Mississippi county, where the injury occurred. The fact that the injury occurred in 1937 and that the suit was brought in October, 1939, before said act 314 became effective . . . does not alter the situation." Citing *Fort Smith Gas Co.* v. *Kincannon, Judge, supra.*

In *Terminal Oil Co.* we further said:

> "In order to clarify the question of service under said act 314, the legislature of 1941 enacted act 21, entitled 'An Act to provide for statewide service of process in local actions.' Section 1 thereof reads as follows: 'In any action which may lawfully be brought only in some one or more particular counties in this state, and not in any county of the state in which service may be had on the defendant, so that the venue of such action is local and not transitory in nature, summons may be served upon the defendant or defendants in such action in any county in this state.'
>
> * * * [A]ct 314 changed the venue of existing actions, those already brought as well as those thereafter to be brought, and localized such actions to one or the other of the two counties named. It is not a question of service, but a question of venue, and the circuit court of Poinsett county is without jurisdiction to proceed with the trial of these cases."

In the recent case of *Evans Laboratories* v *Roberts, Judge,*

243 Ark. 987, 423 S.W. 2d 271, we again granted the writ of prohibition in a case very similar to the one at bar. In that case a resident of Van Buren County filed suit in the Faulkner County Circuit Court alleging that the defendant, Elmer Pearson, was a resident of Faulkner County and an agent and employee of the defendant Evans Laboratories, an Arkansas corporation. The complaint then alleged that the defendant Evans Laboratories, through its said agent, sold some insect eradication pesticide for use in a plant in Van Buren County where the plaintiff lived and was employed. The complaint then alleged that the plaintiff came in contact with the pesticide fumes; that the defendant breached an implied warranty for the reason that the pesticide was not in fact fit for its intended use and purpose and that when it was put to its intended use, the plaintiff was injured thereby. The defendant Evans Laboratories appeared specially on a motion to quash the summons for lack of jurisdiction and the trial court denied the motion. The petition for prohibition was then filed in this court and although the respondent contended in that case that the suit was one sounding in contract rather than in tort, we said:

> "Regardless of whether a suit for a breach of warranty is on contract or in tort, venue for an action is not controlled by such classification, but is controlled by venue statute."

We then pointed out that Ark. Stat. Ann. § 27-613 (Repl. 1962) provides that all other actions not provided for by specific statute may be brought in the county in which the defendant or one of several defendants resides or is summoned, and in that case we then said:

> ". . . the complaint alleged personal injuries in breach of contract, but the plaintiff brought her action *for damages for personal injury by wrongful act* in Faulkner County where she did not reside, and where the accident which caused her injury did not occur.
>
> The venue for this action is in Van Buren County and the circuit court of Faulkner County is without jurisdiction."

The petitioner argues that this court has held that Ark. Stat. Ann. § 27-610 (Repl. 1962) neither repealed nor amended the venue for actions otherwise fixed and cites *Moncus* v. *Raines,* 210 Ark. 30, 194 S.W. 2d 1, in which we held that action for personal injury against a city marshal must be brought under Ark. Stat. Ann. § 27-602 (Repl. 1962) which provides that an action against a public officer for an act done by him by virtue or under color of his office for his neglect of official duty must be brought in the county where the cause, or some part thereof, arose. In so holding that Act 314 of 1939 did not repeal § 27-602, we said:

> "There is no necessary or irreconcilable conflict between the two laws here involved.
>
> In the first the Legislature was dealing with the venue of suits to enforce liability for official misconduct of officers. Such misconduct may consist of many things, such as (in case of peace officers) failure properly to serve legal writs, false imprisonment, and, as in the case at bar, the wrongful or excessive use of force in making an arrest. The Legislature determined that such actions against officers, for obvious reasons of public policy, ought to be brought in the county where the cause of action originated. There is no invincible repugnancy between the two laws. Both may stand and be permitted to operate within their respective orbits, as prescribed by the Legislature."

The petitioner also cites *Downey* v. *Toler, Judge,* 214 Ark. 334, 216 S.W. 2d 60. That was an action brought against state police officers. The action was brought in Grant County where the plaintiffs alleged they received personal injuries when the officers used unnecessary force in arresting them. We granted prohibition upon the petition of the police officers and held that they were officers of the state and, therefore, came within the purview of Ark. Stat. Ann. § 34-201 (Repl. 1962) fixing venue in the county of their official residence. In addition to the reasoning set forth in *Downey,* it would not be practical or good public policy to permit state officials to be drawn away from their official duties and the place of their official residence by suits filed in distant counties arising in connection with their official acts.

Returning now to the case at bar, § 2 of the venue Act 314 provided: "This act shall not repeal any provision of venue for actions except such as are inconsistent therewith..." Section 27-605, *supra,* states where domestic corporations may be sued but § 27-610, *supra,* supersedes § 27-605 and refers only to particular kinds of actions. It provides that actions for damages for personal injury or death by wrongful act *shall be brought* in the county where the accident occurred which caused the injury or death, or in the county where the person injured or killed resided at the time of injury. If this section is inconsistent with the provisions of § 27-605, it is only inconsistent in so far as actions for personal injury or death caused by wrongful act are concerned and in that type of case § 27-610 applies.

The petition for writ of prohibition is denied.

Hoyle Bruce BEDELL *v.* STATE of Arkansas

CR 74-150 521 S.W. 2d 200

Opinion delivered March 31, 1975
[Rehearing denied May 5, 1975.]

Bon McCourtney & Associates, by: *Stephen R. Bigger,* for appellant.

Jim Guy Tucker, Atty. Gen., by: *Robert Newcomb,* Asst. Atty. Gen., for appellee.

CONLEY BYRD, Justice. The appellant, Hoyle Bruce Bedell, was charged by information with the crime of manufacturing marijuana in that he "did unlawfully, wilfully, and feloniously grow and manufacture marijuana (Cannabis sativa L.)." Upon conviction at a jury trial he was sentenced to six years in the penitentiary and fined $3,000.

On appeal to this court Bedell has designated the following points he relies on for reversal:

> "I. The initial warrantless and unconsented search by government authorities, or ranging, of the defendant's farm lands beyond view from public roads was a trespass, constituting an illegal act which tainted all evidence flowing and resulting from this trespass as 'fruit of the poisonous tree,' and the court erred in overruling defendant's motion to suppress evidence.
>
> II. The subsequent search warrant issued pursuant to the initial warrantless searches was limited to search of the defendant's curtilage and residence, and a warrantless contemporaneous search of the defendant's three hundred six (306) acre farm was unauthorized, and the defendant's fourth amendment right should be recognized to extend to adjacent fenced farm lands con-

tiguous to one's residence.

III. The court erred by fatally prejudicing the jury in admitting evidence regarding defendant's possession and use of marijuana given the present circumstances of the defendant's procedural severance of the charges of (1) manufacturing marijuana and (2) possession of marijuana with intent to deliver, and in view of the court's refusal to give defendant's jury instruction number ten (10).

IV. The court erred in refusing defendant's proposed jury instruction number ten (10) which properly described the scope of the statutory definition of 'manufacture'."

The facts appear as follows: The appellant owned a 306 acre hill farm in Randolph County and lived in a house adjacent to the highway on the front or east side of the property. Much of the farm was in timber with small cleared areas near the middle of the west or back side of the tract of land. The fields or cleared areas were surrounded by timber with especially heavy timber and underbrush lying north of the cleared areas.

In September, 1973, the sheriff of Randolph County obtained information that marijuana might be growing on the appellant's land so he and one of his deputies entered the tract through heavy timber at the northwest corner of the tract and first found what appeared to be a single marijuana plant growing in a cleared area, referred to in the testimony as field No. 1. The officers returned to the area a few days later and found 17 plants in a second area; 27 plants in a third area, and 76 plants growing in still another cleared area. All the plants were in a state of cultivation with sawdust and what appeared to be fertilizer having been placed around them. The growing plants were located by following plastic pipes running from what was described as a small holding pond near a newly drilled water well and running to the area where the marijuana plants were found. The officers found the 76 plants in field No. 4 by following a hose which was attached to a pump installed in a dug well or cistern at an old

house place on the property. A plastic line also ran from this well in an easterly direction past a sawdust pile at an old sawmill set and then on toward the house where Bedell lived. The sheriff and his deputy confiscated the growing marijuana and preserved it in a black plastic bag, later introduced into evidence as state's exhibit No. 1. The sheriff testified that the marijuana plants were planted or set out in "hills" and that he observed hills in the four cleared areas where no plants were then growing.

On the basis of the information thus obtained, the sheriff obtained a search warrant and he and his deputies searched Mr. Bedell's house where they found a pillowcase containing marijuana; a glass bottle or jar containing marijuana cigarette butts; a plastic box containing marijuana cigarette butts, and a paper bag containing marijuana. These items, together with the plants taken from the fields, were introduced into evidence.

POINTS I & II. We agree with the state that the Fourth Amendment to the Constitution only protects against *unreasonable* searches and seizures of persons, houses, papers and effects and does not extend to open fields and forested areas. See *Hester* v. *United States,* 265 U.S. 57, 68 L. Ed. 898, 44 S. Ct. 445 (1924). Consequently we find no merit in points I & II.

POINTS III & IV. The appellant's third assignment, as designated, also includes his fourth assignment. We find no merit to the first part of the appellant's third assignment. We gather from the argument in appellant's brief that he may have been charged in a separate case with possession of marijuana with the intent to deliver, but there is no evidence that the jury was made aware of such additional charge. The appellant was being tried on the charge of manufacturing marijuana. The 121 growing marijuana plants were discovered in, and obtained from, fields on the appellant's land some distance from the house where he lived and, there was testimony indicating that the fields contained numerous hills where plants had been set or grown. The marijuana plants were all surrounded by sawdust and a large sawdust pile was located near the center of appellant's tract of land. A new

well had been drilled on the back side of the appellant's property with plastic pipe running to the area where marijuana plants were being cultivated. A gasoline pump with hose connected was found installed in a well or cistern on appellant's property. The hose from the pump ran to the area where the 76 marijuana plants were located, and a hardware merchant from Missouri testified that he sold the pump to the appellant. A filling station operator and gasoline motor mechanic from Missouri testified that he repaired the pump for the appellant. The sheriff testified, under cross-examination by the appellant's attorney, that it was his understanding the appellant had not lived on his property but a few months. So we conclude that the marijuana found in the appellant's house was strong circumstantial evidence that it was he who was growing the marijuana being cultivated on his farm and that it was admissible in evidence for that purpose.

We now come to the trial court's refusal to give appellant's Instruction #10. The Uniform Controlled Substances Act, Ark. Stat. Ann. §§ 82-2602 — 82-2638 (Supp. 1973), is an overall Act pertaining to all of the many controlled substances including marijuana. Section 82-2601 (m) reads as follows:

> "(m) 'Manufacture' means the production, preparation, propagation, compounding, conversion or processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container, *except that this term does not include the preparation or compounding of a controlled substance by an individual for his own use* or the preparation, compounding, packaging, or labeling of a controlled substance:
>
> (1) by a practitioner as an incident to his administering or dispensing of a controlled substance in the course of professional practice; or

(2) by a practitioner or by his authorized agent under his supervision for the purpose of, or as an incident to, research, teaching, or chemical analysis and not for sale." [Emphasis ours].

The trial court instructed the jury in part as follows:

"6. The law defines 'manufacture' to mean the production, including the planting, cultivating, growing or harvesting of a controlled substance, *preparation,* propagation, conversion or *processing* of a controlled substance." [Emphasis ours].

"7. Manufacture means the production, *preparation,* propagation, conversion or *processing* of a controlled substance either directly or indirectly by extraction from substances of natural origin or depending by means of chemical synthesis, *and includes any packaging or repackaging of the substance,* or the labeling or relabeling of it, and it does include the growing or the cultivating of it." [Emphasis ours].

The appellant's requested Instruction No. 10 which was refused by the court reads as follows:

"10. You are hereby instructed that Manufacturing Marihuana means to grow, to produce, to cultivate, to propagate or to harvest marihuana, either directly by natural agricultural production or indirectly or independently, by means of chemical synthesis, and specifically excludes a practitioner or his agent preparing, compounding, packaging, prescribing, dispensing, ordering, or analyzing marihuana in the course of his professional practice, *and also specifically excludes the preparation or compounding of the controlled substance of marihuana by an individual for his own use.*" [Emphasis ours].

Obviously the exception in the definition of manufacture as to "the preparation or compounding of a controlled substance by an individual for his own use" was placed in the act because one's use of a controlled substance is only a mis-

demeanor whereas possession for any other purpose is a felony.

The evidence from which a jury might have drawn an inference that Bedell had prepared *or* compounded marijuana for his own use came primarily from the sheriff and his deputy. They found: a pillowcase containing marijuana in the closet in the southwest bedroom of his home; a glass jar and a plastic box, both containing marijuana cigarette butts (the cigarettes had been smoked) under Bedell's bed; and a paper sack containing marijuana on a bedroom closet shelf. The fact that there were cigarette butts in some containers along with the loose marijuana in others certainly constituted evidence that would justify a belief that Bedell had "prepared" marijuana. When considered in the light of the fact that the cigarettes had been smoked, the inference that Bedell had prepared marijuana for his own use was certainly reasonable.

The jury found Bedell guilty of manufacturing marijuana. It had been instructed that "manufacture" included "preparation" or "processing". It had also been instructed that "manufacture" means production, preparation, propagation, conversion or processing and includes any packaging or repackaging of the substance. It was not told that preparation of the substance by an individual for his own use is specifically excluded.

Since there was evidence that Bedell had prepared marijuana for his own use, the jury should have been told that this did not constitute manufacture. Consequently, the trial court erred in refusing appellant's requested Instruction #10.

Reversed and remanded for the error indicated.

HARRIS, C.J., and GEORGE ROSE SMITH and JONES, JJ., dissent.

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

court did not err in refusing to give the appellant's instruction No. 10.

As pointed out in the majority opinion, the Uniform Controlled Substances Act, Ark. Stat. Ann. §§ 82-2601—82-2638 (Supp. 1973), is an overall Act pertaining to all of the many controlled substances including marijuana. As I read § 82-2601 (m) its interpretation is plain. "Manufacture" means either the production, the preparation, the propagation, the compounding, the conversion or the processing of a controlled substance, either directly or indirectly by extraction from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction, etc. The controlled substance is the object of the manufacture by any one or combination of these processes.

I am unable to read from the evidence in this case that the appellant was engaged in the manufacture of a controlled substance through the process of preparation or compounding. The controlled substance, marijuana, is a plant and is simply not manufactured by preparation or compounding. It is manufactured by production and Ark. Stat. Ann. § 82-2601 (u) (Supp. 1973) states: "'Production' includes the manufacture, planting, cultivation, growing or harvesting of a controlled substance." That was what the appellant was charged with and was convicted of. The exception set out in § 82-2601 (m) "except that the term [manufacture] does not include the *preparation or compounding of a controlled substance by an individual for his own use. . .*" (emphasis added) simply does not apply to growing marijuana.

Bedell was not charged in this case with the possession of marijuana for any purpose. The evidence that he even possessed marijuana inside his home was offered for the purpose, and the sole purpose, of showing his connection with the marijuana that was still growing in, and had been harvested from his fields. My main reason for dissent in this case is stated by the majority as reason for their reversal. The majority opinion says:

> "The evidence from which a jury might have drawn an inference that Bedell had prepared *or* compounded marijuana for his own use came primarily from the

sheriff and his deputy. They found: a pillowcase containing marijuana in the closet in the southwest bedroom of his home; a glass jar and a plastic box, both containing marijuana cigarette butts (The cigarettes had been smoked) under Bedell's bed; and a paper sack containing marijuana on a bedroom closet shelf."

The majority then say that the fact there were cigarette butts in some containers along with loose marijuana in others, certainly constituted evidence that would justify a belief that Bedell had "prepared" marijuana. As I view this case, the mere fact that the jury might so find, as the majority indicate, was a better reason for not giving appellant's instruction No. 10 than it was for giving it. The marijuana in this case had already been grown and harvested and the manufacturing process by production had been completed before it was placed in the pillowcase and paper bag and stored in the appellant's home. All that was left for the appellant to do was lie in bed and enjoy the fruits of his labor. The cigarette butts found in the jar and the plastic container under appellant's bed, to me, were simply evidence that he had been smoking in bed and had not emptied his ashtrays. Certainly it was no evidence he was manufacturing marijuana by preparation or compounding. It was only evidence that he had harvested some of his marijuana crop and had produced smoke from the marijuana he had grown and harvested.

Apparently the majority feel that unless the appellant smoked the entire marijuana plant, stalk, roots, leaves, seed and all, the jury could have reasonably found he prepared and compounded, and thereby manufactured, the leaves he did smoke. The harvesting of marijuana and stripping the leaves from the stalk could be considered preparation and compounding as easily as rolling a cigarette from the leaves or placing the leaves in a pillowcase or paper bag; consequently, under appellant's instruction No. 10, he could have argued that he only prepared and compounded his entire marijuana crop for his own use.

Now if Bedell had been charged and tried for manufacturing marijuana by the unusual, if not impossible, process of

preparation or compounding a controlled substance then, perhaps, he would have been entitled to the defense that he only prepared and compounded it for his individual use and had not manufactured it within the meaning of § 82-2601 (m), *supra,* but this was not the case. The trial court throughout the trial of this case admitted the marijuana found in the appellant's home to show the chain of title from the fields to the appellant's home and the evidence was limited to that purpose. The appellant did not testify and he offered no evidence as to his intended use of the marijuana found on his farm or in his home.

I would affirm the judgment.

HARRIS, C.J., and GEORGE ROSE SMITH, J., join this dissent.

THRIFTY RENT-A-CAR a/k/a COMMERCIAL LEASING SYSTEMS, INC. *v.* Charles Ricky JEFFREY

74-319 520 S.W. 2d 304

Opinion delivered March 31, 1975

Stubblefield & Matthews, for appellant.

Richard J. Orintas, for appellee.

FRANK HOLT, Justice. Appellant's manager caused appellee to be arrested for larceny by a bailee pursuant to Ark. Stat. Ann. § 41-3929 (Repl. 1964). The prosecutor later dismissed the charge. Appellee thereafter brought suit for malicious prosecution. A jury awarded appellee $1,500 compensatory and $1 punitive damages. Appellant was awarded $1,225 on its cross-complaint against appellee for damages to its automobile during the bailment. Appellant first asserts for reversal that the trial court erred in denying its motion for a directed verdict and argues there was insufficient evidence that the criminal action was instituted without probable cause.

In determining the sufficiency of the evidence on appeal, we review the evidence and all reasonable inferences deducible therefrom in the light most favorable to the appellee and affirm if there is any substantial evidence to support the finding of the jury. *Green* v. *Harrington,* 253 Ark. 496, 487 S.W.2d 612 (1972). There we said that upon appellate review it must appear "there is no reasonable probability that the incident occurred as found" by the factfinder. Furthermore, it is well established that upon appeal we consider only the evidence of the appellee or that portion of all the evidence which is most favorable to him. *Baldwin* v. *Wingfield,* 191 Ark. 129, 85 S.W.2d 689 (1935); and *Washington Natl. Ins.* v. *Meeks,* 252 Ark. 1178, 482 S.W.2d 618 (1972).

The appellee was employed at a place of business near that of the appellant. The appellee became acquainted with appellant's manager and expressed an interest in buying one of their rental cars. Appellee's version of the bailment, which was contradicted by appellant, was that appellant permitted him, by a verbal agreement, to have the car on a Friday afternoon with the understanding that he would return or purchase the car on the following Monday. Appellee expressed a desire to show it to his wife, his insurance adjuster to determine the insurance rates, and have a mechanic inspect the brakes and front end alignment. He was told there was no restriction as to the mileage he could put on the car and neither was he limited to keeping it in Little Rock. It was appellee's understanding that he "could drive it wherever [he] pleased". He drove the car to Batesville where he spent Friday night and showed the car to his and his wife's families. Saturday morning they went fishing. That evening they attended a show and then after putting the children to bed, he and his wife went "riding around in the car." He accidentally lodged the car on an asphalt ramp at a dam site causing the damages. He was unable to locate appellant's manager on Sunday and drove the car back to Little Rock. On Monday morning (not having seen his insurance agent or mechanic) he called appellant's manager and advised him about the damaged car. As requested, appellee returned the car.

Appellant's manager denied that the bailment existed

longer than Friday or one day. He and appellee discussed settlement of the damages to the car. Appellee said that he would "try to work something out with him" and "give me a little time." Several days later, appellee moved from Little Rock to Memphis to other employment. A few days later the appellant contacted the prosecuting attorney and had a warrant issued for the appellee upon a charge of larceny by a bailee. Appellee testified that appellant's manager knew that he was in the process of moving. The manager did not secure a written estimate of the cost of the damages to the car until after the criminal action had been dismissed in criminal court. He acknowledged that he could have filed a civil suit. However, he thought the appellee was "judgment proof." Also that he considered the appellee had "broken the law" and "should be punished."

In an action for malicious prosecution, the burden is on the plaintiff to show that the defendant acted maliciously and without probable cause. *Malvern Brick and Tile Co.* v. *Hill,* 232 Ark. 1000, 342 S.W.2d 305 (1961). Only when the facts relied upon as constituting probable cause are undisputed, then the question becomes one of law and should not be submitted to the jury. *Gazzola* v. *New,* 191 Ark. 724, 87 S.W.2d 68 (1935); and *Whipple* v. *Gorsuch,* 82 Ark. 252, 101 S.W. 735 (1907). However, appellant recognizes that where a factual dispute exists "it is generally for the jury to determine the truth and whether a justification is established" for prosecution.

The crux of § 41-3929 is not the existence of an intent to convert the property to the use of the bailee but the use of the property contrary to the agreement. *Sullivant* v. *Pennsylvania Fire Ins. Co.*, 223 Ark. 721, 268 S.W.2d 372 (1954). In the case at bar, the conditions of the verbal bailment are in dispute. As indicated, the appellee took the car to show to his insurance agent and mechanic and "try the automobile out and show it to my wife." It is true that he did not confer with his insurance agent or mechanic about the car. However, there was no particular time agreed upon as to when appellee would return the car on Monday. The car, having been damaged on Saturday, was returned, as requested, Monday morning. According to appellee, appellant did not limit the mileage and he could drive the car wherever he pleased. In

the circumstances, the question as to whether appellee had deviated from the agreement was properly submitted to the jury.

Appellant next argues that the court erred in refusing to direct a verdict on the ground that appellant acted upon the advice of counsel in prosecuting this case. Appellant recognizes our well established rule that matters raised for the first time on appeal will not be considered. Even if we agree with the appellant that its motion was sufficiently presented to the trial court, we cannot agree with its contention. This is so because, as appellant recognizes, a full and complete disclosure of the facts must be made. *Hall* v. *Adams,* 128 Ark. 116, 193 S.W. 520 (1917). As indicated, there was a factual issue between appellant's and appellee's version of the bailment.

Appellant finally asserts that appellee failed to prove that appellant acted with malice, which is a necessary element in a malicious prosecution cause of action. We have held that ". . . . malice may be inferred when there is lack of probable cause, even though there was no express showing of malice." *Malvern Brick and Tile Co.* v. *Hill, supra.* Furthermore, as previously stated, in determining the sufficiency of the evidence, we must view the evidence in the light most favorable to appellee. Appellee testified that when appellant's manager learned about the damaged car, the manager expressed a fear of losing his job. Then he attempted to get appellee to sign a postdated rental agreement in order to have appellant's insurer pay for the damage. According to appellee, appellant's manager knew that appellee was moving to Memphis and he contacted appellee only once before appellee moved. During that last conversation in Little Rock, the parties talked about the damage to the car and appellant again asked appellee to sign the postdated rental agreement. When asked why the criminal action was instituted, appellant's manager answered "[B]ecause he had broken the law and as far as I could see he should be punished." Appellant's manager did not think that it was "in the best interest of the company" to file a civil suit because he thought "the man was judgment proof." Appellee testified that appellant's manager told him the charges would be dismissed

if appellee would pay the damages. Certainly, there is substantial evidence from which the jury could find the necessary element of malice.

Affirmed.

James R. MALLORY, Theola MALLORY and Carolyn MALLORY *v.* Nancy EDMONDSON, as Guardian of the Person and Estate of Nancy MALLORY, and Nancy EDMONDSON, Individually

74-292 521 S.W. 2d 215

Opinion delivered March 31, 1975
[Rehearing denied May 5, 1975.]

Brockman, Brockman & Gunti by: *E. W. Brockman, Jr.,* for appellant.

James L. Hall, Jr., for appellee.

ALLAN W. HORNE, SPECIAL CHIEF JUSTICE. This is an appeal from an Order of the Jefferson County Chancery Court adjudicating custody of Nancy Mallory, an adult incompetent person, and ordering Appellants to return Nancy to Appellee, her grandmother and guardian of her estate and person, and from whose custody Appellants had forceably taken Nancy. Appellants James H. Mallory and Theola Mallory are Nancy's parents and Carolyn Mallory is her sister. At issue here is whether the Chancery Court had jurisdiction over the Appellants and Nancy for the purpose of adjudicating custody and whether the Court's Order in awarding custody to Appellee is supported by the evidence.

Nancy, who at the time of the trial of this case was approximately 31 years of age, was the unfortunate victim of two automobile accidents from which she received serious and permanent injuries. The first accident occurred in 1949 when she was 7 years old and the injuries she received therefrom resulted in crippling injuries and permanent, brain damage which left her retarded and mentally incompetent. The second accident occurred in 1963 and resulted in further permanent, crippling injuries. For many years she has been unable to feed or bathe herself, move about or otherwise care for her bodily needs.

Prior to the 1949 accident, Nancy had from time to time lived with her grandmother and during one period of time while her father was in the military service, resided with

Appellee for a period of almost three years, part of which time Nancy's mother also resided in Appellee's home. After the first accident, Nancy was hospitalized in Memphis, Tennessee where she was treated by a brain specialist, and because of the close proximity of Appellee's home in Pine Bluff, it was decided to leave her with Appellee to continue Nancy's care and treatment by the Memphis physician. What was probably at the time thought by all parties to be a temporary arrangement became permanent for Nancy was destined to live the next 23 years with her grandmother who willingly and devotedly accepted the heavy responsibility of Nancy's care and custody.

In 1963, in connection with the settlement of the second automobile accident in which Nancy was injured, Appellee was appointed guardian of the estate and person of Nancy by the Jefferson County Probate Court. Nancy's parents consented to such appointment and, in writing, waived notice of the appointment of Appellee as Nancy's guardian. (The Chancellor found that the parents had consented to the appointment of Appellee as Nancy's guardian for all purposes and not just for the settlement of the accident case). Although there is some dispute as to the length and frequency of visits, it appears that Nancy's parents visited her in Appellee's home from time to time and that Nancy was taken to Appellants' home in Kentucky for visitation for periods ranging from one to three months a year. However, it is undisputed that, with the exception of such visits, Nancy lived with Appellee from 1950 to June 16, 1973 when Nancy, over the objection of Appellee, was forceably removed from Appellee's home by Appellants and taken by automobile to Appellants' home in Russellville, Kentucky.

The Appellee filed this suit in her capacity as guardian of the estate and person of Nancy and individually praying that she be awarded compensatory and punitive damages for bodily and mental injury allegedly inflicted upon her in the course of the taking of Nancy from her home and that Appellants be ordered to return Nancy back to her care and custody.

In response thereto Appellants, appearing specially to

contest the Court's jurisdiction, filed a Motion to Quash the Service of Process upon them on the ground that they were non-residents of the State of Arkansas and had not been served while in this State. Upon the Court's overruling their Motion to Quash, Appellants, preserving the jurisdictional question, filed their Answer in which they denied: that they took Nancy by force and violence or that they had inflicted any bodily harm or injury to Appellee; that the Appellee is the legally appointed guardian of Nancy; that they consented to the appointment of Appellee as Nancy's guardian; that Appellee is a proper person to have Nancy's custody on the ground that Appellee is not physically able to care for and maintain Nancy. They affirmatively alleged that they and Nancy are non-residents of the State of Arkansas and are domiciled in and residents of Russellville, Kentucky and that the Court does not have jurisdiction of the Appellants or of Nancy; that the Complaint erroneously joins an individual tort action in a custody proceeding; that Appellant James R. Mallory, Nancy's father, was appointed Nancy's guardian in Kentucky in 1950 which guardianship is still in full force and effect; that James R. Mallory was also appointed Nancy's guardian in Kentucky on August 31, 1974, which guardianship is in full force and effect; that Appellant James R. Mallory and Theola Mallory are entitled to Nancy's custody and are physically and financially better able to care for her than Appellee. There were numerous other pleadings, motions, allegations, and charges but the above summarizes the essential facts and pleadings.

From an Order of the Chancery Court finding against Appellants on the jurisdictional question and awarding custody to Appellee with specified visitation privileges to Appellants, Appellants bring this appeal. (The Chancellor held that a cause of action brought by a fiduciary cannot be joined with a cause of action brought in an individual capacity and that the Chancery Court had no jurisdiction to hear and determine an unliquidated tort claim. Neither party raised either of these issues on appeal and, hence, they are not before the Court).

For reversal Appellants rely on the following points:

I. The Chancery Court of Jefferson County, Arkansas

lacked jurisdiction of the Appellants, James R. Mallory, Theola Mallory and Carolyn Mallory, and of the person of the ward, Nancy Virginia Mallory.

II. There is no testimony to deprive the natural parents of the custody of their adult daughter and ward.

I. Service of process was had upon the Appellants in accordance with the provisions of *Ark. Stat. Ann.* § 27-339.1 which provides in pertinent part as follows: "Any cause of action arising out of acts done in this State by an individual in this State or by an agent or servant in this State of a foreign corporation may be sued upon in this State, although the defendant has left this State, by process served upon or mailed to the individual or corporation outside the State."

Appellants argue that the statute applies only to tort actions and not to an action of the nature of the case at bar. We find no case where the statute has been previously construed by this Court. However, as we construe the statute it is not restricted to tort actions. We unhesitantly hold that the acts of Appellants coming into Arkansas, a state where Nancy has lived with their consent for over 20 years, and forcefully and against the will of her legal guardian, removing her from the state creates a cause of action in favor of Appellee as guardian. The statute is constitutional. See *Wichman* v. *Hughes,* 248 Ark. 121, 450 S.W. 2nd 294 (1970) and cases therein cited.

The Chancellor also held that the Court had jurisdiction of Nancy for the purpose of determining her custody even though she was not then present in this state and we agree. The *Restatement of the Law* states that there are three bases upon which jurisdiction may be laid in custody cases. *Restatement, Second, Conflict of Laws,* (1971), Sec. 79 reads as follows:

"A state has power to exercise judicial jurisdiction to determine custody, or to appoint a guardian, of the person of a child or adult

(a) who is domiciled in the state, or
(b) who is present in the state, or

(c) who is neither domiciled nor present in the state, if the controversy is between two or more persons who are personally subject to the jurisdiction of the state."

In *Shaw* v. *Shaw*, 251 Ark. 665, 473 S.W. 2d 848, (1971), it was held that each of the above bases provides a reasonable basis for jurisdiction in a proper case. In the case at bar we find that the ward was domiciled in this state for the following reasons: she has resided in this state for over 20 years; her guardian who stands in loco parentis to her is domiciled in this state. It is further pointed out that the third basis of jurisdiction noted by the Restatement, i.e., if the controversy is between two or more persons who are personally subject to the jurisdiction of the state, is present in this case inasmuch as we have held that the Court had personal jurisdiction of Appellants as discussed above.

To hold that this state does not have jurisdiction to determine Nancy's custody because she is no longer present in this state would be tantamount to approval of Appellants' action in wrongfully removing her from her guardian's custody and to encourage self-help in similar cases. This we decline to do.

II. The Chancellor's award of custody to Appellee gives us more difficulty. We quote in part from the lengthy and well-reasoned opinion of the Chancellor.

"The facts of this case are different from any case that this Court has ever heard. There appears to be a paucity of cases with similar facts. Nancy has been in the plaintiff's home for most of the time since 1950, visiting occasionally in the home of defendants. In December, 1963, with a waiver of notice having been properly executed by Defendants James R. Mallory and Theola Mallory, the plaintiff was appointed guardian of the person and estate of Nancy by the Probate Court of Jefferson County. She was the legal guardian of Nancy at the time that the defendants forceably removed the ward from plaintiff's home.

"The Court, in striving to arrive at a just and equitable

decision, has considered several relevant factors. Factors tending to support the defendants' position are:

(1) They are the natural parents and sister of the incompetent.

(2) They are younger than plaintiff and would probably be more able to personally care for Nancy than the legal guardian.

(3) The family would be reunited.

"Factors tending to support plaintiff's position are:

(1) The plaintiff has had the physical custody of Nancy for most of the time since 1950. The natural parents have consented to the arrangement whereby their daughter has made her home with plaintiff over twenty years.

(2) The plaintiff has been Nancy's legal guardian since December, 1963, this appointment having been made with the knowledge and consent of Defendants James R. Mallory and Theola Mallory.

(3) The plaintiff appears to have given Nancy constant and attentive care during the entire time the incompetent has resided in the home of this party.

(4) As legal guardian and pursuant to Ark. Stats. 57-625, the plaintiff was 'entitled to the custody of the ward.' The defendants had several legal remedies available to them to obtain the custody of Nancy, but instead of pursuing one of these remedies, they took the law into their own hands and forceably removed this incompetent from the home of her legal guardian and fled the State.

(5) Even though certain physical infirmities of the plaintiff has made it more difficult for her to minister to the needs of Nancy as she once did, the evidence reflects that Mrs. Edmondson, as the legal guardian of Nancy, is holding assets in excess of $6,000.00 that belongs to her ward. This account could be used to hire someone to assist on a part-time or full time bases."

There is evidence that the Appellee who with her husband is over 80 years of age, is deteriorating physically and has some trouble seeing. On the other hand, James R. Mallory is suffering from advanced stages of emphysema and asthmatic condition and there was some doubt as to whether he would be physically able to make the trip to Arkansas in order to attend the trial of this cause. There is evidence that Nancy's mother, Theola, has herself been ill and was hospitalized for significant health reasons on several different occasions in 1965, 1967, 1969 and 1970. Other examples of balancing factors affecting a decision as to the proper person to have Nancy's custody could be cited. While we may have decided the case differently had we been the Chancellor, our reasons for not substituting our judgment for the Chancellor's in this case are well stated in *Stevenson* v. *Stevenson*, 237 Ark. 724, 375 S.W. 2d 659 (1964) where we said:

> "During the hearing the perceptive Chancellor had the opportunity to fully appraise the witnesses and their testimony. Appellant vigorously contends that the Chancellor erred in awarding custody of the children to the father, but there was estimable evidence which supported the able Chancellor's conclusion, and we have said, consistently and frequently, that we will not reverse the findings of the Chancellor unless such findings are against the preponderance of the evidence."

In recognition of the finding by the Chancellor that "because of Plaintiff's age, the time is not far removed when another custodial arrangment will, out of necessity, have to be worked out for Nancy," the Court retained jurisdiction of the case for the purpose of entering appropriate orders in the future relative to Nancy's welfare. We would echo the Chancellor's statement and emphasize that the Appellants are always free to petition the Court for a modification of the custody decree upon a showing of changed circumstances. *Stevenson* v. *Stevenson*, supra.

Affirmed.

BYRD, J., Dissents.

HARRIS, C.J., not participating.

MISSOURI CITY STONE, INC. and HARTFORD INSURANCE GROUP *v.* Jerry PETERS

74-323 521 S.W. 2d 58

Opinion delivered April 7, 1975

Daily, West, Core & Coffman, for appellants.

Floyd G. Rogers and *Hardin, Jesson & Dawson,* for appellee.

CARLETON HARRIS, Chief Justice. The question here presented is whether the finding of the Workmen's Compensation Commission should be sustained, the commission finding that the compensation statutes of Arkansas apply to an injury sustained by Jerry Peters, appellee herein, in the State

of Oklahoma. Appellants, Missouri City Stone, Inc. and Hartford Insurance Group, are paying claimant under provisions of the Oklahoma Workmen's Compensation Act, but controvert any payments under the Arkansas act. The question of percentage of disability is not involved, it being recognized that the disability is permanent and total, irrespective of which state act applies. [1] Peters was injured in a rock quarry accident at Wilson's Rock Oklahoma, located approximately 15 miles from Fort Smith, Arkansas. Peters suffered a crushed face and severed spine in the accident and is permanently paralyzed from the waist down. It might be here stated that payment of maximum benefits under the compensation law of one state does not bar an employee from asserting a subsequent claim under the Workmen's Compensation Law of a sister state unless the law of the first state so declares. That situation does not exist in the claim at issue. *McGehee Hatchery Co.* v. *Gunter,* 234 Ark. 113, 350 S.W. 2d 608. Of course, there can be no double recovery; only the difference by which the second award is greater than the first may be recovered. *McGehee Hatchery Co.* v. *Gunter, supra.*

In *International Paper Company* v. *Tidwell,* 250 Ark. 623, 466 S.W. 2d 488, we pointed out, that whether the Arkansas Workmen's Compensation Law can be applied where the claimant is injured in another state, is a mixed question of law and fact; that as to factual determinations, the findings of the commission are binding upon the courts if there is any substantial evidentiary support, and that we must accept that view of the facts which is most favorable to the commission's findings. Still further, that where fair-minded men might honestly differ as to the conclusion to be drawn from facts, either controverted or uncontroverted, the drawing of inferences and reaching of conclusions are for the commission, and not the courts. In *Tidwell,* the commission found it had jurisdiction because appellee was a citizen and resident of Arkansas both prior to and at the time of his injuries, was paid in Arkansas under the supervision of appellant's Arkansas office, and the contract of employment was entered into in this state.

[1]At that time, the Arkansas act provided for a maximum weekly payment of $49.00, while the Oklahoma act only provided for payments of $43.00 per week; also, the Oklahoma act has a ceiling, while Arkansas has no ceiling in cases of permanent disability.

The commission, in reaching its conclusions in the case now before us, quoted from *Tidwell* as follows:

> "When we consider the interest that this state has in the welfare of its residents, in minimizing the likelihood of their becoming public charges or objects of local charity, in having a procedure for a remedy readily available to its residents, and in securing compensation to physicians and hospitals in Arkansas which might not otherwise be available to a claimant, we cannot say that reason and logic require a different approach to a liberal construction of our statute because of these limited dissimilarities, in spite of the fact that a different result has been reached in other jurisdictions, and the fact that the injury might be compensable under the laws of another state."

The commission then proceeded to enumerate the facts upon which it predicated its decision and concluded:

> "Arkansas has a legitimate interest in the welfare of the claimant and in minimizing the likelihood of his becoming a public charge or object of local charity, and in having a procedure for remedy readily available to him, and in securing compensation to physicians and hospitals in Arkansas which might not otherwise always be available to him."

Peters was allowed compensation benefits at the rate of $49.00 per week, being the maximum benefit that he was eligible to receive under the Arkansas Workmen's Compensation Law, appellants to receive credit for payments made under the Oklahoma Workmen's Compensation Law. From such award, appellants appealed to the Circuit Court of Sebastian County, and that court affirming the commission award, appellants appealed to this court. For reversal, it is asserted that there is no substantial evidence to support the commission's findings, and that the findings do not support the award, points of a similar nature which will be discussed together.

On August 28, 1970, Peters went to the Employment

Security Office in Fort Smith, seeking employment and that office, having previously received an order from the Missouri City Stone Company for a truck driver on a river job at Wilson's Rock in Oklahoma, referred Peters to the job. Peters went to the jobsite and was interviewed by Elmer Partain, Missouri Job Superintendent, who advised him that there were no jobs open at that time but to leave his name, address, and phone number with the head mechanic. A few days later, there was a vacancy for a water truck driver and Partain telephoned Peters that he had this job open.[2] Peters received the telephone call in Alma around 8:00 P.M. at the home of a neighbor, accepted the employment, and reported to the jobsite the next day. Thereafter, Peters continued to reside in Alma and commuted to and from the jobsite each day. In the meantime, Partain had made arrangements with Holt-Krock Clinic in Fort Smith to furnish ambulances and doctor services for anyone who might be injured on the job. After the explosion, and injury of Peters, the latter was taken to Sparks Hospital in Fort Smith, where, according to Partain, the company had "set up" with the doctors. Employees on the job were paid by check out of a Fort Smith bank.

Partain, a permanent resident of Little Rock, testified that upon completion of the Oklahoma job, the company had a job to do in Little Rock; that the services of Peters being satisfactory, the latter was offered a job when the crew moved to Arkansas.[3] The company had no permanent offices in Oklahoma (only a portable field office being maintained at the jobsite), but does have an office at Sweet Home, Arkansas, near Little Rock, the company purchasing the property there in 1968. It does not appear that this office is maintained the year-round, and while there is an office phone, there is no answering service. A shop on the property is used to maintain equipment and trucks. Partain testified that there were three employees on the Oklahoma job from Arkansas. Some other findings considered favorable to appellee were made by the commission, but inasmuch as evidence is not entirely clear on such points, we omit them from this discussion.

[2]It is not entirely clear whether Partain made this call from Wilson's Rock or Fort Smith, but we do not consider this fact as being particularly pertinent to the issue at hand.

[3]Peters testified that he had intended to go to Little Rock on the job offered.

Of course, the underlying question is whether the Arkansas Workmen's Compensation Commission had jurisdiction to make any finding or award. Appellant company is foreign to both Oklahoma and Arkansas, being a Missouri corporation. The commission found that Arkansas did have sufficient contacts with the claimant in order to apply its compensation laws, and in accordance with the principles set out in *Tidwell*, it must be remembered that where fair-minded men may honestly differ as to the conclusion to be drawn from facts, the drawing of inferences and reaching of conclusions are within the province of the commission. When viewed in this light, we think the evidence substantial that there was a significant relationship with Arkansas.

Professor Arthur Larson presents an excellent discussion of Workmen's Compensation Laws as they are involved in Conflicts of Laws in 6 Duke Law Journal 1037 (1971), the article being entitled "Constitutional Law Conflicts and Workmen's Compensation." Therein, Professor Larson states:

> "The conflicts problem in compensation law, as stressed at the outset, is normally not a choice-of-law question at all, since the forum can apply only one statute, that of its own state, and there is thus no occasion or opportunity to engage in a choice of law. The only 'choice' the forum has is to grant relief under its own statute or to deny relief altogether. With that pair of alternatives, it is easy to see why *some* substantial interest should suffice, without worrying about its relative weight when compared with the interests of foreign states."

He further points out that working uniformity could not be achieved without a simultaneous amendment of all state statutes so that each is a perfect complement of the other, and then says:

> "The achievement of such statutory coordination is, of course, entirely improbable; but even if it were possible, there is serious doubt whether the states would find it desirable. The low-benefit states might fear that the operation of a uniform rule would put unpredictable

high-benefit burdens on its employers, while the high-benefit states might fear that in certain combinations of facts employees in whom they have an interest would get an unacceptably low level of compensation.

"The only uniformity to be looked for, then, is the uniform right of all states having a legitimate interest in the injury to apply their own diverse rules and standards - separately, simultaneously or successively."

While some of the items heretofore enumerated bear no particular weight, we think that the overall evidence reflected ample facts to support the award. Of course, there are factual differences between this case and *Tidwell,* but that itself is of no great moment since the factual background of this type of case will rarely be the same. The most important fact of all is that Peters was a resident of Alma, Arkansas at the time he became employed by Missouri City Stone, Inc. and is still a resident of this state. His ties to Arkansas were demonstrated by the fact that he daily commuted to and from the jobsite. It might also be mentioned that any unemployment benefit to which Peters might be entitled, prior to his injury, because of lack of employment, would have been administered in Arkansas. And, of course, this state is interested in minimizing the likelihood of one of its citizens becoming a public charge or an object of local charity. It is obvious, if Peters should become devoid of financial resources, which state, or its citizens would have the responsibility of taking care of him.

Affirmed.

FOGLEMAN and JONES, JJ., concur.

BYRD, J., dissents.

JOHN A. FOGLEMAN, Justice, concurring. I concur in the result, but I consider the language of the opinion to state a new concept of jurisdiction, differing from that upon which we based our finding that there was jurisdiction in *International Paper Company* v. *Tidwell,* 250 Ark. 623, 466 S.W. 2d 488. The policy reasons given there for construing the statute liberally in favor of jurisdiction did not become, either singly

or collectively, a factual basis for the exercise of jurisdiction in Arkansas. They were nothing more than they purported to be — policy reasons for a liberal construction. I submit that the fact that Peters was at all times a resident of Arkansas cannot confer jurisdiction on our commission. Neither can the securing of compensation to Arkansas physicians and hospitals. Nor can the combination. We did not, and should not, under our statute, adopt the rule advocated by Prof. Larson, i.e. that some substantial interest should suffice. If it should, the General Assembly, not this court, should say so.

It was clearly established in *Tidwell* that there *must* be a *statutory* basis for the entertainment of a claim, and without it, a claimant is left either to a common law remedy or to the compensation laws of the state in which the injury took place. There was no coverage here or in *Tidwell*, insofar as the Arkansas law is concerned, except for employment carried on in this state. It cannot be otherwise. See Ark. Stat. Ann. § 81-1302 (c) (Repl. 1960). It is interesting to note, as we did in *Tidwell*, that Prof. Larson notes six grounds upon which applicability of a particular compensation act has been asserted. One of these is the place where the employee resides. But he was not sure that a state could apply its statute on that ground under federal constitutional limitation. He did feel sure that a state was free to apply its laws if it was the place where the injury occurred, where the contract was made or where the employment relation exists or is carried out.

Still, we approach this matter and the Workmen's Compensation Commission did, with a prima facie presumption that the Commission had jurisdiction. Ark. Stat. Ann. § 81-1324 (Repl. 1960) and we did not, as appellant suggests, hold differently in *Duke* v. *Pekin Wood Products Co.*, 223 Ark. 182, 264 S.W. 2d 834. This means to me that the mere filing of a claim makes out a prima facie case of jurisdiction, which is sufficient unless the respondent brings in evidence sufficient to rebut the presumption. Barnhart, Use of Presumptions in Arkansas, 4 Ark. L. Rev. 128, 132; *Continental Gin Co.* v. *Benton*, 104 Ark. 367, 149 S.W. 528; *Nunez* v. *O.K. Processors*, 238 Ark. 429, 382 S.W. 2d 384. See also, *Hollenberg* v. *Lane*, 47 Ark. 394; *Cartwell* v. *Menifee*, 2 Ark. 356; *Craig* v. *Sims*, 160

Ark. 269, 255 S.W. 1; IX Wigmore on Evidence (3d Ed.) 293, § 2494. The situation is not unlike that arising in a civil case where the burden of showing want of jurisdiction lies upon a party moving to dismiss for want of jurisdiction. *Arkansas Land & Cattle Co.* v. *Anderson-Tully Co.*, 248 Ark. 495, 452 S.W. 2d 632.

As I see it, it was not shown by appellant that the commission did not have jurisdiction. The commission held that it did and reached the following pertinent conclusions:

> As we review the facts in this case we find that the claimant is a resident of Alma, Arkansas, and was a resident of that city in August of 1970. On or about August 28, 1970, the claimant went to the Fort Smith, Arkansas, Employment Security Division Office seeking employment. This office had already been advised by the respondent of certain employee needs. The claimant was directed by the Fort Smith Employment Security Office to the job site in Oklahoma. The claimant met the Superintendent of the respondent at the site, was interviewed and an application taken, but the claimant was advised that there was no opening at that particular time. The respondent noted the claimant's phone number and address in Alma, Arkansas, and a few days after the interview the Superintendent of the respondent called the claimant and asked him if he was still interested in the job. The claimant replied that he was and the claimant was told to report to work and that he would be put on the water truck. In response to this telephone call the claimant reported to the job site in Oklahoma and was employed by the respondent.
>
> Claimant continued to reside in Alma, Arkansas, and commuted to and from the job site each day. When the claimant was injured he was taken from the job site to a Fort Smith hospital by a Fort Smith ambulance and treated exclusively by the Fort Smith, Arkansas, physicians.
>
> Payroll checks to the claimant were drawn on a Fort Smith, Arkansas, bank. There was also testimony

> that the Workmen's Compensation claim of the claimant is being serviced out of Little Rock, Arkansas, office of the respondent as opposed to an Oklahoma office.
>
> The claimant accepted employment for a temporary job in Oklahoma and was later offered full time employment with the company in Arkansas.
>
> The respondent, Missouri City Stone, is a Missouri corporation with its main office in Dallas, Texas, and its parent company, Markham and Brown, is a Texas corporation with its offices in Dallas. Missouri City Stone had only one project in Oklahoma and that was the project where the claimant was injured. Missouri City Stone maintained only a temporary trailer which served as an office at the site in Oklahoma, but maintains a permanent office in Sweet Home, Arkansas, near Little Rock, Arkansas, upon property owned by it. The respondent owns no property in Oklahoma.
>
> The testimony in the case reveals that the Superintendent of the respondent on the Oklahoma job maintains his home both before and after the accident in Little Rock, Arkansas. The evidence further reveals that employees of the Missouri City Stone on the project in Oklahoma were Arkansas residents who worked in Arkansas before and after this accident for the respondent.

The commission might have added that most of the work of appellant which had been performed under its general superintendent had been done in Arkansas; that, in addition to being a shop, the field office in Little Rock affords a place where the company payrolls are made; the checks for the payroll on the Oklahoma job were made out in Fort Smith, Arkansas; and that appellant had been domesticated in Arkansas.

This case is similar to *Tidwell* in that the employer was localized as a resident and the employee was at all times a resident. The only possible distinction is the place where the contract was entered into. I do not believe that appellant in-

troduced sufficient evidence to overcome the prima facie presumption. Peters testified that he accepted the job at his home, when he was called there by appellant's general superintendent by telephone. The place of making of the contract was at least a question of fact. A contract is entered into at the place where the offer is accepted and when made by telephone, it is regarded as made at the place from which the accepting party speaks. 17A CJS 352, Contracts § 356; 17 Am. Jur. 2d 392, Contracts § 53.

There was not sufficient evidence to overcome the prima facie presumption of jurisdiction and, to say the least, there was substantial evidence to support the finding.

ORKIN EXTERMINATION COMPANY, INC. *v.* Albert R. WEAVER

74-311 521 S.W. 2d 69

Opinion delivered April 7, 1975

[As Amended April 21, 1975.]
[Rehearing denied April 28, 1975.]

Coleman, Gantt, Ramsay & Cox, for appellant.

Baim, Baim & Mullis, for appellee.

GEORGE ROSE SMITH, Justice. The appellant Orkin is engaged in the pest control business in many states. The appellee Weaver worked for Orkin, as a sales and service representative, from 1965 until he was discharged in 1973 for having failed to file reports of his calls upon customers. Within a week Weaver re-entered the pest control business, in partnership with another former Orkin employee. Orkin then brought this suit to enforce, by injunction, a provision in Weaver's contract of employment by which he agreed not to engage in the pest control business in certain areas for a period of two years after the termination of his employment by Orkin. The chancellor denied relief, finding the contractual provision to be invalid. We agree with his decision.

Inasmuch as Orkin relies upon our holding in *Orkin Exterminating Co.* v. *Murrell,* 212 Ark. 449, 206 S.W. 2d 185 (1947), we may conveniently use that opinion as a basis for our discussion of this case. There Murrell had resigned as the manager of Orkin's Little Rock office and had gone into the pest control business for himself. Murrell's contract, as compared to Weaver's, was less restricted as to time — one year instead of two years — but was broader as to territory. We sustained the contract, upon proof that trade secrets, special training, confidential information, and access to lists of customers were involved. We need only compare the facts in the *Murrell* case to the facts in this case, which are practically undisputed.

First, trade secrets and confidential information. More than 25 years ago, when *Murrell* was decided, there may have been such esoteric data, but according to the present record that condition no longer prevails. Training in the field is available at the college level, in Arkansas. Technical manuals upon the subject can be purchased. The Arkansas Association of Pest Control is a source of information to its members. The pesticides used in the business are available upon the open market to the public in general. Federal law requires that directions for their use be set forth on the label. The witness Henry, who was Orkin's manager when Weaver was discharged, testified:

> Q. Now, in your opinion, while this man was an employee of yours at Orkin Exterminating Company, did he have access to any trade secrets?
>
> A. Really, I don't believe you would call them trade secrets. It was just information that the company felt should be kept confidential. But information that if you wanted to research all facilities that are available you could come up with it.
>
> Q. Not information that Orkin and Orkin alone had, is that correct?
>
> A. That's right.

In *Rector-Phillips-Morse* v. *Vroman*, 253 Ark. 750, 489 S.W. 2d 1 (1973), we held that such information — "confidential" in the sense that no company voluntarily opens its records to its competitors — is not secret information in a case such as this.

Next, the matter of special training. Weaver worked for Orkin for more than seven years, during which he attended four or five training schools. He testified: "I wouldn't call it special training. I mean, if you have been to one meeting you have been to all of them." That testimony is not contradicted. There is nothing to suggest that Orkin did anything more than train its own employees, as a matter of self-interest, to be proficient in their jobs. There is no proof that similar training was not readily obtainable elsewhere.

Finally, in *Murrell* we stressed the former employee's "access to all records, customers' lists and credit ratings." Murrell, however, was a branch manager and as such had access to all records in the office. By contrast, Weaver was a route man who was familiar only with the list of some 250 customers that he serviced every month. That familiarity was essential to the performance of his duties. Orkin's witness Richardson, its Pine Bluff manager at the time of the trial, readily admitted that he could not think of any salesman for any company in the United States who did not have contact with customers.

In *Murrell* we noted that Orkin's former employee solicited and procured "a large number" of its best customers. In the case at bar Orkin proved that it had between 702 and 850 customers who subscribed to its monthly pesticide service, plus 4,000 subscribers to its annual termite service. In its case in chief Orkin proved that Weaver obtained exactly one of its customers after he left Orkin (but it was shown later in the case that the customer in question was not even in the area protected by the contract). Weaver readily admitted, in response to questions by his own attorney, that he was servicing 18 persons or firms that "might" have been Orkin's customers. Thus the proof at the time of trial, almost a year after Weaver's discharge, was that he had obtained at most 18 out of the 702 monthly customers that Orkin had. Orkin's manager admitted, however, that the company lost about 40% of its customers every year, by normal attrition.

The basic flaw in Orkin's position is that its contract, according to its own proof, is directed not against *unfair* competition but against competition of any kind on the part of its former employees. Upon this point Orkin introduced its current manager, Richardson, who explained the reason for the contract, in these words:

> The main reason is, you take a man, you train him in the business, you send him out to service a customer, and they develop a personal contact with the customers, personal relationships, then should they leave for any reason and go in a business of their own

> they still have this personal contact which means that they have the ability, the opportunity to take a customer from us as their own.

Orkin's other witness, its former manager, Henry, testified:

> Q. And this agreement was strictly an agreement that was to, in your opinion, hold down competition by former salesmen and former employees, is that correct?
>
> A. I believe that's absolutely the only reason for it.
>
> Q. It had nothing to do with the trade secrets and confidential information?
>
> A. No, sir.

Precisely the same point of view is urged in Orkin's brief in this court: ". . . preventing a former employee from competing against his employer and using the training, skills and information acquired from his employer is a valid reason for restriction."

If Orkin's position is sound, then any employer in any business devoted to selling — whether the sales be of insurance, real estate, clothing, groceries, hardware, or anything else — can validly prohibit its former salesmen from engaging in that business within the vicinity for as long as two years after the termination of employment. Needless to say, the law does not provide any such protection from ordinary competition. *Vander Werf* v. *Zunica Realty Co.*, 59 Ill. App. 2d 173, 208 N.E. 2d 74 (1965); *Renwood Food Products* v. *Schaefer*, 223 S.W. 2d 144 (Mo. App., 1969); *Grace* v. *Orkin Exterminating Co.*, 255 S.W. 2d 279 (Tex. Civ. App., 1953); *Lakeside Oil Co.* v. *Slutsky*, 8 Wis. 2d 157, 98 N.W. 2d 415 (1959); *Herbert Morris, Ltd.* v. *Saxelby*, [1916] A.C. 688, Ann. Cas. 1916D, 537.

Orkin also relies upon a paragraph in the contract which recites that if a court should find the territorial restrictions to be unreasonable, then the restrictions are to be limited to any portions of the entire territory that were worked by the

employee during any period of 90 days or more within the last twelve months preceding the termination of the agreement. We need not discuss this point, because of the invalidity of this contract is not due only to the territorial restrictions. (And see *Rector-Phillips-Morse* v. *Vroman, supra.*)

Finally, after studying the language of the contract we cannot say that the chancellor was wrong either in awarding Weaver two weeks' separation pay or in denying him two weeks' vacation pay.

Affirmed on direct and cross appeal.

HARRIS, C.J., not participating.

FOGLEMAN, J., dissents.

JOHN A. FOGLEMAN, Justice, dissenting. Since I feel that the majority has unduly limited the legitimate area of protection by a covenant not to compete, I must dissent. I do not consider the distinctions made between this case and *Orkin Exterminating Co.* v. *Murrell*, 212 Ark. 449, 206 S.W. 2d 185 to afford adequate basis to justify failure to apply its principles.

The "trade secrets" or confidential information involved here is far different from that in *Rector-Phillips-Morse* v. *Vroman*, 213 Ark. 750, 489 S.W. 2d 1. There this court said that a trade secret may be defined as a secret formula, *method,* or *device* that gives one an advantage over competitors. Admittedly, Orkin's confidential technical manuals told its sales and service personnel *how to service* its customers. An Orkin employee taught Weaver procedures. Confidential technical bulletins prepared by Orkin's research and development section disseminated among its employees disclose the latest ideas and recommendations of the employer in treating procedures and on chemicals that can or cannot be used in particular areas. The chemicals are not specifically found on the market, but since federal law requires that the ingredients be shown on a label, an employee could learn which chemicals to buy on the open market in order to provide service to a customer. Orkin has patent rights, not on the chemicals, but on the mixtures. One can buy the chemicals

that go into Orkin's mixtures but not the mixtures.

To operate successfully in the pest control business, one must have a working knowledge of the problems that could be encountered in a particular business being served, of the various insects that might be anticipated, how they multiply, where and how they hibernate, the areas to be searched, the particular chemical to be used to treat the specific infestations found, the strength to be achieved by mixing chemicals, and the types of areas in which applications should or should not be made. All these techniques, chemicals and application procedures are kept confidential. Weaver did have access to all Orkin's mixtures of chemicals, methods of application and techniques, all of which were confidential.

Weaver attended four or five statewide school sessions. The information he received there was confidential. He admits that 90% of his training came from Orkin.

Weaver named 18 concerns as *some* of the customers he now services who were once customers of Orkin, but said that he was not *completely* sure about them. He was sure that he serviced customers that were once those of Orkin. His wife did actively solicit some of them. He testified that he did not solicit them "directly". The strange coincidence of Orkin's customers requesting service by Weaver might be explained by his across-the-coffee type method of saying that he was in business for himself, instead of just walking up to the customers and saying, "Can I have your business?", which he said he did not do.

It seems to me that the competition against which Orkin sought to protect itself in this action was unfair. It also seems to me that the manner in which Weaver became a competitor is worthy of consideration. His present partner, Majors, was also a former Orkin employee who left Orkin shortly before Weaver was fired. Weaver, after having worked for Orkin for 7½ years, and with full knowledge that his employer required the filing of daily reports, was terminated for failure to file them for a two week period. Within two or three days, he was associated with Majors, first with another company and

then in a partnership. All his work was in Pine Bluff and southeast Arkansas. He was in direct competition with Orkin.

While Weaver had not had access to Orkin's master customer list during the 7½ year period, he did become familiar with the customers on his own route list. The customers he did not "directly" solicit, but who contacted him "directly" knew him through Orkin. He simply professed to believe that his contract did not apply if he was fired.

Any information needed by a salesman could be obtained from the customer list. He could get the general customer list for the Pine Bluff area, by asking, at least about a specific individual. Pine Bluff, Rison, and from Sheridan to Helena and Stuttgart, constituted Weaver's route. He received a list of customers on his route every day, consisting of 15 to 20 names each. Somehow he knew that Orkin had about 850 customers when he left.

I daresay this is the first such Orkin contract held invalid at the appellate level. See *Grace* v. *Orkin Exterminating Co.*, 255 S.W. 2d 279 (Tex. Civ. App. 1953); *Orkin Exterminating Co.* v. *Veal*, 355 S.W. 2d 831 (Tex. Civ. App. 1962); *Orkin Exterminating Co., Inc.* v. *Wilson*, 501 S.W. 2d 408 (Tex. Civ. App. 1973); *Orkin Exterminating Co.* v. *Wilson*, 227 N.C. 96, 40 S.E. 2d 696 (1946); *Orkin Exterminating Co. of Raleigh* v. *Griffin*, 258 N.C. 179, 128 S.E. 2d 139 (1962); *Orkin Exterminating Co. Inc. of South Georgia* v. *Mills*, 218 Ga. 340, 127 S.E. 2d 796 (1962) See also, *Thomas* v. *Orkin Termite Co., Inc.*, 222 Ga. 207, 149 S.E. 2d 85 (1966); *Orkin Exterminating Co.* v. *Gill*, 222 Ga. 760, 152 S.E. 2d 411 (1966); *Rider* v. *Orkin Exterminating Co.*, 224 Ga. 145, 160 S.W. 2d 381 (1968).

While appellate review has been rendered more difficult because the contract is not abstracted, I do feel that Orkin had property rights in its mixtures, techniques, procedures, business secrets and research developments, and that they were entitled to have them protected. I cannot agree that only ordinary competition is involved here.

Insofar as the territorial restriction is concerned, I think

that, to say the least, the less restrictive area could easily be upheld, without the court making a contract for the parties. I do not think that the larger territory was unreasonable.

I would reverse the decree.

Ella Cox McELHANEY et al *v.* Virgil COX et al

74-344 521 S.W. 2d 66

Opinion delivered April 7, 1975

W. Q. Hall, for appellants.

Albertson and Boyd, by: *Jim H. Boyd,* for appellees.

JOHN A. FOGLEMAN, Justice. Appellants contend that the chancery court erred in allowing attorneys' fees of $275.00 to appellees' attorneys from the proceeds of a partition sale in this case. The action was commenced by a petition of appellees Virgil Cox and Clara Armstrong to quiet the title to the lands involved in them. Appellants Ella Cox McElhaney and Pearl Reeves answered and counterclaimed, alleging that they were tenants in common with appellees and that the property was not susceptible of division in kind, and asking that the lands be sold in partition, that the court award Ella Cox McElhaney taxes paid by her and interest thereon out of the proceeds of sale, and that, after payment of costs and a reasonable attorney's fee, the balance be divided among the respective heirs according to their interests. Appellees responded, asserting that appellants had no interest in the property and asked that the counterclaim be dismissed. Appellants then filed a request for admissions. If these requests had been admitted, it would have been clearly established that appellees were tenants in common. Appellees, however, filed an *amended* complaint alleging that it was amended by agreement of the attorneys for appellees and appellants, that the parties were tenants in common and that the property, not being divisible in kind, should be sold and the proceeds divided according to the interests of the respective parties. Appellees prayed that the court order a sale and divide the proceeds. No responsive pleading was thereafter filed by appellants.

On the 19th day of September, 1973, upon presentation of the amended complaint, the court entered an order directing the sale. No other pleading is mentioned in the decree. Prior to the entry of the decree, the attorney for appellants had advised one of the attorneys for the appellees that the proposed order was in proper form, except that it made no mention of reimbursement for taxes paid. The sale was held, reported and confirmed. The clerk of the court was its commissioner in making the sale. She filed a request for approval of her proposed distribution of the proceeds of sale, which included an item of $275 for attorneys' fees.

The major thrust of appellants' contention is that they, rather than appellees, instituted the suit and that Ark. Stat.

Ann. § 34-1825 (Supp. 1973), the governing statute, requires that a reasonable fee be allowed to the attorney bringing the suit. They argue that since appellees first filed a petition to quiet title and appellants counterclaimed for partition, the allowance should have been to their attorney, not appellees'. They overlook the fact that the *amended* complaint stated a new and different cause of action and superseded the original petition to quiet title. *Talkington* v. *Schmidt*, 219 Ark. 333, 242 S.W. 2d 150; *American Bonding Company* v. *Morris*, 104 Ark. 276, 148 S.W. 519; *Waters-Pierce Oil Co.* v. *Bridwell*, 103 Ark. 345, 147 S.W. 64, Ann. Cas. 1914B 837. They also ignore the fact that the decree for partition was rendered on that amended complaint, without consideration of any other pleading. Under the circumstances there was no error in allowing a reasonable fee to the attorneys for appellees as the parties bringing the suit for partition.

Appellants also list, but do not argue, a point for reversal based upon the absence of a prayer by appellees for allowance of attorneys' fees. Even if appellants have not waived this point for reversal by their failure to argue it, it is not well taken for at least two reasons. Appellants challenged the allowance by a motion, in which the lack of a specific prayer was not even mentioned, much less asserted as a ground. The issue cannot be raised for the first time on appeal. *Hendrix* v. *Hendrix*, 256 Ark. 289, 506 S.W. 2d 848. Furthermore, the statute mandates the taxing of the fee as a part of the costs of the cause. *Johnston* v. *Smith*, 248 Ark. 929, 454 S.W. 2d 649. We have held that under the statute as presently written the fee should be assessed and taxed proportionately against all parties. *Ramey* v. *Bass*, 210 Ark. 1097, 198 S.W. 2d 835.

Costs are incident to all actions, and where the statute requires that they be awarded, and does not require a demand for their payment, the absence of a specific prayer for the allowance in any pleading filed by appellees is not fatal. See *Jefferson County* v. *Philpott*, 66 Ark. 243, 50 S.W. 453; *Eddie* v. *Eddie*, 138 Mo. 599, 39 S.W. 451; 20 CJS 261, Costs § 2; *Arizona Cotton Ginning & Mfg. Co.* v. *Sims*, 29 Ariz. 198, 240 P. 341 (1925). See also, *Summerville* v. *North Platte Valley Weather Control District*, 171 Neb. 695, 107 N.W. 2d 425 (1961).

The judgment is affirmed.

BYRD, J., concurs.

Miss Linda Ellen SNOW and
Mrs. Dale Loyd SMITH *v.*
Marjorie T. MARTENSEN

74-300 522 S.W. 2d 371

Opinion delivered April 7, 1975
[Rehearing denied May 12, 1975.]

Crouch, Blair, Cypert & Waters, for appellants.

Jones & Segers, for appellee.

J. FRED JONES, Justice. This is an appeal by Miss Linda Ellen Snow and Mrs. Dale Loyd Smith from a Washington County Probate Court judgment holding the appellee, Marjorie T. Martensen, to be the surviving joint tenant, and therefore sole owner, of a savings account in the approximate amount of $70,000 deposited with the First Federal Savings

and Loan Association of Fayetteville in the names of Blanche M. Box and Marjorie M. Martensen.[1]

The facts appear as follows: Mrs. Blanche M. Box was 83 years of age when she died testate in Washington County, Arkansas, on October 17, 1971. She left as her sole surviving heirs, one daughter, the appellee Marjorie T. Martensen, and two granddaughters, the appellants Linda Ellen Snow and Joan Snow Smith.

Mrs. Box was living in California when she executed her last will and testament on March 10, 1969, and the pertinent provisions of the will read as follows:

> "FIRST: I revoke all Wills and Codicils that I have previously made.
>
> SECOND: I declare that I am married to JOHN V. BOX and all references in this Will to 'my husband' are to him. I have one child now living, my daughter, MARJORIE T. MARTENSEN. I have one deceased child, my daughter, MARY J. SNOW, who was survived by her daughters, LINDA ELLEN SNOW and JOAN ELIZABETH SNOW. Both of my children are the children of my former marriage. I have no other children, living or deceased.
>
> THIRD: I give and bequeath all my jewelry to my daughter, MARJORIE T. MARTENSEN. If she fails to survive me this bequest shall fail.
>
> FOURTH: I give, devise and bequeath the residue of my estate, real and personal, wherever situated, including all failed and lapsed gifts, as follows:
>
> (a) One-half (½) thereof to my daughter, MARJORIE T. MARTENSEN. If she fails to survive me, I give all such property to her lawful issue who survive me on the principle of representation.
>
> (b) One-fourth (¼) thereof to my granddaughter,

[1]Marjorie T. and Marjorie M. are one and the same person.

LINDA ELLEN SNOW.

(c) One-fourth (¼) thereof to my granddaughter, JOAN ELIZABETH SNOW.

* * *

SEVENTH: I nominate and appoint my husband as Executor of this Will, to serve without bond. If my husband shall for any reason fail to qualify or cease to act as Executor, I nominate and appoint CARL J. SCHUCK as Executor of this Will, to serve without bond. The term 'Executor' as used in this Will shall include any personal representative of my estate. I authorize my Executor to sell or lease such property of my estate as may be necessary or advisable, subject to confirmation as may be required by law and to hold, manage and operate any business belonging to my estate at the risk of my estate. I authorize and empower my Executor to invest and reinvest my estate to the extent permitted by law in such investments as are authorized by the provisions of California Civil Code Section 2261 or any subsequent statute of similar import."

Mrs. Martensen went to California and returned to her home in Fayetteville with her mother, Mrs. Box, about October 1, 1971. Mrs. Box's husband, John V. Box, died after the will was executed. Following the death of Mrs. Box, Mr. Schuck renounced his right to appointment as executor under the will and Mrs. Martensen was appointed administratrix with will annexed. Mrs. Martensen filed her inventory on May 10, 1973, showing no real estate, and personal property totaling $786.00 itemized as follows:

"Miscellaneous personal effects	$ 50.00
One (1) old style round cut diamond ring, 2.20 carats with four small diamond melee	696.00
One (1) 14 kt. yellow gold bracelet	25.00
One (1) 14 kt. yellow gold bee pin	15.00"

The appellants filed objections to the inventory filed by

the appellee. They contended that the savings account here involved constituted assets of the decedant's estate to be administered under her will. Mrs. Martensen contended first that the amount in the savings account was a gift to her and, second, that the savings account belonged to her as the surviving joint tenant with right of survivorship. The probate judge agreed with Mrs. Martensen on her second contention and on appeal to this court the appellants have designated the following points for reversal:

> "The probate court erred in holding that Arkansas law does not require a designation in writing to create a joint-tenancy with right of survivorship in a savings account held in a savings and loan.
>
> The probate court erred in failing to hold that even if Ark. Stat. 67-1838 (1) does not on its face require a designation in writing, that that statute has been amended and/or repealed either directly or by implication by Act 78 of 1965 (Ark. Stat. 67-552).
>
> The probate court erred in failing to hold that Section 1 of Ark. Stat. 67-1838 as far as it attempts to make the doing of an act conclusive evidence of another act or of an intention is invalid.
>
> The probate court erred in failing to hold that an account with a savings and loan is a contract and since the signature card (appellants' exhibit A) was never signed by Blanche Box (and in fact, there was no evidence that it was ever seen by her), Blanche Box is not bound by the language on the signature card nor is she an applicant for the opening of a joint account as stated on the signature card."

We find no merit to the appellants' first two points.

In *Willey, Adm'r* v. *Murphy,* 247 Ark. 839, 448 S.W.2d 341, we had under consideration a savings account in a savings and loan association under Ark. Stat. Ann. § 67-1838 (Repl. 1966) and also certificates of deposits in the Peoples Bank and Trust Company of Russellville under Ark. Stat.

Ann. § 67-552 (Repl. 1966). The savings and loan certificate for $8,000 was issued to Pearl Bailey or V. A. Murphy. The evidence was to the effect that both Mrs. Bailey and Mr. Murphy went to the savings and loan association office and opened the account with Mrs. Bailey's money. A deposit slip and signature card were in evidence in that case and the signature card designated Mrs. Bailey and Murphy as joint tenants with right of survivorship. Mrs. Bailey died and the trial court held, in a suit between Murphy and the administrator of Mrs. Bailey's estate, that the savings account belonged to Murphy and we affirmed citing § 67-1838, as follows:

> " 'If the person opening such savings account fails to designate in writing the type of account intended, or if he designates in writing to the association that the account is to be a 'joint tenancy' account or a 'joint tenancy with right of survivorship' account, or that the account shall be payable to the survivor or survivors of the persons named in such account, then such account and all additions thereto shall be the property of such persons as joint tenants with right of survivorship.' "

On the same date the account was opened with the savings and loan association, Mrs. Bailey and Mr. Murphy went to the Peoples Bank and Trust Company of Russellville and opened an account there through certificates of deposit. The certificates were stamped "as joint tenants with right of survivorship and not tenants in common." An executive officer of the bank testified that Mrs. Bailey introduced Mr. Murphy to him and told him she wanted the certificates issued in both names, and that he assumed she wanted it in a normal wording of a joint account with right of survivorship. He said he misplaced Mr. Murphy's name and upon so advising Mrs. Bailey, she again advised him to issue the certificates in her name and the name of Mr. Murphy. The trial court found that the two bank certificates were not issued in the form required by law to vest title in Murphy as survivor. We affirmed the trial court and in doing so quoted § 67-552, as follows:

> " 'If the person opening such account, or purchasing

> such certificate of deposit, designates in writing to the banking institution that the account or the certificate of deposit is to be held in 'joint tenancy' or in 'joint tenancy with right of survivorship,' or that the account or certificates of deposit shall be payable to the survivor or survivors of the persons named in such account or certificate of deposit, then such account or certificate of deposit and all additions thereto shall be the property of such persons as joint tenants with right of survivorship.' "

As to the bank certificates in *Willey, supra,* we relied on *Cook* v. *Bevill,* 246 Ark. 805, 440 S.W.2d 570, where we said that there must be a substantial compliance with the "designation in writing" requirement of the Act in order to effect survivorship.

In *Cook* v. *Bevill, supra,* we traced the history of § 67-552 as relating to joint accounts in banks and stated that Act 260 of 1937 (§ 67-521 before amendment) had a two-fold purpose. "It protected the bank in making payments from deposits in the names of any two persons; and it declared 'a definite and conclusive relation of the parties to such deposit on the death of either.' " Citing *Pye* v. *Higgason,* 210 Ark. 347, 195 S.W.2d 632. We then pointed out in *Bevill* that Act 78 of 1965, Ark. Stat. Ann. § 67-552 (Repl. 1966), "was our first comprehensive enactment governing joint bank accounts." In *Bevill* we then continued:

> "Two years previously a very similar act was passed affecting joint deposits in savings and loan associations. See Ark. Stat. Ann. § 67-1838 (Repl. 1966). The principal virtue of Act 78 is the requirement of *designation in writing;* that is, when an account is opened or a certificate of deposit is issued in the name of two or more persons, a written designation is made as to the investiture of title."

We are unable to read into Act 78 of 1965, § 67-552, an amendment of § 67-1838. Section 67-552 is under Chapter 5 of the statutes pertaining to "Powers of Banks" and only banking institutions are mentioned therein. This section

simply reads in part as follows:

> "Checking accounts and savings accounts may be opened and certificates of deposit may be issued by any banking institution with the names of two [2] or more persons, either minor or adult, or a combination of minor and adult, and such checking accounts, savings accounts and certificates of deposits may be held:
>
> (a) If the person opening such account, or purchasing such certificate of deposit, designates in writing to the banking institution that the account or the certificate of deposit is to be held in 'joint tenancy' or in 'joint tenancy with right of survivorship,' or that the account or certificates of deposit shall be payable to the survivor or survivors of the persons named in such account or certificate of deposit, then such account or certificate of deposit and all additions thereto shall be the property of such persons as joint tenants with right of survivorship."

Ark. Stat. Ann. § 67-1838 (Repl. 1966) is under an entirely different Chapter 18 of the statutes applying to "Savings and Loan Associations" and the pertinent portion of this statute simply reads as follows:

> "Savings accounts may be opened in any association or a federal association in the names of two [2] or more persons, either minor or adult, or a combination of minor and adult, and such savings accounts may be held:
>
> (1) If the person opening such savings account fails to designate in writing the type of account intended, or if he designates in writing to the association that the account is to be a 'joint tenancy' account or a 'joint tenancy with right of survivorship' account, or that the account shall be payable to the survivor or survivors of the persons named in such account, then such account and all additions thereto shall be the property of such persons as joint tenants with right of survivorship."

It is not necessary to attempt to determine the intent of

the Legislature in making such broad distinction in "accounts and certificates of deposits in two or more names" when dealing with a banking institution and "savings accounts in the names of two or more persons" when deposited with a savings and loan association. Regardless of the intent of the Legislature, the language is plain. The practical effect of § 67-1838 is that if an individual opens an account in a savings and loan association in the names of two or more persons and fails to designate in writing to the association that the account is to be a "tenant in common" account (§ 67-1838 [3]), then the account and all additions thereto shall be the property of such persons as joint tenants with right of survivorship. In other words, as the law now stands, if the account is opened in a banking institution, a joint account with right of survivorship shall be designated in writing; whereas, if the account is opened in a savings and loan association, the account becomes a joint account with right of survivorship unless a contrary intent is so designated.

In support of appellants' third point they rely on *Cupp, Adm'r* v. *Pocahontas Fed. S. & L.*, 242 Ark. 566, 414 S.W.2d 596, but in that case we said:

> "While we have recognized that the legislature can not declare one fact conclusive evidence of another material fact in controversy, such is not the situation involved here. It is perfectly permissible for the legislature to declare the legal effect of doing certain acts. The legislature declared only what the legal effect of executing and filing with the association such a designation would be — namely, to make Thucie Nolen the owner of the account as between heirs and devisees of the holder thereof."

The appellants' fourth point gives us considerable difficulty in light of the record in this case. We fully appreciate the difficulty confronting the probate judge in the trial of this case because by far the majority of the 294 page record consists of objections to exhibits and testimony, and the court's rulings thereon. When the competent evidence is gleaned from the objections overruled, the facts, as they relate to the immediate question before us, appear as follows: Mrs. Box

was living in California when she executed her will on March 10, 1969. Sometime between January, 1971, and October, 1971, Mrs. Box decided to move to Fayetteville, Arkansas to live with her daughter and son-in-law, Mr. and Mrs. Martensen. It is not clear from the record exactly when Mrs. Box came to Arkansas but according to Mr. Martensen's testimony, it was apparently around October 2, 1971. Mrs. Box had $70,000 on deposit in three separate savings and loan associations in California which were transferred to the First Federal Savings and Loan Association of Fayetteville.

Mr. Martensen testified that he and Mrs. Martensen went to California (apparently in September, 1971) and upon his return to Fayetteville, he made arrangements with the First Federal Savings and Loan Association to obtain the proper documents to effect the transfer of Mrs. Box's funds in California to the First Federal Savings and Loan Association of Fayetteville. He said he obtained several blank combination letter-draft forms from Mr. Eason, president of First Federal Savings and Loan Association, and took the blank forms to his home. He said that on October 2, 1971, after Mrs. Martensen arrived from California with Mrs. Box, that Mrs. Box signed the forms in his presence. In this connection Mr. Martensen testified as follows:

> "Q. What did you do with these documents after you obtained them in blank from the Federal Savings and Loan Association, Mr. Martensen?
>
> A. These blank documents here?
>
> Q. Yes, sir.
>
> A. These were taken to my home prior to my wife's arrival with Mrs. Box, which I left California a week, four or five days before.
>
> Q. So, you took them to your house?
>
> A. Yes, sir.
>
> Q. All right. What happened after that?

A. After Mrs. Box was there she went through a process of cleaning out, cleaning house, settling down in the home, sending out her laundry and that type of thing."

Mr. Martensen then said that on Saturday morning, after the mail came, Mrs. Box signed the instruments in his presence. He then continued as follows:

"Q. What happened after that, Mr. Martensen?

A. The documents were signed. The books were handed to me by my wife who had them on the way from California. I took them to the office.

Q. These documents were signed by whom?

A. Mrs. Box.

Q. Who was present when she signed them?

A. My wife, myself and Mrs. Box."

Mr. Martensen said that after Mrs. Box signed the instruments and handed them back to him, he took them to his office and put them in the safe together with the California passbooks which his wife had in her possession and gave to him. He said he was planning to return to California on Monday morning, October 4, in connection with the house in California, and on that morning he took the documents signed by Mrs. Box to Mr. Eason at the savings and loan association. He said that from then on it was in the hands of Mr. Eason. The instruments so referred to were simply printed form letters bearing sight draft form designed for use by savings and loan associations in obtaining transfer of funds. The letter portion was a request for transfer signed by Mr. Eason as president of First Federal and the sight draft was to be signed by the depositor or owner of the funds. Mr. Martensen testified that Mr. Eason sent the draft to California and when the money was received by First Federal Savings and Loan Association, Mr. Eason called him. He said all the blank forms he obtained from Mr. Eason bore an "x" mark where they were to be signed by Mrs. Box and that

he, Martensen, did not make the small "x" marks on the instruments where Mrs. Box was supposed to sign.

Mr. A. P. Eason, Jr., testified that he was president of the First Federal Savings and Loan Association of Fayetteville and had been since it was formed in 1953. He testified by deposition that Mr. and Mrs. Martensen were customers of his association and he recalled Mr. and Mrs. Martensen coming in and discussing with him the transfer of the accounts from California to Fayetteville. He said he did not recall whether Mrs. Box was present or not. He said that Mr. and Mrs. Martensen did request a transfer of the funds. He said he did not remember the exact date of the request and would have to rely on the date of the correspondence with the California institutions in connection therewith. He said upon Mr. Martensen's request he furnished him the regular draft forms used for such purposes and which the association prepares for withdrawals from another association. He said it was necessary for the holder of the account to sign the draft form and that signatures purporting to be those of Mrs. Box appeared on the forms when they were returned to him. He said after sending the instruments together with the passbooks to the savings and loan associations in California, he received drafts made payable to the First Federal Savings and Loan Association of Fayetteville. He said that upon receipt of the money from the California institutions, he called the Martensens or Mrs. Box, he did not remember which, and as a result of the conversation, he deposited the funds to the joint account. Mr. Eason then testified as follows:

> " 'Exhibit D' and that has previously been identified as the signature card and introduced in evidence by the petitioners, '—contains only the signature of Mrs. Martensen, can you explain why that was?
>
> Answer: When the money came in, I called and told them that it was here, and Marg came by, and signed the card, and said her mother would be by in a few days, that she was sick.' "

Mr. Eason testified that it was quite common for one person

to come in and open a joint account and sign a signature card and the other party to the account not do so. In this connection he said:

> " '. . . this again is quite common, we will have many times the parents and children open accounts; it works both ways; the children will say, 'Mamma will come by, and sign the card next week,' and by the same token, the parents will come in and open an account, and say, 'My son is in South America, or Florida, and he's going to do this, and in two or three months he will be by and sign the account.' "

Mrs. Martensen's testimony was primarily directed to the identification of her mother's signature on the instruments involved, but the genuineness of Mrs. Box's signature on the draft forms is not really questioned in this case. The so-called signature card which was placed in evidence as plaintiff's exhibit 8 was more than a mere "signature card." It was the only documentary evidence of instructions to First Federal Savings and Loan Association of Fayetteville in opening the savings account. This form, as filled out by First Federal and signed by Mrs. Martensen, appears as follows:

> "
>
> Account No. 2-520
>
> A.
> and B. Box Blanche M. and
> and C. Martensen Marjorie M.
>
> Type All Names: (Last Name) (First Name) (Middle Name)
>
> as joint tenants with right of survivorship and not as tenants in common, and not as tenants by the entirety, the undersigned hereby apply for a savings account in
>
> FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF FAYETTEVILLE
>
> and for the issuance of evidence thereof in their joint names described as aforesaid. You are directed to act

pursuant to any one or more of the joint tenants' signatures, shown below, in any manner in connection with this account and, without limiting the generality of the foregoing, to pay, without any liability for such payment, to any one or the survivor or survivors at any time. This account may be pledged in whole or in part as security for any loan made by you to one or more of the undersigned. Any such pledge shall not operate to sever or terminate either in whole or in part the joint tenancy estate and relationship reflected in or established by this contract. It is agreed by the signatory parties with each other and by the parties with you that any funds placed in or added to the account by any one of the parties *are and shall be conclusively intended* to be a gift and delivery at that time of such funds to the other signatory party or parties to the extent of his or their pro rata interest in the account. You are authorized to accept checks and other instruments for credit to this account, whether payable to one or more of the parties, and to supply any needed endorsement. You are relieved of any liability in connection with collection of all items handled by you without negligence, and shall not be liable for acts of your agents, sub-agents or others or for any casualty. Withdrawals may not be made on account of such items until collected, and any amount not collected may be charged back to this account, including expense incurred, and any other outside expense incurred relative to this account may be charged to it. The official proxy committee of the institution is authorized in our absence to cast our vote or votes at any meeting of the members from year to year until this proxy is canceled in writing.

A

Signature (Type) Street City & State Phone

B /s/ Marjorie M. Martensen

Signature (Type) Street City & State Phone

C

Signature (Type) Street City & State Phone

Note: The correct way to establish a common law joint

tenancy or its equivalent in any state is to use 'and' in joining tenants' names on all evidence of the account. All tenants should sign this card. Rule out unused signature line."

The probate judge did his usual thorough job of sifting the evidence and applying the law in this case but on appeal to this court probate cases are tried de novo as are chancery cases[2] and we do not reach the same results that the probate judge did. In the first place there is no question but that the funds withdrawn from the California accounts were the personal funds of Mrs. Box, and there is no question that Mr. Eason knew the funds belonged to Mrs. Box when they were transferred to the First Federal Savings and Loan Association of Fayetteville. These funds were in the substantial amount of $70,000 and there is no evidence whatever that Mrs. Box ever directed Mr. Eason to deposit these funds in a joint account with Mrs. Martensen except, of course, the oral instructions he received from Mr. and Mrs. Martensen, and the written instructions he received from Mrs. Martensen on the so-called signature card. The withdrawal of the funds from the California institutions, and the method of doing so, are not really important to the case before us. The important point is not the *withdrawal* of the funds but the *redepositing* of the funds in the First Federal Savings and Loan Association of Fayetteville.

The trial court pointed out that the signature card itself bore the typewritten name of Blanche Box and Marjorie Martensen. The court then reasoned that the statute does not require affirmative *handwritten* designation but on the contrary used the term for designation "in writing" and provides only that if "the account stands in the name of two or more persons without any contrary indication, this is enough to make a joint survivorship operable." The court then cites and discusses *Cupp, Adm'r* v. *Pocahontas Fed. S. & L.*, 242 Ark. 566, 414 S.W.2d 596, and *Harris, Adm'r* v. *Searcy Fed. S. & L. Assn.*, 241 Ark. 520, 408 S.W.2d 602, and also *Willey, Adm'r* v. *Murphy*, 247 Ark. 839, 448 S.W.2d 341. In each of the three cases cited by the trial court, *the owner of the money actually open-*

[2]*State* v. *Snow*, 230 Ark. 746, 324 S.W.2d 532; *Mabry* v. *Corley*, 236 Ark. 306, 365 S.W.2d 711.

ed the account, but that is not the situation in the case at bar.

There is no question that the account as it stood on the books of the First Federal Savings and Loan Association when Mrs. Box died, was a joint account with right of survivorship simply by operation of law under the statute because it was in two names. The trial court pointed out that there is no evidence in the record to show that Mrs. Box did not know that the joint account was opened in her name and Mrs. Martensen's name; and, no evidence "that she wasn't at liberty to do whatever she wanted to about it, if she didn't like the savings certificates issued in that fashion." We agree with the trial judge on this point but we think it more important that there was no evidence in the record to show that Mrs. Box did know about it, or that she was aware of it. There is really no evidence that Mrs. Box knew anything at all between October 2, when the Martensens say she signed the drafts for the transferral of her funds to First Federal Savings and Loan Association of Fayetteville, and October 17 when she died. The so-called "signature card" in which Mrs. Martensen directed First Federal Savings and Loan to open the joint account was not dated but the certificates issued in compliance with the request, were dated October 12, only five days before Mrs. Box's death. Although Mrs. Box signed the drafts for the transfer of the funds at the Martensen home on October 2, she did not sign the undated signature card at all. It can reasonably be assumed that Mrs. Box and Mrs. Martensen's names were typed on the signature card at the time it was signed by Mrs. Martensen. Certainly there is no evidence that Mrs. Box typed her and Mrs. Martensen's names on the signature card.

Mrs. Martensen did not say whether Mrs. Box was too ill to sign the signature card at home as she had done in connection with the transfer drafts, but she did indicate to Mr. Eason that Mrs. Box was too ill to be with her and sign the card when the account was opened. According to Eason, she said Mrs. Box would by by a few days later and sign the signature card, but Mrs. Box died a few days later and there is no evidence that she ever appeared at First Federal Savings and Loan Association's office, or ever saw or talked to Mr. Eason.

We simply are unable to interpret § 67-1838, *supra,* as closing and locking the door behind a joint account with right of survivorship when once the money is deposited in two names and a receipt or passbook is issued thereon, *regardless of whose money is involved and who makes the deposit.* Of course, there was no fraud alleged and none proven in this case, but to uphold the judgment of the probate court under the strict construction of the statute here involved would create a situation wide open to fraud in exactly such factual situation as we have in this case. An old and senile person could simply say to another, "go deposit my funds in a savings and loan association," or "go transfer my funds from 'x' savings and loan association to 'y' savings and loan association," and, if the person so directed should deposit or transfer such funds in two names, there would simply be no question as to who owned the funds if the original owner should die; or as for that matter, if he should become totally incompetent before learning that his instructions had not been carried out. We are unable to believe that the Legislature intended such result.

Mrs. Box died less than two years after she executed the will under probate in this case. Mrs. Box made no change in her will by codicil or otherwise and there is no evidence that she ever considered doing so. According to the inventory filed by Mrs. Martensen, Mrs. Box owned no property whatever except miscellaneous personal property of the value of $50.00 to be divided equally between the appellants and the appellee, and the jewelry she bequeathed to Mrs. Martensen.

We are of the opinion and so hold, that "the person opening such savings account," as referred to in § 67-1838 (1), means the person who owns the money with which the account is being opened in the names of more than one person. The judgment is reversed and this cause is remanded to the trial court for further proceedings not inconsistent with this opinion.

Reversed and remanded.

FOGLEMAN, J., dissents; BYRD, J., concurs.

JOHN A. FOGLEMAN, Justice, dissenting. I disagree with the result reached and with some of the observations made by the majority. I certainly do not agree that savings and loan associations are not protected by the present statutes. The real difference in legislation relating to banks, as construed by this court, and that relating to savings and loan associations is that no designation in writing is required for a "joint tenancy" account in a savings and loan association to fix ownership of the account as between the parties, but it is required for a bank account.

We should not reverse the probate court's judgment unless it is clearly against the preponderance of the evidence. It seems to me that this is what causes the majority's difficulty on appellant's fourth point. It seems to me that the point was not well taken. Mrs. Box could open an account with the savings and loan association without ever signing a signature card, insofar as any legal requirement is concerned. The only requirement that she sign a card is that of the association, which has a perfect right to waive it. Furthermore, it is not necessary that she ever see a signature card. I think that there is a clear preponderance of the evidence that Mrs. Box was an applicant for the opening of a joint account.

I find ample evidence that Mrs. Box opened the account. John Martensen, son-in-law of Mrs. Box, testified that when she died she was living with him and his wife. Through him, an exhibit not mentioned in the majority opinion and excluded by the probate judge was introduced. It was a memorandum written on one of the printed form letters used by First Federal Savings & Loan Association for the purpose of accomplishing a transfer of funds, to which was attached a draft for signature by the depositor. This memorandum was dated "02 Oct. 71" and bears the heading "MARTY TO DO" with the following enumeration:

1. BOOKS AND HOUSE TO BE JOINT WITH MARGY

2. CHANGE WILL SO MARGY WILL BE EXECUTOR

3. POWER OF ATTORNEY FOR MARTY SO HOUSE CAN BE CLOSED, MAINTAINED, AND RENTED AS NECESSARY

4. FIND OUT ABOUT CAR TITLE

This list extends beyond a perforation which enables one to separate the letter and the draft, and actually ends where the printing on the draft form begins. A line was run through most of the printed matter on the draft. The same signature that appears on the drafts actually used to transfer the accounts also appears on the signature line provided on the draft form. Martensen testified that this document was signed by Blanche M. Box in the presence of her daughter and Martensen at the same time she signed the drafts. The "top part" or enumeration was done by him in the presence of Mrs. Box, according to Martensen. Martensen said he had several conversations with his mother-in-law about the transfer of these accounts, beginning in January 1971 in Santa Monica, where Mrs. Box was then living and continuing by means of telephone, letters and visits in Santa Monica in June of 1971 and September 1971. Pursuant to these conversations, Martensen continued, he made arrangements for the documents to accomplish the transfers. After Mrs. Box arrived in Fayetteville, she delivered the passbooks for her California accounts to Martensen. At the time all the documents were signed, Martensen was planning to go to California to close Mrs. Box's house, put her furniture in storage and try to rent the house.

Martensen testified that after the memorandum was signed, Mrs. Box handed it to him along with the letters and drafts for the transfer of the accounts. He said he took them to his office along with passbooks which Mrs. Martensen had previously had in her possession and put them in his safe until Monday, October 4, when he took them to Eason at the office of the association. He stated that Eason called him when the necessary papers for the transfer were received by the association.

Eason specifically recalled having seen the memorandum. After receipt of it along with the letters and drafts, he

mailed the drafts to the California institutions. He took the memorandum to constitute an instruction to open the account as a joint account of Mrs. Box and her daughter.

A proffer of testimony by Martensen was made when the court sustained an objection. Martensen would have testified that Mrs. Box stated in the conversations he had with her that she wanted these funds transferred into a joint account in the names of herself and her daughter. He also would have testified, if the court had not sustained an objection, that Mrs. Box always referred to the savings and loan accounts as "books".

The trial court also sustained objections to the introduction of the exhibit, even though Eason stated that he saw it and acted upon it. An objection was also sustained to Eason's testimony that he clearly understood the instructions on the memorandum and that it is quite common for people to refer to accounts in savings and loan associations as books.

The proffered testimony did not come within the purview of the dead man's statute. The court sustained objections, not on the basis of this rule, however, but as hearsay. I frankly do not understand the basis of the court's holding that the exhibit was hearsay. It clearly established Martensen's authority to act as the agent of Mrs. Box in the matter of the "books". It was written and presented to the president of the savings and loan association by Martensen and this officer of the association acted upon it.

Insofar as this document and the conversations are concerned there was no effort to prove the truth of any facts stated by Mrs. Box. The proof was offered to show that the statements were made and if they were, they were certainly relevant. It was the veracity of Martensen that was in question, not that of Mrs. Box. Thus, this testimony is not hearsay. See *Motor Insurance Corp.* v. *Lopez*, 217 Ark. 203, 229 S.W. 2d 228. *Flaherty & Whipple* v. *State*, 255 Ark. 187, 500 S.W. 2d 87; *Liberto & Mothershed* v. *State*, 248 Ark. 350, 457 S.W. 2d 64; *City of Springdale* v. *Weathers*, 241 Ark. 772, 410 S.W. 2d 754.

Statements made by a principal tending to show the authority of an agent are not incompetent as hearsay. *Missouri Pacific Railroad* v. *Clements*, 225 Ark. 268, 281 S.W. 2d 936; *Flournoy* v. *Hewgley*, 234 F. 2d 213 (10th Cir. 1956); *Webb* v. *Webb*, 116 Utah 155, 209 Pac. 2d 201 (1949). Directions to an agent by his superior are not hearsay, but substantive evidence of the agent's authority or lack of it. *Powerine Co.* v. *Grimm Stamp & Badge Co.*, 127 Neb. 165, 254 N.W. 722 (1934).

Statements of the deceased to show her intentions were not inadmissible under the hearsay rule. *Crawford* v. *Center*, 193 Ark. 287, 100 S.W. 2d 83; *Webb* v. *Webb*, supra. *Flournoy* v. *Hewgley*, supra. See also *John Hancock Mutual Life Ins. Co.* v. *Menson*, 97 F. Supp. 320.

Where there is an ambiguity in language used or it is shown that words used by parties are commonly accorded a meaning different from their ordinary meaning, parol evidence is admissible to explain them, to show the way in which a particular term is understood commercially, or in a particular trade or business or in local popular and general use. *Paepcke-Leicht Lumber Co.* v. *Talley*, 106 Ark. 400, 153 S.W. 833; *Wilkes* v. *Stacy*, 113 Ark. 556, 169 S.W. 796; *Ft. Smith Appliance & Service Co.* v. *Smith*, 218 Ark. 411, 236 S.W. 2d 583; *Ellege* v. *Henderson*, 142 Ark. 421, 218 S.W. 831; *Taylor* v. *Union Sawmill Co.*, 105 Ark. 518, 152 S.W. 150; *McCarthy* v. *McArthur*, 69 Ark. 313, 63 S.W. 56; *Jackson County Gin Co.* v. *McQuiston*, 177 Ark. 60, 5 S.W. 2d 729; *Davis* v. *Martin Stave Co.*, 113 Ark. 325, 168 S.W. 553. Testimony of the parties to show the meaning of such terms is admissible. *Ellege* v. *Henderson*, supra. Parol evidence is also admissible in such circumstances to explain the situation and relation of the parties and the surrounding circumstances. *Clear Creek Oil & Gas Co.* v. *Bushmaier*, 165 Ark. 303, 264 S.W. 830.

I submit that all of the proffered testimony was admissible. When it is considered, it seems to me that the probate judge's decree was correct, even though he did not consider it.

On appeal in a chancery case, we consider evidence im-

properly excluded in the trial court. *Cox* v. *Smith*, 99 Ark. 218, 138 S.W. 978. As the majority points out, this appeal is governed by rules governing appeals in equity cases.

I would affirm the decree.

CONLEY BYRD, Justice, concurring. I cannot interpret Ark. Stat. Ann. § 67-1838 (Repl. 1966), as authorizing one not the owner of money to establish a joint account with right of survivorship until such time as the account has been acknowledged in writing by the owner. To do so would permit a legislative fiat which we said could not be done in *Cupp, Adm'r.* v. *Pocahontas Fed. S. & L.*, 242 Ark. 566, 414 S.W. 2d 596 (1967). Since appellee's contention would make the act void, it should be given a construction that would make it valid. Thus without Mrs. Box's signature, the statute cannot pass title to property.

For the reasons stated I only concur in the result.

JOHNSON CONSTRUCTION CO. and TRI-STATE INSURANCE CO. *v.* Mack NOBLE

74-328 521 S.W. 2d 63

Opinion delivered April 7, 1975

Shackleford, Shackleford & Phillips, for appellants.

Switzer & Switzer, for appellee.

J. FRED JONES, Justice. This is a workmen's compensation case in which Mack Noble, a 58 year old ironworker, sustained an injury to one leg below the knee while in the course of his employment by Johnson Construction Company. The injury resulted in a 30% loss of use of the leg below the knee and Mr. Noble was paid workmen's compensation benefits based on that loss. He subsequently filed claim for additional compensation and the Commission awarded benefits for permanent total disability. The circuit court affirmed the Commission and the question before us on appeal, as relied on by the appellants, is whether there was any substantial evidence to sustain the award of permanent total disability.

The claimant testified that when he stands on his feet for more than an hour, the pain in his injured leg increases and his foot swells. He said it is then necessary for him to lie down and elevate his foot. He testified that he had been a journeyman ironworker since 1953 and prior to that he worked as a carpenter. He said he has no education; that he had nothing wrong with him prior to his accident, and that he knows of no remunerative employment he can now engage in because of his injured leg. He testified that he had not attempted to find work because he knows of nothing he would be able to do; that he is currently drawing $254.10 per month in Social Security benefit payments and has not applied for rehabilitation or retraining of any type.

Mr. Charles Trantham, an ironworker foreman, testified that he had been an ironworker for 22 years. He testified as to various physical requirements demanded of a journeyman ironworker and testified that as an ironworker foreman, he would not employ or approve Mr. Noble for employment because of his physican condition.

Dr. Dean C. Andrew testified that even though Mr. Noble could not return to his prior employment, he did have transferable skills and there were jobs available in south Arkansas which Mr. Noble could perform. Dr. Andrew said, however, that Mr. Noble's educational limitations, together with his physical limitations, might functionally preclude him from obtaining employment. He mentioned such jobs available in Mr. Noble's home county of Ashley as night watchman or guard.

Dr. E. R. Hartmann testified that Mr. Noble had a 30% disability to the leg below the knee based on joint stiffness of the right foot and ankle. He testified that the condition of the claimant's foot was inconsistent with work requiring walking, squatting or walking on rough or uneven ground. He said Mr. Noble would have difficulty with eight hours of weight bearing on his foot. He said he felt that Mr. Noble could perform such jobs as working around a table on even or smooth surfaces and such jobs as night watchman in a building, or where his walking would be on smooth surfaces.

The appellants cite *Ray* v. *Shelnutt Nursing Home,* 246 Ark. 575,439 S.W. 2d 41, in support of their contention that there is no substantial evidence to support the Commission's finding of permanent total disability. We are of the opinion, however, that the evidence in the case at bar places it more in the category of *Wilson & Co.* v. *Christman,* 244 Ark. 132, 424 S.W. 2d 863, rather than the *Shelnutt Nursing Home* case.

The appellants cite *McNeely* v. *Clem Mill & Gin Co.,* 241 Ark. 498, 409 S.W. 2d 502, where we first held that benefits for scheduled injuries under Ark. Stat. Ann. § 81-1313 (c) (Repl. 1960) are not limited to the schedule when the scheduled injury *renders the claimant totally disabled.* The appellants then cite *Anchor Const. Co.* v. *Rice,* 252 Ark. 460, 479 S.W. 2d 573, wherein we held that where the injury is to a scheduled member, the Commission cannot award disability benefits greater than the rating for permanent partial physical imparimnet provided in the schedule *unless the disability is permanent and total.* The appellants then state, in connection with the case at bar, as follows:

"As the only rating of permanent partial physical impairment is Dr. Hartmann's evaluation of thirty percent to the leg below the knee, the Workmen's Compensation Commission was put in the awkward position of either finding that the appellee had a disability of thirty percent to the leg below the knee or that he is permanently and totally disabled. The Commission, with Commissioner Cross dissenting, adopted the latter finding."

The appellants then argue that:

"It is obvious that the appellee is not permanently and totally disabled and in so finding the majority of the Commission was simply attemtping to avoid the harsh results of the holding in the Anchor Construction Company case, supra. In this regard, the appellants respectfully suggest to this Court that perhaps the Anchor Construction Company case, supra, should be re-examined."

The appellants then earnestly urge that we re-examine our holding in *Anchor Const. Co.* v. *Rice, supra,* but in presenting their argument that we do so, the appellants practically adopt the same reasoning and argument presented in the dissenting opinion to *Anchor Const. Co.* v. *Rice.* This court has already had an opportunity to re-examine the decision in *Anchor Const. Co.* v. *Rice, supra,* and has failed to reverse or modify the opinion in that case. We have reaffirmed our holding in *Anchor* in the cases of *Meadowlake Nursing Home* v. *Sullivan,* 253 Ark. 403, 486 S.W. 2d 82, and *Cooper Ind Products* v. *Worth,* 256 Ark. 394, 508 S.W. 2d 59 (1974). The *McNeely* and *Meadowlake* cases may be distinguishable to some degree from *Anchor* in that in *McNeely* the award of total disability was not *stated to be permanent;* and in *Meadowlake* the injury was to the head of the femur requiring the installation of a prosthesis in the hip joint and thus, perhaps, distinguishable as affecting the body as a whole rather than being confined strictly to the scheduled injury to the leg. The *Cooper* case, however, was not thus distinguishable.

In *Cooper Ind Products* v. *Worth, supra,* the question was squarely presented as to whether an injury to the right knee

rendered the claimant permanently and totally disabled. In that case by majority opinion we again reaffirmed our holding in the *Achor Const. Co.* case and citing *Meadowlake Nursing Home* v. *Sullivan*, we applied Ark. Stat. Ann. § 81-1313 (a) (Repl. 1960) notwithstanding the provisions of subsection (c) and affirmed the Commission's award of permanent and total disability. The dissenting opinion in the *Cooper* case leaves no doubt that *Anchor* has been re-examined by this court and that *Anchor* still holds.

We, therefore, agree with the appellee that the *Anchor Const. Co.* case is current Arkansas law and we conclude that if it is to be changed in the foreseeable future, it must be done by legislative act rather than decision of this Court.

The judgment is affirmed.

Tom MILLER et ux *v.* James E. WILLEY d/b/a/ WILLEY REAL ESTATE

74-349 521 S.W. 2d 68

Opinion delivered April 7, 1975

Mooney & Boone, for appellants.

Warren E. Dupwe, for appellee.

FRANK HOLT, Justice. Appellants gave appellee a written option to purchase their property for $10,000. The option was properly exercised and appellants refused to convey the property. The chancellor ordered specific performance by the appellants. On appeal they first contend that the chancellor erred in overruling appellants' demurrer to the evidence and not voiding the contract because of the failure of a tender of consideration. We cannot agree.

The appellants accepted a $100 payment when they signed the contract which provided that the balance would be paid "at closing." When appellee exercised the option to purchase, he notified appellants that the balance of the purchase price would be paid to them upon receipt of their deed and abstract. Appellants refused to deliver the deed and abstract. In appellee's complaint for specific performance, he reiterated his willingness to pay the agreed balance. At trial the appellee tendered the balance of the purchase money. Since appellants repudiated their contract, the tender of payment was unnecessary until the date, as here, the issue was litigated. The law does not require a tender of payment where it would be a vain and useless effort. *Gentry* v. *Holland,* 243 Ark. 172, 419 S.W.2d 130 (1967); *Hollowoa* v. *Buck,* 174 Ark. 497, 296 S.W. 74 (1927); and *Read's Drug Store* v. *Hessig-Ellis Drug Co.*, 93 Ark. 497, 125 S.W. 434 (1910). In the case at bar there was sufficient tender in view of the repudiation of the contract.

Neither can we agree that the trial court erred by not voiding the contract on the ground of the "Undisclosed Principal" doctrine. Appellant refused to deed the property to the

City of Jonesboro as instructed by the appellee who was purchasing this and other property for the city. The appellants, it appears, had some animosity toward the city and were unwilling for it to acquire their property. However, the appellants cannot repudiate their contract on this basis since they agreed to "execute and deliver to [appellee], or to any person or persons as we [appellee] **** shall direct in writing, a good and sufficient Warranty Deed and an up to date Abstract of . . . ." their property. Also, appellee testified that he was unaware of any ill feeling of appellants toward the city and that he acquainted appellants with the fact that he was purchasing the property for a client. An agent, without disclosing his principal, can make a valid and enforceable contract in his own name. *Shelby* v. *Burrow,* 76 Ark. 558, 89 S.W. 464 (1905); and Restatement of Agency 2d, § 304 (1957), Comment c. In the circumstances we cannot say the chancellor's findings are against the preponderance of the evidence.

Affirmed.

Dr. Grant COOPER, G. Robert ROSS et al *v.*
Frank B. HENSLEE et al

74-102 522 S.W. 2d 391

Opinion delivered April 7, 1975

Morton Gitelman and *Walker, Kaplan & Mays, P.A.,* by: *Philip E. Kaplan* and *John M. Bilheimer,* for Cooper; *Ray Trammell,* for Ross et al.

Givens & Buzbee, for Henslee et al; Deputy Prosecuting Atty. *Tom Tanner,* for Lee Munson, Prosecuting Attorney.

THOMAS HARPER, Special Justice. This case is here on appeal from a decree of the Pulaski County Chancery Court. Appellees Frank B. Henslee and twenty-two other members of the Arkansas General Assembly filed their complaint in that Court against appellant Dr. Grant Cooper, Chancellor C. Robert Ross of the University of Arkansas at Little Rock (UALR) and the University's Board of Trustees (collectively referred to as Ross), and Mrs. Nancy Hall, State Treasurer, seeking to enjoin Mrs. Hall and Ross from disbursing any state funds for the payment of any salary to appellant Cooper, an assistant professor of history at UALR, and seek-

ing a mandatory injunction ordering Ross to terminate appellant Cooper's employment in any capacity at UALR.

Appellees alleged that appellant Cooper had (1) violated the provisions of Section 1 of the Acts of Arkansas of 1941 (Ark. Stats. 41-4111) and (2) that because Cooper was an avowed member of the Progressive Labor Party (PLP), an affiliate of the Communist Party, he was ineligible for State employment because of the provisions of Section 3(c) of said Act [Ark. Stats. 41-4113(c)].

After preliminary pleadings and procedure not particularly relevant here, during which appellees abandoned their prayer for the mandatory injunction to terminate Cooper's employment, the issues were narrowed to (1) whether the trial court had jurisdiction to grant the relief sought and (2) whether these statutes are constitutionally valid.

Appellants Ross aligned themselves with appellant Cooper on the constitutional issues. The prosecuting attorney of Pulaski County, by an intervention, aligned himself with the appellees and further sought a declaratory judgment, asking the lower Court to declare that the involved statutes are constitutional.

After the issues were drawn the cause was heard by the trial court on oral evidence, following which a decree was entered finding both statutes to be constitutional, that appellant Cooper had violated Section 1 of Act 292 of 1941 (Ark. Stats. 41-4111) and was a member of PLP, " a communistic organization", which, as well as Cooper, believes in the necessity of the violent overthrow of the governments of Arkansas and the United States, that Cooper teaches from a communistic viewpoint, and that Cooper's membership in PLP renders him ineligible for employment by the State of Arkansas. On these findings the lower Court dismissed the State Treasurer as a party to the action and enjoined the Chancellor of UALR and its trustees from paying appellant Cooper any salary from public funds in his capacity as an assistant professor at UALR. The decree, except to the extent of the findings noted above, did not enter the declaratory

judgment sought by the intervening prosecuting attorney.

From that decree, appellants Cooper, Ross and the Trustees have appealed to this Court.

Appellant Cooper mainly contends (1) the Chancery Court lacked jurisdiction to grant the injunction and (2) that the statutes involved are unconstitutional because Ark. Stats. 41-4113(c) is a bill of attainder and violates the First and Fourteenth Amendments of the Constitution of the United States, and (3) that both statutes are unconstitutional on their face and unconstitutional as applied to appellant Cooper. The appellants Ross generally adopt these contentions except as to jurisdiction.

Ark. Stats. 41-4111 reads:

> "Subversive activities defined and prohibited. — (a) It shall be unlawful for any person; (1) to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of any such government; (2) with the intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence; (3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof. (b) For the purposes of this section, the term "government in the United States" means the government of the United States, or the government of this state. [Acts 1941, No. 292. §1, p. 754.]"

Ark. Stats. 41-4113 in its entirety reads:

"41-4113. Penalty for subversive activities — Ineligibility for employment. — (a) Any person who violates any of the provisions of this act shall be deemed guilty of a felony and, upon conviction thereof, be fined not more than ten thousand dollars [$10,000] or imprisoned for not more than ten [10] years, or both such fine and imprisonment. (b) No person convicted of violating any of the provisions of this act [§§41-4111 — 41-4113] shall, during the five years next following his conviction, be eligible for employment by the State of Arkansas, or by any department or agency thereof. (c) No person who is a member of a Nazi, Fascist or Communist society, or any organization affiliated with such societies, shall be eligible for employment by the State of Arkansas, or by any department, agency, institution, or municipality thereof."

Subsection (c), supra, is that portion of this section under attack here.

The facts are not in dispute. At the time this action was commenced and tried below, appellant was employed by the State of Arkansas as a member of the faculty of UALR. He admitted he was a member of the PLP, that he espoused its aims and principles, which included advocacy of revolutionary change of the government of the United States, by violence if necessary, which change is regarded as inevitable, although not within any specific time, except in the "future". He admitted that he advocated these principles to his students, and that he taught from a communistic point of view.

We find it necessary to discuss only two of the issues raised by appellants.

Appellees' complaint, as amended to eliminate the prayer for mandatory injunction, states a cause of action under the "illegal exaction" section of the Arkansas Constitution (Article 16, Section 13). It has long been held a court of equity has jurisdiction to enjoin payment of public funds in violation of law. *Revis* v. *Harris,* 217 Ark. 25, 228 S.W. 2d 624 (1950); *Rose* v. *Brickhouse,* 182 Ark. 1105, 34 S.W. 2d 472

(1931); *Sitton* v. *Burnett,* 216 Ark. 574, 226 S.W. 2d 544 (1950); *Starnes* v. *Sadler,* 237 Ark. 325, 372 S.W. 2d 585 (1963); *Nelson* v. *Berry Petroleum Co.*, 242 Ark. 273, 413 S.W. 2d 46 (1967).

It should be kept in mind that while the trial court found Section 41-4111 was constitutional and that appellant Cooper had violated its provisions, nevertheless there was no finding he had been convicted for such violation, and the record shows no conviction. The only relief granted appellees in the decree was to enjoin appellants Ross and the Trustees from paying any State funds to Cooper because of his party membership. Accordingly, we do not find it necessary to consider the question of the trial court's jurisdiction to construe Section 41-4111, but only whether it had jurisdiction to grant this injunctive relief.

By applying the provisions of 41-4113(c) to the uncontroverted proof in this case, payment of salary to the appellant Cooper would be an illegal exaction if 41-4113(c) can withstand constitutional scrutiny.

After a careful consideration of the decisions of the United States Supreme Court construing state statutes of similar, if not identical, purposes we conclude that Ark. Stats. Ann. 41-4113 Section (c) must be declared unconstitutional on its face as violative of the First Amendment to the United States Constitution.

In *United States* v. *Robel,* 389 U.S. 258, 88 S.Ct. 419, 19 L.Ed.2d 508 (1967), the U.S. Supreme Court held unconstitutional that portion of the Subversive Activities Control Act of 1950 which attempted to bar from any employment in any defense facility a person who was a member of a communist-action organization. The statute in that case was not dissimilar to 41-4113(c) in that it prevented membership and employment without regard to the relationship between the two. Chief Justice Warren, speaking for the Court, stated the problems caused by overbreadth at page 265-266 of Vol. 389 U. S.:

"[12-16] It has become axiomatic that '[p]recision

of regulation must be the touchstone in an area so closely touching our most precious freedoms.' *NAACP* v. *Button*, 371 U.S. 415, 438, 83 S.Ct. 328, 340, 9 L.Ed.2d 405 (1963); see *Aptheker* v. *Secretary of State*, 378 U.S. 500, 512-513, 84 S.Ct. 1659, 1667, 12 L.Ed.2d 992; *Shelton* v. *Tucker*, 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231 (1960). Such precision is notably lacking in §5(a) (1) (D). That statute casts its net across a broad range of associational activities, indiscriminately trapping membership which can be constitutionally punished and membership which cannot be so proscribed. It is made irrelevant to the statute's operation that an individual may be a passive or inactive member of a designated organization, that he may be unaware of the organization's unlawful aims, or that he may disagree with those unlawful aims. It is also made irrelevant that an individual who is subject to the penalties of §5(a) (1) (D) may occupy a nonsensitive position in a defense facility. Thus §5(a) (1) (D) contains the fatal defect of overbreadth because it seeks to bar employment both for association which may be proscribed and for association which may not be proscribed consistently with First Amendment rights. See *Elfbrandt* v. *Russell*, 384 U. S. 11, 86 S.Ct. 1238, 16 L.Ed.2d 321; *Aptheker* v. *Secretary of State*, *supra*; *NAACP* v. *Alabama ex rel*, *Flowers*, 377 U.S. 288, 84 S.Ct. 1302, 12 L.Ed. 2d 325 (1964); *NAACP* v. *Button*, *supra*. This the Constitution will not tolerate."

41-4113(c), on the basis of Communist or similar party membership alone, bars an individual from employment by the State or any of its agencies, departments and institutions or by a municipality. The State no doubt has an interest in protecting certain areas of State government and sensitive positions of employment from those who might threaten the exercise of governmental functions, but 41-4113(c), as written, indiscriminately and without any precision whatsoever prevents, solely on the basis of association, any such party member from any employment by the State, its agencies, departments and institutions or by a municipality in the State.

Keyishian v. *Board of Regents*, 385 U.S. 589, 87 S.Ct. 675, 17

L.Ed.2d 629 (1967), reviewed provisions of administrative regulations and statutes pertaining specifically to teachers at State institutions in New York State which required as a condition of employment that these teachers certify in writing among other things that they had never been a member of the Communist party. Justice Brennan speaking for the majority stated at Page 606 of Vol. 385 U.S.:

> "[1] We proceed then to the question of the validity of the provisions of subdivision 1 of §105 and subdivision 2 of §3022, barring employment to members of listed organizations. Here again constitutional doctrine has developed since *Adler*. Mere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis for exclusion from such positions as those held by appellants.
>
> "[12] In *Elfbrandt* v. *Russell,* 384 U.S. 11, 86 S.Ct. 1238, 16 L.Ed.2d 321, we said, 'Those who join an organization but do not share its unlawful purposes and who do not participate in its unlawful activities surely pose no threat, either as citizens or as public employees.' Id., at 17, 86 S.Ct., at 1241. We there struck down a statutorily required oath binding the state employee not to become a member of the Communist Party with knowledge of its unlawful purpose, on threat of discharge and perjury prosecution if the oath were violated. We found that '[a]ny lingering doubt that proscription of mere knowing membership, without any showing of "specific intent," would run afoul of the Constitution was set at rest by our decision in *Aptheker* v. *Secretary of State,* 378 U.S. 500, 84 S. Ct. 1659, 12 L.Ed.2d 992.' *Elfbrandt* v. *Russell, supra,* at 16, 86 S.Ct. at 1240. In *Aptheker* we held that Party membership, without knowledge of the Party's unlawful purposes and specific intent to further its unlawful aims, could not constitutionally warrant deprivation of the right to travel abroad. As we said in *Schneiderman* v. *United States,* 320 U.S. 118, 136, 63 S.Ct. 1333, 1342, 87 L.Ed. 1796, '[U]nder our traditions beliefs are personal and not a matter of mere association, and *** men in adhering to a political party or

other organization *** do not subscribe unqualifiedly to all of its platforms or asserted principles.' 'A law which applies to membership without the "specific intent" to further the illegal aims of the organization infringes unnecessarily on protected freedoms. It rests on the doctrine of "guilt by association" which has no place here.' *Elfbrandt, supra,* at 19, 86 S.Ct., at 1242. Thus mere Party membership, even with knowledge of the Party's unlawful goals, cannot suffice to justify criminal punishment, see *Scales* v. *United States,* 367 U.S. 203, 81 S.Ct. 1469, 6 L.Ed.2d 782; *Noto* v. *United States,* 367 U.S. 290, 81 S.Ct. 1517, 6 L.Ed.2d 836; *Yates* v. *United States,* 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356; nor may it warrant a finding of moral unfitness justifying disbarment. *Schware* v. *Board of Bar Examiners,* 353 U.S. 232, 77 S. Ct. 752, 1 L.Ed.2d 796."

In *Cole* v. *Richardson,* 405 U. S. 676, 92 S.Ct. 1332, 31 L.Ed.2d 593 (1972), Chief Justice Burger, speaking for the Court at page 680 of 405 U.S. stated the following principle with reference to loyalty oaths:

> "We have made it clear that neither federal nor state government may condition employment on taking oaths that impinge on rights guaranteed by the First and Fourteenth Amendments respectively, as for example those relating to political beliefs. ***
>
> "Employment may not be conditioned on an oath denying past, or abjuring future, associational activities within constitutional protection; such protected activities include membership in organizations having illegal purposes unless one knows of the purpose and shares a specific intent to promote the illegal purpose."

It might be argued that appellant Cooper's admitted knowledge of the aims and purposes of PLP and his belief in and advocacy of these aims and purposes would justify upholding Section 41-4113(c) in its prohibition of State employment of a member of PLP who knew, believed in and advocated its aims and principles. But, the statute does not go that far. It proscribes such employment because of mere par-

ty membership, and nothing more. This lack of precision and the narrow restriction to party membership only would bar from State employment not only any such party members who knew and advocated the aims and principles of the party, but also any such member of the party who was a member, and nothing more. The validity of the statute in the light of First Amendment rights must be viewed in the light of the effect of the statute on all persons, and not just the appellant Cooper.

Obviously, the philosophy of the Court has not changed during the last few years. See *Sugarman* v. *Dougall,* 413 U. S. 634, 93 S.Ct. 2842, 37 L.Ed.2d 853 (1973), a case involving aliens in civil service positions. It is totally inconsistent to invalidate a loyalty oath provision and allow to stand a statute which punishes a certain class, state employees, for mere membership in a political organization. The philosophy of the loyalty oath cases reinforces the strength of the First Amendment to the U. S. Constitution. See also *Brandenburg* v. *Ohio,* 395 U.S. 444, 89 S.Ct. 1827, 23 L.Ed.2d 430 (1969); *Yates* v. *U.S.,* 354 U.S. 298, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957); *Noto* v. *U.S.,* 367 U.S. 290, 81 S.Ct. 1517, 6 L.Ed.2d 836 (1961).

This Court has no choice but to follow these decisions of the Court which is the final arbiter when constitutional interpretation is in dispute. To uphold the provisions of Ark. Stats. Ann. 41-4113(c) as protecting a valid state interest, i.e. teaching in a state institution the communist theory of government, would be to ignore the controlling authority on this issue. This Court cannot accept those arguments made by Henslee with reference to Cooper's particular position and the interest of the state therein as applicable to justify affirming the constitutionality of a statute that has such a chilling effect on the exercise of valid First Amendment rights such as freedom of speech and freedom of association.

We are not unmindful of *Adler* v. *Board of Education,* 342 U.S. 485, 72 S. Ct. 380, 96 L.Ed. 517 (1952), and *Beilan* v. *Board of Education of Philadelphia,* 357 U.S. 399, 78 S.Ct. 1317, 2 L.Ed.2d 1414 (1958), relied on by appellees.

However much one might wish to accept *Adler* as authority for upholding Sec. 41-4113(c), one must also face the reality that *Adler* has been so thoroughly eroded, if not overruled by the later cases of *Keyishian*, *Robel* and others, that we cannot view it as an acceptable precedent to uphold this particular statute.

The issue before us is not whether appellant Cooper's beliefs, his advocacy and teaching of PLP's aims and principles or his PLP membership merit our approval. The sole relevant issue is whether his membership in PLP constitutionally disqualifies him from employment by the State. We must hold that it did not.

As an example of the overbreadth of the provisions of 41-4113(c) which require the discharge of a state employee regardless of the relationship of his employment to a valid state interest, a person operating a mowing machine for the State Highway Department, or an elevator operator in a State building, would be deprived of his First Amendment rights without any compelling state interest in his political philosophy.

The Constitution of the United States does not permit us to take a contrary view. Article 6, Clause 2, the Supremacy Clause, provides in part:

> "This Constitution, and the Laws of the United States . . . . shall be the supreme law of the land; and the Judges in every State shall be bound thereby . . . . the Constitution or Laws of any State to the contrary notwithstanding."

The federal supremacy granted by this clause applies not only to the Constitution and laws of the United States, but to the interpretation of that Constitution and those laws by the United States Supreme Court. *Cooper* v. *Aaron*, 358 U.S. 1, 78 S.Ct. 1401, 3 L.Ed.2d 5, citing Chief Justice Marshall's forceful exposition of this point in *Marbury* v. *Madison*, 1 Cranch 137, 177, 2 L.Ed. 60.

In view of our holding we find it unnecessary to reach

any conclusion as to the validity of Ark. Stats. 41-4111 or any of the provisions of Ark. Stats. 41-4113 other than subsection (c). Subsection (a) provides for the punishment, upon conviction, for violation of the prohibitions of the statute and subsection (b) bars any person so convicted from State employment for a period of five years, but the record here shows no such conviction, thus eliminating any necessity to consider the validity of these subsections. Nor do we find it material whether this subsection is a bill of attainder, for in any event subsection (c) cannot be upheld.

The injunction of the lower court was issued on the basis of subsection (c), and since it must fall, we reverse the decree of the Chancery Court and remand with directions to dissolve the injunction against appellants Ross and the Trustees, to dismiss the complaint and intervention, and for other proceedings consistent with this opinion.

The writer is authorized to state that Justices George Rose Smith, Brown and Jones join in this opinion and in the concurring opinion of Justice Fogleman.

The Chief Justice concurs in part and dissents in part.

FOGLEMAN, GEORGE ROSE SMITH, BROWN and JONES, JJ concur.

HOLT, J. disqualified.

CARLETON HARRIS, Chief Justice. concurring in part; dissenting in part. I concur in part and dissent in part to the majority opinion. My concurrence is based on the fact that I agree that the decree must be reversed, but my dissent is premised on the fact that I disagree with the reason for reversal.

I would reverse because I do not feel that the chancery court had jurisdiction. The statues passed upon by the chancellor are a part of the criminal law of our state, listed under the heading, "Treason, Disloyal Conduct, Sabotage." While I agree with the majority that, under a number of United States Supreme Court decisions, membership alone in

a communist organization, is insufficient to bar one from State employment, it is my view that the trial court, in rendering its decree, also took into consideration the provisions of Ark. Stat. Ann. § 41-4111 (Repl. 1964), which state:

> "(a) It shall be unlawful for any person; (1) to knowingly or willfully advocate, abet, advise, or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence, or by the assassination of any officer of any such government; (2) with the intent to cause the overthrow or destruction of any government in the United States, to print, publish, edit, issue, circulate, sell, distribute, or publicly display any written or printed matter advocating, advising, or teaching the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence; (3) to organize or help to organize any society, group, or assembly of persons who teach, advocate, or encourage the overthrow or destruction of any government in the United States by force or violence; or to be or become a member of, or affiliate with, any such society, group, or assembly of persons, knowing the purposes thereof. (b) For the purposes of this section, the term 'government in the United States' means the government of the United States, or the government of this state."

A violation is a felony, and subjects the offender to a fine of up to $10,000 or imprisonment for not more than 10 years, or both, and the statute further provides that any person convicted shall not be eligible for employment by the state or any agency or department for the next five years following his conviction.

The first finding made by the chancellor was that the activities of Cooper are in violation of the quoted section; it is *then* found that subsection (c) of § 41-4113 is valid and that Cooper is ineligible for employment by the State of Arkansas. In fact, the only reason for taking testimony was for the purpose of showing the activities of Cooper; there was certainly

no reason to take testimony simply to show that he belonged to a communistic group, for he very readily admitted that.

The constitutionality of § 41-4111 in its application to appellant, in my opinion, depends upon the extent of the activities of Cooper in furtherance of the prohibited objectives therein mentoned (with particular reference to subsection [a] [1], *Yates* v. *United States,* 354 U.S. 298, *Noto* v. *United States,* 367 U.S. 290, and I agree with appellant that the chancery court was without authority to make this determination for it had no jurisdiction. In this state, criminal felony violations are heard in the circuit court and we held in *Ferguson* v. *Martineau, Chancellor,* 115 Ark. 317, 171 S.W. 472, "It is no part of the mission of equity to administer the criminal law of the State. A court of equity has no jurisdiction over matters merely criminal or merely immoral."

The case of *Gordon* v. *Smith, Chancellor,* 196 Ark. 926, 120 S.W. 2d 325, involved efforts of certain citizens to enjoin police officers within this state from arresting, threatening to arrest, or otherwise interfering with the citizens in operating their automobiles upon the streets and highways because they had not complied with a statute providing for the testing of motor vehicles, it being the contention of the citizens that this statute was unconstitutional. This court, citing a number of cases, held that the chancery court was without jurisdiction and that the matter should be determined in a court of law.

I do not reach the question of whether the evidence before the chancellor sustains a violation of § 41-4111 or any subsection therein, which would stand under United States Supreme Court decisions, for I am firmly convinced that the chancery court was without jurisdiction.

JOHN A. FOGLEMAN, Justice, concurring. I concur in the result, but I never reach the considerations which bring the majority to it. There was a finding by the chancery court that the activities of Dr. Cooper were in violation of Ark. Stat. Ann. § 41-4111 (Repl. 1964). Viewed in the light most favorable to the court's decree, Dr. Cooper's testimony may be summarized as follows:

> The Progressive Labor Party of which I am a member believes that there is a ruling class, consisting of a very small group of people, which controls the country's economy, and through that power, also controls the government and that this control creates oppression. The Party also believes that there must be a dictatorship of the working class, but since the ruling class will not surrender its power voluntarily, there will be violence. The Party is prepared for that eventuality. I joined the Party knowing of these guidelines. I adhere to them and believe that violence and a revolution are necessary. I explain to my students that I believe revolution is necessary. The Party believes that the government, as the agent of the small group constituting the ruling class, practices violence on most people, who can only

escape this violence by violence and I agree.

> I do not believe the Progressive Labor Party can obtain power through constitutional means. I explain to my students that, looking at the record of American history, the only possible solution is revolution. The Progressive Labor Party thinks we have to overthrow the government of the United States. I personally adhere to this philosophy. I view the necessity for the revolution as a moral imperative but I am not talking about anything imminent or in the near future. I do not think the overthrow of the government will occur in the next few years. I discuss politics with teachers and students and talk about the situation and what I think should be done about it.

Dr. Cooper and his party believe that violence and a revolution are necessary. I take this to mean essential, indispensable, requisite, denoting that which fills an urgent need. The American Heritage Dictionary; Webster's New International Dictionary, 2d Ed. (see "needful") See also, Webster's Third New International Dictionary; Rodale, The Synonym Finder. He explains this to his students. This necessity, to him is a moral imperative. This means that it is obligatory, mandatory, directive, compulsory; more than urgent need or demand that cannot be deferred or evaded; something to be acted on; an unavoidable fact compelling or insistently calling for action. The American Heritage Dictionary; Webster's New International Dictionary, 2d Ed. They believe the only possible solution is revolution — that they *have* to overthrow the government. This seems to be rather compelling and seems to be more than the expression of an idea.

Just the belief that his dreams are not going to come true within the next few years does not conceal the fact that he believes in and advocates that which he thinks should be done now. To me, advocacy and encouragement of action are implicit in his expression and explanation of these beliefs. Clearly, Dr. Cooper has the specific intent to further the unlawful aims of his organization, shares its unlawful purposes and is an active member. The Party's aim, of which he seems to be

fully aware, is established by his own testimony. Assuming that they may not be unlawful, his own characterization is that they are not "constitutional means". It may be that one must command or invite an instantaneous assault upon the officers or seat of government before he is removed from the area of First Amendment protection, under some of the authorities cited in the majority opinion. Permitting a veil so transparent, woven largely from finespun semantical thread, to become a constitutional shield against such "teaching" is so distasteful to me that I prefer to take another approach to the matter.

Unlike the majority, I consider the very first point for reversal relied upon by appellant, i.e., that Ark. Stat. Ann. § 41-4113(c) (Repl. 1964) is an unconstitutional bill of attainder. With this argument, I must agree, although there seems to be some lack of consistency in decisions where the Communist Party is involved. Article I, § 10 of the United States Constitution provides that no state shall pass a bill of attainder, i.e., a legislative act which inflicts punishment without a judicial trial. The constitutional provision was adopted as a direct reaction to English bills of attainder, some of which were enacted for retribution and some for preventive purposes. The latter were legislative judgments, based largely on past acts and associations, that a given person or group was likely to cause trouble, perhaps overthrow the government, and therefore deprivations were inflicted upon the person or group in order to prevent the feared event. *United States* v. *Brown*, 381 U.S. 437, 85 S.Ct. 1707, 14 L.Ed.2d 484. There can be no disavowal of such a purpose in § 41-4133(c). For that reason it seems to me to be an unconstitutional bill of attainder which cannot be viewed in any other light, under the most recent decisions of the United States Supreme Court by which we are bound in matters involving the federal constitution. The decisions from which I reach this result span a century and are completely consistent.

The bill of attainder had been a device to which resort was frequently had in England in the sixteenth, seventeenth and eighteenth centuries for dealing with persons who had attempted, or threatened to attempt to overthrow the govern-

ment. Our constitutional prohibition was adopted by the Constitutional Convention unanimously and without debate.[1] *United States* v. *Brown*, supra.

"Bill of attainder" under the federal constitutional provision is an all-inclusive term, encompassing what formerly had been known as bills of pain and penalties, which were, along with the classic bill of attainder imposing the death penalty, legislative acts inflicting punishment without a judicial trial. *Cummings* v. *The State of Missouri*, 71 U.S. (4 Wall.) 277, 18 L.Ed. 356 (1866); *Ex parte Garland*, 71 U.S. (4 Wall.) 277, 18 L.Ed. 366 (1866)[2]; *United States* v. *Lovett*, 328 U.S. 303, 66 S.Ct. 1073, 90 L.Ed. 1252 (1946); *United States* v. *Brown*, 381 U.S. 437, 85 S.Ct. 1707, 14 L.Ed.2d 484 (1965). The word punishment, in the sense of the constitutional provision, is more comprehensive than when used to describe imprisonment, fines, or deprivation of life. In the constitutional sense, it also includes penalties of a civil nature, by deprivation or suspension of civil or political rights, depending upon attendant circumstances and the causes of the deprivation. Disqualification from the pursuit of a lawful profession or vocation, as well as a bar from government service, may constitute this type of punishment. *Cummings* v. *The State of Missouri*, supra; *Ex parte Garland*, supra; *United States* v. *Lovett*, 328 U.S. 303, 66 S.Ct. 1073, 90 L.Ed. 1252 (1946); *United States* v. *Brown*, supra. Bill of attainder may be directed against individuals or against a whole class or easily ascertainable group. *Cummings* v. *The State of Missouri*, supra. *United States* v. *Lovett*, supra; *United States* v. *Brown*, supra.

It seems to me that under *United States* v. *Brown*, supra, the latest and most authoritative case on the subject § 41-4113(c) must fall as a bill of attainder because it makes eligibility for employment dependent upon non-membership in a Nazi, Fascist or Communist society, and not upon the ac-

[1]For an enlightening discussion of the history of the bill of attainder, both in England and the United States, and the application of our constitutional prohibition, see Notes and Comments, the Bounds of Legislative Speculation: A Suggested Approach to the Bill of Attainder Clause, 72 Yale Law Journal 330 (1962-1963).

[2]It is worthy of note that this case involved the right of Augustus H. Garland to continue to practice law before the Supreme Court of the United States after he had served first as a representative and later as a senator in the Congress of the Confederate States. Except for this decision Attorney General Garland could not have been the first Arkansawyer to serve in the president's cabinet.

tivities in which either the person or society may be engaged. See, *Communist Party of the United States* v. *Subversive Activities Control Board*, 367 U.S. 1, 81 S.Ct. 1357, 6 L.Ed.2d 625 (1961). I am not unaware of *American Communications Assn.* v. *Douds*, 339 U.S. 382, 70 S.Ct. 674, 94 L.Ed. 925 (1949) which upheld a provision of the National Labor Relations Act, as then written. I do feel that, in *Brown*, the U.S. Supreme Court, in distinguishing *Douds*, strictly limited it, to say the least, and, in effect, removed a part of its foundation, saying that this part resulted from a misreading of *United States* v. *Lovett*, supra.[3] Be that as it may, the court pointed out in *Douds* that the bar of access of a union having an officer who was a member of the Communist party to the National Labor Relations Board did not necessarily bar any Communist party member from office in his union, even though loss of his position was a possible indirect result. Here, and in *Brown*, the bar was absolute. Concluding language in the *Brown* opinion seems pertinent and applicable. Since I think it requires that § 41-4113(c) as written be declared void as a bill of attainder, I quote it, as follows:

> We do not hold today that Congress cannot weed dangerous persons out of the labor movement, any more than the Court held in *Lovett* that subversives must be permitted to hold sensitive government positions. Rather, we make again the point made in *Lovett:* that Congress must accomplish such results by rules of general applicability. It cannot specify the people upon whom the sanction it prescribes is to be levied. Under our Constitution, Congress possesses full legislative authority, but the task of adjudication must be left to other tribunals.
>
> This Court is always reluctant to declare that an Act of Congress violates the Constitution, but in this

[3]The efficacy of *Douds* on this point seems to have been doubtful in the minds of several members of the court many years ago. See dissenting opinions in *Killian* v. *United States*, 368 U.S. 231, 82 S.Ct. 302, 7 L.Ed.2d 256 and in *Bryson* v. *United States*, 396 U.S. 64, 90 S.Ct. 355, 24 L.Ed.2d 264 (1969), where the majority declined to decide whether the section of the act questioned in *Douds* and later repealed, would then have passed constitutional muster and whether *Douds* would be reaffirmed. Justices Black and Douglas, dissenting, pointed out that only 6 members of the court participated in *Douds*, and their analysis indicates that only one half of them joined in this part of the "opinion of the Court."

case we have no alternative. As Alexander Hamilton observed:

> "By a limited constitution, I understand one which contains certain specified exceptions to the legislative authority; such, for instance, as that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing."

Since it appears clear to me that this is a bill of attainder I would avoid penetrating the more tangled jungle in which cases involving bars to employment, those involving mere qualifications for employment and those requiring test oaths seem to be so intermingled and intertwined that drawing clear distinctions is difficult, if not impossible.

I must add that I agree with the majority on the jurisdictional question. If § 41-4113(c) rendered Dr. Cooper's employment an illegal contract, it was unenforceable. *K. & S. Sales Co.* v. *Lee*, 164 Ark. 449, 261 S.W. 903; *Tallman* v. *Lewis*, 124 Ark. 6, 186 S.W. 296. The payment of his salary would be an illegal exaction under those circumstances. See, *Tallman* v. *Lewis*, supra. Enjoining that payment from tax funds is not the enforcement of the criminal law any more than refusing to enforce a gambling contract would be. To enforce a contract prohibited by law would permit the law to aid in its own undoing. *Tallman* v. *Lewis*, supra.

For the reasons I have stated I would reverse the decree.

McArthur DAVIS *v.* GENERAL MOTORS CORPORATION

74-351 521 S.W. 2d 214

Opinion delivered April 14, 1975

Paul K. Roberts, for appellant.

Shackleford, Shackleford and *Phillips*, for appellee.

GEORGE ROSE SMITH, Justice. Smart Chevrolet Company, after having repossessed and resold a car which it had originally sold to McArthur Davis, brought this suit against Davis for a deficiency judgment. Davis filed a counterclaim against Smart (the dealer) and a third-party complaint against General Motors Corporation (the manufacturer), asserting breaches of warranty. General Motors succeeded, upon the pleadings alone, in obtaining a dismissal of the third-party complaint against it. This appeal is from the order of dismissal. Inasmuch as that order affects a substantial right and strikes a pleading, it is an appealable order within the terms of the statute. Ark. Stat. Ann. § 27-2101 (Supp. 1973).

The dismissal came about in this way: The original sum-

mons was served upon Davis on April 10, 1974. On April 24 Davis filed an answer to the complaint, a counterclaim against Smart, and a motion "pursuant to Arkansas Statutes, Section 34-1007," for leave to make General Motors a party and to serve a summons and third-party complaint upon that corporation. On April 30 the trial court entered an order which, without making any reference to the statutes, directed that General Motors be made a party to the case. On May 6 Davis filed his third-party complaint against General Motors, seeking damages for breach of warranty. Counsel for General Motors, in asking that Davis's third-party complaint be dismissed, pointed out that Davis's motion of April 24 had cited a section of the Uniform Contribution Among Tortfeasors Act, Ark. Stat. Ann. § 34-1007 (Repl. 1962). Counsel asserted that General Motors was not a joint tortfeasor and that the third-party complaint should therefore be stricken.

The motion to strike the third-party complaint should have been denied. Obviously Davis's motion for leave to bring in General Motors was in error in its reference to the Uniform Contribution Among Tortfeasors Act, because Davis was asserting a cause of action against General Motors, not a claim for contribution. The third-party complaint itself made that fact perfectly clear. Davis was entitled to file that pleading. Ark. Stat. Ann. § 27-1134.1 (Supp. 1973). There is no possibility whatever that General Motors was misled by the superfluous reference to the Uniform Act. The error must therefore be disregarded, as it does not affect the substantial rights of General Motors. Ark. Stat. Ann. § 27-1160 (Repl. 1962).

Reversed.

FIRST FEDERAL SAVINGS & LOAN ASSOC. of MALVERN, ARK. *v.* ARKANSAS SAVINGS & LOAN ASSOC. BOARD, ET AL

74-331 521 S.W. 2d 542

Opinion delivered April 14, 1975

Hall, Tucker & Lovell, for appellant.

Harold E. Anderson, Jr., for appellee Arkansas Savings & Loan Bd., *Stubblefield & Matthews*, for appellee First Security Savings & Loan Ass'n. of Hot Spring County.

LYLE BROWN, Justice. On October 24, 1973, an application was filed with the Arkansas Savings & Loan Association Board for a state chartered association to be located in Malvern, Hot Spring County, and to be known as First Security Savings & Loan Association of Hot Spring County. Protests to the application were filed by Malvern National Bank, Bank of Malvern, and First Federal Savings & Loan Association of Malvern. After a pre-hearing conference and a public hearing the application for the proposed charter was granted. The circuit court affirmed. Appellant here is First Federal Savings & Loan Association of Malvern, and the

appellees are Arkansas Savings & Loan Association Board and First Security Savings & Loan Association of Hot Spring County.

At the outset of this appeal First Federal argues that the Board erred in failing to make specific findings of underlying facts, as required by a provision in the Administrative Procedure Act. Ark. Stat. Ann. § 5-710 (b) (Suppl. 1973) which states:

> "In every case of adjudication a final decision or order shall be in writing or stated in the record. A final decision shall include findings of fact and conclusions of law, separately stated. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting the findings."

The quotation is a part of the Administrative Procedure Act, and of course applies to most every state board such as Arkansas Savings & Loan Board, appellee here.

We have taken a hard line on the proposition that the quoted statute must be followed. We have so stated in two very recent opinions. *Arkansas S. & L. Bd.* v. *Central Ark. S. & L.*, 256 Ark. 846, 510 S.W. 2d 872 (1974); *First State B. & L. Ass'n* v. *Arkansas S. & L. Bd.*, 257 Ark. 599, 518 S.W. 2d 507 (1975).

In the hope that it will prove helpful to the administrative boards, the trial courts and attorneys, we shall set out the order, paragraph by paragraph, entered by the Board and compare them with the requirements of Ark. Stat. Ann. § 67-1824 (Supp. 1973).

Section (1) of § 67-1824

> "All the prerequisites for the approval of the charter set forth in this Act (Sections 67-1801 — 67-1862) have been complied with."

Board's Order:

> "1. That an application for charter containing the

items required by Section 16 of Act 227 of 1963 has been properly filed with the Supervisor of the Board by First Security Savings and Loan Association of Hot Spring County, Malvern, Arkansas.

"2. That the application for charter and supporting documents of First Security Savings & Loan Association of Hot Spring County complies with all of the prerequisites for the approval of a charter as set forth in Act 227 of 1963, as amended, and the rules and regulations of the Arkansas Savings and Loan Association Board.".

Findings No. 1 and No. 2 merely paraphrase Section (1) and are not accompanied by a concise and explicit statement of the underlying facts supporting the findings.

Section (2) of § 67-1824

"The character, responsibility and general fitness of the persons named in the articles of incorporation and who will serve as directors and officers of such Association are such as to command confidence and warrant belief that the business of the proposed association will be honestly and efficiently conducted in accordance with the intent and purpose of this act and the proposed association will have qualified full-time management."

Board's Order:

"3. That the information submitted to the Board demonstrates that those persons named in the Articles of Incorporation and who will serve as officers and directors of First Security Savings & Loan Association of Hot Spring County, possess a general background reflecting the responsibility, character and general fitness necessary to instill confidence and convey the belief that the business pursued by the Association will be conducted efficiently and with the honesty and integrity by Act 227 of 1963, as amended.

"4. That First Security Savings & Loan Association of Hot Spring County will have qualified full-time

management in that it will submit to the Supervisor of the Board detailed biographical information and a personal financial statement of the proposed full-time managing officer, and said managing officer will not be employed until it is determined by the Supervisor of the Board that he is qualified."

Finding No. 3 simply rearranges the wording found in Ark. Stat. Ann. § 67-1824 (2) (Suppl. 1973). The finding is devoid of any concise and explicit statement of the underlying facts supporting the finding.

Finding No. 4 states that the applicant will have qualified full-time management which is verbatim from the requirement of Section 67-1824 (2). The finding goes on to say that the applicant will submit information on the managing officer who will not be employed until the Supervisor determines that he is qualified. A careful reading of the statute requires the Board, not the Supervisor, to find that the proposed association will have qualified full-time management. The Board has not made this affirmative finding but has delegated that statutory requirement to the Supervisor of the Board. This is in violation of the statute.

Section (3) of § 67-1824

"There is a public need for the proposed association and the volume of business in the area in which the proposed association will conduct its business is such as to indicate a successful operation."

Board's Order:

"5. As indicated by the application, exhibits thereto, and testimony of the witnesses on behalf of the applicant, it is found that there exists a public need at the present time for First Security Savings & Loan Association of Hot Spring County because of the area's untapped savings potential and the unsatisfied demand for long-term loans.

"6. That the volume of business in the areas sur-

rounding and including Malvern, Arkansas, where First Security Savings & Loan Association of Hot Spring County will conduct its business is sufficient to indicate a successful operation based on the evidence submitted to the Board of the area's savings potential, demand for long-term loans and overall economic growth."

Findings No. 5 and No. 6 are again a mere recital of the statutory language of Ark. Stat. Ann. § 67-1824 (3) (Suppl. 1973). Finding No. 5 merely states that there exists a public need from the application, exhibits thereto and testimony of the witnesses. There is no explicit statement of the underlying facts supporting this finding as well as the finding that the volume of business is sufficient to indicate a successful operation. There is total absence of any fact, figure or computation constituting an underlying fact which formed the basis for the statutory language used. We have no way of knowing what specific facts the Board relied upon in making this finding.

Section (4) of § 67-1824

"The operation of the proposed association will not unduly harm any other existing association or federal savings and loan association or other financial institution."

Board's Order:

"7. That the operation of First Security Savings & Loan Association will not harm any existing state-chartered savings and loan association, Federal Savings and loan association, commercial bank or any other financial institution since the proof shows that there is sufficient savings and loan potential in the proposed service area to adequately support the existing institutions and the proposed savings and loan association."

No underlying facts are pointed out to support the statutory language used in Finding No. 7. We are left to guess what facts the Board found to substantiate that sufficient savings and loan potential is in the area. The finding should have related the basis for an amount of the savings and loan

potential; the sources from which the savings and loans would be derived; the amount of savings and loans required to support the applicant; the loss of savings and loans which might be suffered by the existing financial institutions; and other underlying facts supporting their finding.

Section (5) of § 67-1824

> "The proposed association will be independent of the other financial institutions, that those persons named in the articles of incorporation as directors and officers do not have such affiliations with any financial institutions or other businesses closely related to the savings and loan association business which would affect the independence of the proposed association, and that the directors are representative of the community."

Board's Order:

> "8. That the matters submitted to the Board establish that the subscribers to withdrawable capital of First Security Savings & Loan Association of Hot Spring County represent a cross-section of the community to be served and that the Applicant will be established and operated in a manner independent of other financial institutions since those persons named in the Articles of Incorporation as directors and officers to not have any affiliations with any financial institutions or other businesses closely related to the savings and loan association business which would affect the independence of the proposed association, and that the directors are representative of the community."

Finding No. 8 is again a copy of Section 67-1824 (5). There is no explicit statement of the underlying facts supporting this finding.

The judgment is reversed and the cause remanded through the Circuit Court to the Board for such further proceedings as may be necessary.

ARKANSAS BEVERAGE COMPANY *v.* Richard R. HEATH, DIRECTOR DEPARTMENT OF FINANCE AND ADMINISTRATION, STATE OF ARKANSAS

74-154 521 S.W. 2d 835

Opinion delivered April 14, 1975
[Rehearing denied May 19, 1975.]

Rose, Nash, Williamson, Carroll and *Clay, P.A.*, for appellant.

Karl Glass, Harlin R. Hodnett and *Robert Brockman*, for appellee.

JOHN A. FOGLEMAN, Justice. Arkansas Beverage Company brings this appeal from an adverse decree in its suit against appellee to recover a use tax deficiency assessment paid by it under protest. Appellant is engaged in the business of producing, selling and distributing bottled soft drinks called Pepsi Cola. The items purchased by it upon which the use tax was assessed were bottles, cardboard bottle cartons, an electronic bottle conveyor and a case conveyor. It is appellant's contention that the glass bottles, which were returnable and reusable, and the cardboard cartons in which bottled drinks were placed and carried became recognizable,

integral parts of the finished product, i.e., the bottled drink, and were thus exempt from use tax under Ark. Stat. Ann §§ 84-3106 (B) (Supp. 1973) and 84-1904 (i) (Repl. 1960) as items purchased for resale. Appellant also contends that the electronic bottle inspector, the bottle conveyor and the case conveyor were items of machinery purchased to replace, in its entirety, similar existing ma hinery used directly in producing and packaging articles of commerce at appellant's manufacturing and processing plant in Arkansas and that the machinery replaced would have been exempt under Ark. Stat. Ann. § 84-3106 (D) (2) (a) (Supp. 1973), if that subsection had been in effect at the time of its purchase, and was exempt under Ark. Stat. Ann. § 84-3106 (D) (2) (Supp. 1973).

The chancery court held the returnable bottles and paper cartons were purchased for appellant's use and consumption and were subject to tax, but that appellant was not a manufacturer within the meaning of Ark. Stat. Ann. § 84-3106 (D) (2). It also held the bottle inspector, bottle conveyor and case conveyor were not used directly in a manufacturing process and were subject to the use tax.

Let it be remembered that taxation is the rule and exemption the exception, so the heavy burden of clearly establishing the claimed exemptions beyond reasonable doubt rested upon appellant. *Heath* v. *Midco Equipment Co.*, 256 Ark. 14, 505 S.W. 2d 739 (1974); *Scurlock* v. *Henderson*, 223 Ark. 727, 268 S.W. 2d 619. Tax exemption provisions must be strictly construed against exemption and to doubt is to deny the exemption. *Heath* v. *Midco Equipment Co.*, supra; *Hervey* v. *Tyson's Foods*, 252 Ark. 703, 480 S.W. 2d 592. It must also be remembered that appellate review in this case is by trial de novo upon the record, but that the chancery court's findings of fact will not be reversed unless clearly against the preponderance of the evidence.

Appellant lists the following points upon which it relies:

A

RETURNABLE BOTTLES AND CARDBOARD CARTONS ARE EXEMPT FROM USE TAX AS

PURCHASES FOR RESALE UNDER §§ 3106 (B) and 84-1904(i)

1. Returnable bottles and cardboard cartons are a recognizable, integral part of the finished product.

2. There is a sale of the bottles and cartons within the meaning of the Gross Receipts Act.

3. The cost of the bottles and cartons is included in the sales price of the product. The deposit is not the sale price of the bottle.

4. Prior to 1973 appellee recognized that returnable bottles and cardboard cartons were exempt from sales and use tax.

5. Other jurisdictions support appellant's position.

B

THE ELECTRONIC BOTTLE INSPECTOR, CASE CONVEYOR AND BOTTLE CONVEYOR ARE EXEMPT FROM USE TAX UNDER § 84-3106 (D) (2) (SUPP. 1973).

1. Appellant's plant is a manufacturing or processing plant within the meaning of § 84-3106 (D) (2)

2. The machinery in question is used directly in producing, assembling, processing or packaging the bottled beverage.

3. The items in question were purchased to replace existing machinery in its entirety.

The chancellor held that appellant had failed to meet its burden of proof as to the bottles and cardboard cartons. We agree as to the bottles but not as to the cardboard cartons. We should say at the outset that as to the bottles, we consider the case of *Hervey* v. *Southern Wooden Box, Inc.*, 253 Ark. 290, 486 S.W. 2d 65 to be controlling in spite of the fact that there

had been an administrative determination that the bottles were exempt.

The bottles were returnable. The beverage sold by appellant is bottled under carbonation, sealed with a crown, and sold, insofar as is pertinent here, to retailers who sell food and beverages for consumption and who collect and remit a sales tax. These bottles containing the carbonated drink are delivered to appellant's customers in cases containing 24 bottles each in 24 separate compartments or pockets or with partitions containing cardboard cartons into which either 6 or 8 bottles of the beverage have been packed. Two-thirds of appellant's bottled drinks are packaged in the cardboard cartons, and appellant's customers nearly always sell a full package to the ultimate consumer, who takes the package from the seller's place of business to the place of consumption in the carton. The retailer, appellant's customer, puts up a deposit of $1.00 for each case of the bottled beverage. Seventy-two cents, or three cents per bottle, is for the bottles and twenty-eight cents for the wooden shell or case. No deposit is made on the paper cartons. The price of the drink is the same per bottle, regardless of whether it is packaged in a cardboard carton. The retailer requires the same deposit of his customer in order to encourage the return of the bottles. Whenever a new supply of beverages is delivered by appellant to a customer by truck, the driver picks up whatever empty bottles, cardboard cartons and wooden cases the customer has on hand and the retailer is credited with the amount he was charged as a deposit on such bottles and cases. The net charge for the bottles and cases delivered after deducting any such refunds is credited to appellant's "deposit income account." Appellant says that its customers are not accountable to it for either the bottles or the cartons and cannot be forced to redeem their deposits. Appellant charges the cost of new bottles and cartons as a part of the cost of sales at the time they are filled and packaged. The amount of any deposit charged or received is credited to the "deposit income account" from which is subtracted the amount of any refunds at the end of the fiscal year, the net credit balance in the "deposit income account" is then deducted from cost of sales, and appellant's income, as shown by its books, is increased by that amount.

So far as appellant's books are concerned the bottles and cartons are treated as a part of the cost of goods sold and not as overhead. New bottles that have never been put in service are carried on the books at cost when inventory is taken and used bottles, either full or empty, are valued at the deposit value. The only cartons on the balance sheet are new, unused cartons on hand at the end of an accounting period. Bottles and cartons in the hands of retailers or consumers do not appear on appellant's books at all.

The reason given by appellant for requiring the deposit is to encourage the return of the bottles for reuse. By dividing the number of cases of returnable bottles delivered by the number not returned during a fiscal year, appellant calculated that during the tax year involved, it used a bottle an average of 10 times before it was lost or discarded. By dividing the net cost of bottles lost or discarded during that year by the number of cases of returnable bottles, appellant determined that its cost of bottles for each 24-bottle case was 17.2 cents. The actual average cost of new bottles bought during appellant's fiscal year 1972 was 9 cents. During the same fiscal year the average selling price was $1.92 per case, the average cost was $1.106, and the overhead cost $0.634, leaving a net income of $0.18 per case before taxes and $0.078 after taxes.

Overhead expenses in appellant's accounting system consist of depreciation, advertising, promotion, delivery truck expenses, and other general expenses not charged as direct cost of the product. The cost of bottles and cartons under this accounting method comprised about 20% of the total cost of goods sold. In the case of non-returnable bottles, appellant charges their entire cost to the sale, and the Department of Finance and Administration recognizes that disposable bottles and cans are exempt from use tax as an integral part of the finished product. The selling price of the product in a non-returnable container is higher than that in returnable bottles.

All the bottles bear the Pepsi Cola Company trademark. Appellant acquires bottles that come from other franchised Pepsi Cola dealers because it accepts any bottle bearing the

company trademark in giving refund credit. If a neighboring Pepsi Cola bottler increases its deposit refund it is necessary for appellant to also make an increase in order to insure return of bottles it had originally bought and distributed in its territory. Appellant, in the fiscal year 1973 had increased the bottle deposit to 5 cents for this reason. Using the formula previously applied, appellant calculated that it then used each bottle 12 times.

The bottle deposit is not treated as a part of the sales price of the product under regulations issued pursuant to the Wage and Price Stabilization Act, under which the selling price of the bottled drink was regulated. No sales tax is paid by appellant when its customer returns bottles for deposit refund. The trademark of the Pepsi Cola Company on the bottle serves to identify the product for the consumer. Appellant distinguishes its bottled product from those dispensed at a soda fountain or from a vending machine in a paper cup, because those so dispensed must be consumed immediately and usually on the premises where purchased, while the bottled drink, being carbonated and sealed under pressure in a strong container, may be transported and stored for later consumption.

Upon these facts, appellant contends that the returnable bottles become a recognizable, integral part of its product — a packaged, bottled beverage — exempt as goods used in the manufacture, compounding, processing, assembling or preparing it for sale. Thus, says appellant, under our statutes, the bottles were purchased for resale. Appellant admits that the Arkansas case nearest in point is *Hervey* v. *Southern Wooden Box*, 253 Ark. 290, 486 S.W. 2d 65, wherein we held that there was no exemption for wooden cases in which the beverages sold by soft drink bottlers were delivered to the retailer, but that paper cups used in vending machines, from which the bottler sold its products at retail, were exempt. Appellant says that the crucial test is whether the bottle becomes a recognizable integral part of the product sold by it.

Appellant likens the bottles in this case to the paper boxes in *McCarroll* v. *Scott Paper Box Company*, 195 Ark. 1105, 115

S.W. 2d 839, and to the paper cups in *Hervey* v. *Southern Wooden Box Co.*, supra, saying that the product sold is a bottled, carbonated beverage which could not be preserved or sold if it were not contained in a bottle and that there is no real distinction to be made between a returnable and a non-returnable bottle. Appellant reasons that it surrenders both title and possession when it delivers the bottled beverage. It considers the *Scott Paper Box* case controlling because the bottle is a component part of the product sold in unchanged form to the retailer and in turn to the consumer. Since the bulk syrup used at fountains is sold by it at a much lower price than the bottled drink, it takes the position that the cost of the bottles is an important element in the cost of the product and in computation of its selling price and is considered as such rather than as a part of general overhead expense, and the bottles are not used for any other purpose.

We do not agree, largely for the same reasons given for denying the application of the exemption statute to wooden soft drink cases. If appellant sells its bottled beverage at 8 cents per bottle, its cost analysis reveals that only $0.0075 is left for profit and payment of taxes. We cannot accept the premise that appellant is selling a 9 cent bottle for a 3 cent or even 5 cent deposit. The deposit, admittedly, is to "encourage" the return of the bottle and if appellant's calculations are correct, it rather effectively does so. For this or other reasons, bottles are returned and used over and over. Appellant's electronic bottle inspector is used to detect cracks in bottles to be used for bottling and to cause them to be discarded. Appellant's internal bookkeeping, by which it shows a profit on a "sale" of 24 bottled drinks for $1.92 when the bottles alone, if new, had cost $2.16, does not afford any basis for distinction of the *Southern Wooden Box Company* principle, even if the method is used throughout the bottling industry. Obviously, regardless of the "surrender" of title and possession, appellant expects to get its bottles back and if the deposit is not sufficient to assure that it does, it is raised. Otherwise, appellant could not long remain in business.

We regard substance to be more important than form in determining the nature of the transaction. In substance, the transactions involving the bottles when delivered to

appellant's customers, when "sold" by them and when returned to appellant are not sales, and the purchase of the bottles by appellant is not for resale but for use. In this respect, we agree with the Court of Appeals for the District of Columbia, 214 F. 2d 197 (1954). See also, *Gay* v. *Canada Dry Bottling Co. of Florida*, 59 So. 2d 788 (Fla. 1952); *Wichita Coca Cola Bottling Co.* v. *U.S.*, 152 F. 2d 6 (5th Cir. 1945); *Evans* v. *Memphis Dairy Exchange*, 194 Tenn. 317, 250 S.W. 2d 547 (1952). We find that the bottles are used by appellant and that there was no sale or purchase of them for resale. Appellant's bookkeeping is, as appellee suggests, more consistent with an amortization of the cost of the bottle than with a purchase for resale. The fact that in some cases retailers charge a "sales tax" on the consumer's bottle deposit, cannot transform the character of the bottler's transactions. Although the administrative interpretation of the statutes by appellant's predecessors may be considered as persuasive, we are not controlled by it and disagree with it. Certainly, we cannot say that appellant has, beyond reasonable doubt, established its entitlement to this exemption.

We reach a different result as to the cardboard cartons, which also bear the trademark of Pepsi Cola. Although it is true that a substantial number of them are returned and reused, it seems to us that this is largely attributable to fortuitous circumstances, among which is the convenience of using them for returning empty bottles. Appellant does nothing to assure their return. No deposit has ever been required. No credit is given to the retailer for return of the cartons. These cartons are delivered to retailers, primarily grocery stores, in non-compartmentalized wooden cases. The retailer almost always sells the filled carton to the consumer as a package just as he receives it. One purpose of the use of the carton is to encourage the purchase of more than one bottle of appellant's beverage. Another is for convenience of the customer in carrying and handling. Appellant's cost accounting on the cartons is handled in a manner similar to the treatment given bottles, except, of course, for the "deposit income." Appellant calculates that enough usable cartons are returned to enable the six-bottle cartons to be used two or three times and the eight-bottle ones, 3.6 times or an overall average of 2.8 times per carton. On this basis, appellant calculated that its cost,

per carton, was 4.7 cents, which is included as a cost item. Until returned cartons are put into the production line, appellant does not know whether they can be reused and does then discard damaged cartons. Because of this, and because their value is so small, used cartons are not considered for inventory purposes. Under these circumstances, we find that appellant's cartons are more analagous to the paper boxes in the *Scott Paper Box* case and the paper cups in the *Southern Wooden Box* case than to the wooden cases in the latter case or to the wrapping paper, paper bags and twine in *Wiseman* v. *Wholesale Grocers Association*, 192 Ark. 313, 90 S.W. 2d 987.

B 1

We cannot agree with the chancellor that the appellant is not a manufacturer within the meaning of Ark. Stat. Ann. § 84-3106 (D) (2). The bottled soft drink is a distinctly different product from the mixture of syrup and carbonated water distributed at a fountain or by a vending machine. Even though appellant produces and sells Fountain syrup in bulk and buys and sells canned beverages, its principal business is the production and sale of bottled carbonated soft drinks, nearly all of which are sold to retailers for resale to the ultimate consumer. Appellant makes its own syrup. The bottled beverage is produced on a rather sophisticated production line, beginning with a case unloader, where empty bottles are removed from the cases and fed into the line, and ending with the "palletizing" of cases fitted with the bottled product and ready for market. During the process, the bottles are washed, inspected, filled, capped and repackaged into cases.

The syrup used by fountains and in vending machines serving the beverage in a paper cup is not the same as the concentrate purchased by appellant. The syrup sold to fountains is made by appellant who also makes it for its finished bottled product. In the preparation of the liquid beverage, water from the city supply is pumped into a reaction tank, where chlorine, lime and ferrous sulphate are added to reduce hardness and alkalinity, to oxidize such organic matter as bacteria and micro-organisms and to remove all insoluble material. The amounts of the chemicals vary from day to day after testing of the city water. The treated water is then pass-

ed through filters first of white, high silicate sand, then of carbon, and finally, of fine fiberglass. That water is added in proper proportions to granulated sugar in a stainless steel mixing tank to form a simple syrup to which is added, in precise order, a liquid concentrate purchased from the franchiser, vanilla, a citric acid solution, and, if necessary, a solution of benzoate of soda. The resulting mixture is "bottling syrup" if, after having been thoroughly stirred and left sitting for a certain period, and tested, it falls within accepted tolerances. Some syrups then require "aging" for a proper blending. After all tests are satisfactorily passed, the syrup passes into a tri-o-matic cooler where the syrup and water are mixed in exact proportions, cooled to 34^0, and carbonated by being pumped through a spray head into a mist which is saturated with carbon dioxide gas. The finished beverage is then ready for the filling and crowning of bottles. This liquid goes into a uniblend filler, which by means of a counterbalance pressure system maintains a proper amount of the liquid in the filler tank where it, by a filling operation, is fed into the bottles, which have been through a cleaning and inspection process. Then the filled bottle is crowned and transferred to a belt for completion of the packaging and stacking process, after which it is moved to the stock warehouse or a delivery truck. The only item furnished by the Pepsi Cola Company is the concentrate.

The bottling operation is considered to be manufacturing in the bottling industry. "Rules and Regulations Pertaining to Bottling Plants" promulgated by authority of Ark. Stat. Ann. § 82-110 (Repl. 1960) require a properly screened syrup room for the mixing and handling of syrups and other ingredients whenever they are mixed for *manufacture* of beverages. They also require all products used in *manufacture,* such as extracts, flavors, sugar, syrup, color, water and the like be pure and wholesome.

For the purpose of the sections of the statute in question here, manufacturing and processing refer to and include those operations commonly understood to be within their ordinary meaning. It is the position of appellee that appellant has failed to meet its burden of proof and that it has only shown that it is engaged in a process of pouring Pepsi Cola

syrup and carbonated water into a cleaned and inspected bottle on which it then puts an air tight cap. Appellee relies principally upon *C.J.C. Corp.* v. *Cheney*, 239 Ark. 541, 390 S.W. 2d 437, where we held that the "ready-mix" concrete business was not manufacturing, because it involved only the mixing of various basic ingredients or material to prepare a concrete product for ultimate use.

We think, however, that the proof clearly shows that appellant is engaged in manufacturing at a manufacturing plant or facility. A particular flaw in appellee's reasoning arises from the premise that the process is pouring Pepsi Cola syrup into a bottle. He does, however, recognize that the syrup poured into the bottle is a manufactured article. It is clear from the undisputed testimony that this syrup is manufactured by appellant and the extensive process by which this is accomplished was described in detail. The courts follow the common usage or popular meaning of the word manufacturing in construing the statute. *Pellerin Laundry Mach Sales Co.* v. *Cheney*, 237 Ark. 59, 371 S.W. 2d 524; *C.J.C. Corporation v. Cheney*, 239 Ark. 541, 390 S.W. 2d 437. We think of a manufactured article as something to be placed on the market for retail to the general public in the usual course of business. *Morley* v. *E. E. Barber Construction Co.*, 220 Ark. 485, 248 S.W. 2d 689. The act itself recognizes that manufacturing encompasses the processing, fabricating or assembly of raw materials into a form of personal property to be sold in the commercial market. See, Ark. Stat. Ann. § 84-3106 (D) (2) (c). In a slightly different context we have approved a definition of a manufacturer as one engaged in making materials, raw or partly finished, into wares suitable for use. *Riggs* v. *Hot Springs*, 181 Ark. 377, 26 S.W. 2d 70.

We find that appellant is engaged in manufacturing a bottled carbonated beverage from raw ingredients such as water, sugar, Pepsi Cola concentrate, vanilla, citric acid and carbon dioxide and that the plant wherein the process is carried on is a manufacturing plant. This was the result reached in Oklahoma. *Oklahoma Tax Commission* v. *Oklahoma Coca Cola Bottling Company*, 494 P. 2d 312 (Okla., 1972). See also, *Assessors of Boston* v. *Commissioner of Corporations and Taxation*, 323 Mass. 730, 84 N.E. 2d 129 (1949). The fact that the

Pepsi Cola concentrate or other ingredients had been partly processed does not take the operation out of the field of manufacturing.

It is not so easy to deal with the question whether appellant met its burden of proving that the electronic bottle inspector, case conveyor and bottle conveyor are used directly in the actual manufacturing or processing operation at any time from the initial state where actual manufacturing or processing begins through the completion and packaging of the finished end product. There is no difficulty in fixing one terminal of this requirement. The "packaging" of the end product is accomplished when the bottled carbonated beverage is placed in the wooden cases. The great difficulty lies in ascertaining the initial stage where the actual processing begins. There seems little room for doubt that each piece of machinery or equipment involved here was used directly in producing, assembling, processing, finishing or packaging of an article of commerce.

The bottling process is conducted on a fully automated production line. The case unpacker lifts empty bottles from the wooden cases and places them upon a bottle conveyor upon which they are fed into a bottle washer. The case conveyor, a continuous belt, then takes the empty wooden cases from the case unpacker to the case packer at the other end of the production line where it is loaded with filled drink bottles. The empty bottles taken from the cases are conveyed through a thorough rinsing and washing, to an inspection station. There two persons check for chipped, cracked, uncleaned or beaded bottles, which are removed from the bottle conveyor. The bottles remaining on the conveyor then pass to the electronic bottle inspector, which projects a beam of light through the base of each bottle into a receiver. If the beam of light is reduced or deflected by any object or material in a bottle, that bottle is rejected; otherwise, it passes to the filler where it is filled with the finished beverage coming from the tri-o-matic cooler and then moved to the crowner or bottle capper where it is sealed and then it goes to the case packer where it is packed into a wooden case with 23 other such bottles. According to appellant's vice president and chief operations officer the manufacturing process begins, at the

latest, with the case unpacker, and each step in the process thereafter is just as important to the production of the final finished product as any other and without any of them the production line would not function.

The bottle conveyor in question extends from the bottle washer through the electronic inspector. The functions of the bottle conveyor and the bottle inspector are completed before the filling of the bottles. Neither of the three machines in question has anything to do with the liquid before it is put in the bottle. It seems clear to us that the electronic bottle inspector and the bottle conveyor are used directly in producing, assembling, processing or packaging of the article of commerce between the initial state of actual manufacturing or processing and the completion of the finished article. A majority of the court also feels that the case conveyor falls into this category.

We cannot agree with appellee that only that machinery used in the mixing or the filling process could possibly be considered as machinery or equipment used directly in manufacturing or processing. Neither do we agree with appellant that the bottle conveyor is excluded as transportation equipment not directly used in the manufacturing or processing operation. The majority of the court does not agree that the case conveyor is excluded transportation equipment. In this respect we are influenced by the fact the process is a continuous, synchronized operation from the time the empty bottle is taken from the case until the case filled with the bottled beverage is palletized for storage, or delivery, without any human intervention, except for the removal of broken bottles and the intermittent removal of filled bottles for testing the product, and, if any one machine or device in the production line fails to function, the operation stops. In such an integrated process, we must consider each such machine or device as being used directly in producing, assembling, processing and packaging the ultimate product. This was the approach we took in *Cheney* v. *Georgia-Pacific Paper Corp.*, 237 Ark. 161, 371 S.W. 2d 843; *Arkansas Rwy. Equipment Co.* v. *Heath*, 257 Ark. 651, 519 S.W. 2d 45 (1975). See also, *State* v. *Try-Me Bottling Co.*, 257 Ala. 128, 57 So. 2d 537 (1952); *Schenley Distillers* v. *Commonwealth*, 467 S.W. 2d 598 (Ky. 1971).

The decree is affirmed insofar as it affects the bottles, but reversed as to the cardboard cartons, the case conveyor, the bottle conveyor and the electronic bottle inspector.

The Chief Justice, MR. JUSTICE BYRD and Special Justice JOHN S. DAILY dissent from the affirmance but concur in the reversal. Mr. Justice HOLT was disqualified and did not participate.

JOHN S. DAILY, Special Justice, dissenting in part. The majority of the Court makes a distinction between the cardboard cartons and the bottles which I am unable to draw. Each is a "recognizable, integral part of the manufactured product" (a carton of bottled carbonated soft drinks) — Sec. 84-1904 (i) (Repl. 1960). This total end product is sold by the manufacturer to the retailer, and by the latter to the consumer, incident to which resale the retailer collects from the consumer a Gross Receipts Tax calculated upon the total resale price of the complete package. I see no practical way for the retailer to separate the price of the components of this end product and impose a Gross Receipts Tax upon part of same and exclude other parts. The majority imposes a Compensating Use Tax upon the bottles at their purchase by the manufacturer, but Section 84-3106 (B) exempts these bottles from the Use Tax if they are subjected to a levy of a Gross Receipts Tax. A levy of both taxes upon the same item of tangible personal property is precluded by the statutes and by all prior pronouncements of this Court on this point. *Hervey* v. *International Paper Company*, 252 Ark. 913 at 915; *Hervey* v. *Southern Wooden Box Company*, 253 Ark. 290 at 291. This distinction drawn by the majority between the bottles and the cardboard cartons seems to be predicated upon the practice of the Appellant, in company with a great number of its fellow manufacturers in the carbonated bottled drink trade, to require its purchaser, the retailer, (in addition to paying the purchase price) to put up a deposit on each bottle; and the retailer makes a like requirement of his purchaser, the consumer. Each of these deposits is fully refundable in the event that the bottle is returned by the consumer to the retailer, and by the retailer to the manufacturer. This practice, according to the record in this case, is not applied to cardboard cartons. I view this deposit and refund require-

ment as to the bottles to be wholly irrelevant to the question of the impact of the imposition and exemption provisions of the Gross Receipts and Compensating Use Tax Acts. To me it is clearly a device, and only that, to induce the consumer to return the bottle to a retailer and reclaim his deposit, and for the retailer to return it to the manufacturer and reclaim his deposit, to the end that the bottle may be recycled by the manufacturer. This practice would appear to be laudable and in the interest of conservation benefiting the general economy. Also, according to the uncontradicted evidence in the record, it results in a benefit to the consumer in enabling the manufacturer to make more frequent reuse of each bottle whereby it can profitably include in its sale price the amortized (in the practical sense) cost of the bottle over the bottle's returnable life, rather than the bottle's total initial cost being included in the sale price on each sale of the end product. Also, according to the uncontradicted evidence in this record, there is an absolute sale of the completed packaged product, and all of its components, by the manufacturer to the retailer, and by the retailer to the consumer, and each of these latter two is free to do as he will with the product, including the bottles, which he may return for recovery of his deposit or not, as he chooses.

If the manufacturer is subjected to a Compensating Use Tax on its cost of the bottles, which I understand the majority to hold, it will necessarily be under economic compulsion to add this additional tax cost to its end product price and thereby pass it on to the consumer. Contrary to the opposite politically inspired pronouncements, producers do not pay taxes. They collect and remit them and pass them on in the price of their products into the hands of the consumer. If they do not they are soon out of business. If this economic law of the free market system prevails, the manufacturer will add the use tax imposed on the bottles to the price of its packaged end product which includes the bottles, and the retailer will impose a Gross Receipts Tax calculated on his total price to the consumer (i.e. his purchase price from the manufacturer, including the use tax imposed on the bottles, plus his retailers profit). There is no suggestion in the record as to how the retailer could eliminate the bottles from the retail price in calculating the sales tax he must collect. Thus the consumer

will pay a Gross Receipts Tax upon the final retail price which will include the "passed on" use tax paid by the manufacturer. This results in the double tax, and even a tax on tax, that is proscribed by the Court's decisions in the cases cited above.

I respectfully dissent from the affirmance of the Trial Court's ruling on the bottles.

I am authorized to state that the Chief Justice and Mr. Justice Byrd join in this dissent.

Norman Wayne JOURNEY *v.* STATE of Arkansas

CR 74-169 521 S.W. 2d 210

Opinion delivered April 14, 1975

Gene Worsham, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Robert A. Newcomb*, Asst. Atty. Gen., for appellee.

J. FRED JONES, Justice. Some jewelry was taken in an armed robbery in St. Louis, Missouri, and was later found and recovered in Little Rock, Arkansas. Norman Wayne Journey was charged on information filed by the prosecuting attorney in Arkansas with the crime of possessing stolen property (the jewelry) of a value in excess of $35.00 knowing the same to have been stolen. (Ark. Stat. Ann. § 41-3938 [Repl. 1964]). Journey filed a motion to dismiss the information because of prior acquittal and the motion was denied by the trial court. On appeal to this court Journey contends that the trial court erred in denying his motion to dismiss.

Journey's motion was predicated upon the fact that he had been tried and acquitted in a United States District Court in Missouri under a federal grand jury indictment for the crime of transporting the stolen merchandise in interstate commerce. (18 U.S.C.A. § 2314). The district court, in the federal case, set out the specific charge against Journey, and the elements necessary to prove the charge, in its instructions to the jury as follows:

> "The indictment is based upon a statute which is Federal law which reads as follows:
>
> 'Whoever transports in interstate or foreign commerce any goods, wares, merchandise, securities or money, of the value of $5,000 or more, knowing the same to have been stolen, converted or taken by fraud; or . . .'
>
> shall be punished according to law.
>
> Three essential elements are required to be proved in order to establish the offense charged in the indictment:
>
> First: The act or acts of transporting, or causing to be transported, in interstate commerce stolen jewelry as charged;

Second: Doing such act or acts willfully and with knowledge that the property had been stolen;

Third: The value of the stolen property so transported or caused to be transported must exceed $5,000.00."

The district court emphasized in its instructions to the jury that in order to convict, it would be necessary for the government to prove beyond a reasonable doubt, that the property had a value in excess of $5,000. The district court also instructed the jury as follows:

"Bear in mind that possession alone is not an offense, and that defendant is not charged with illegal possession. This instruction is given only to aid your understanding of the next following instruction.

Possession of property recently stolen, if not satisfactorily explained, is ordinarily a circumstance from which the jury may reasonably draw the inference and find, in the light of surrounding circumstances shown by the evidence in the case, that the person in possession knew the property had been stolen.

And possession in one State of property recently stolen in another State, if not satisfactorily explained, is ordinarily a circumstance from which the jury may reasonably draw the inference and find, in the light of surrounding circumstances shown by the evidence in the case, that the person in possession not only knew it to be stolen property, but also transported it, or caused it to be transported, in interstate commerce."

The court also gave instruction as follows:

"If you should find beyond a reasonable doubt from the evidence in the case that the jewelry described in the indictment was stolen, and was transported in interstate commerce as charged, and that, while recently stolen, the property was in the possession of the accused in another State than that in which it was stolen, you may, from those facts draw the inference that the jewelry was

> transported, or caused to be transported, in interstate commerce by the accused, with knowledge that it was stolen, unless possession of the recently stolen property by the accused in such other State is explained to the satisfaction of the jury by other facts and circumstances in evidence in the case."

At Journey's trial in the United States District Court in Missouri, a Mr. Pettry and a Mr. Emory were identified as the robbers. There was evidence submitted pertaining to Journey's activities in helping to dispose of the jewelry by sale in Little Rock and the ultimate recovery of the stolen jewelry in Little Rock. The evidence pertaining to the transportation of the jewelry from St. Louis to Little Rock was entirely circumstantial and actually proved only that Journey, Pettry, Emory, and the jewelry, all appeared in Little Rock at approximately the same time. As already stated, the federal district court found him not guilty.

The statute on possession of stolen property for which information was filed against Journey in Arkansas is Ark. Stat. Ann. § 41-3938 (Repl. 1964) and reads as follows:

> "Any person who shall possess stolen goods, money or chattels which exceed the aggregate value of thirty-five dollars ($35.00), knowing them to be stolen, with intent to deprive the true owner thereof, shall be guilty of a felony, and upon conviction thereof, shall be punished by imprisonment in the penitentiary not less than one (1) year nor more than twenty one (21) years; and if the aggregate value thereof be not more than thirty five ($35.00) dollars, such person shall be guilty of a misdemeanor and shall be punished by imprisonment in the county prison or municipal or city jail not more than one [1] year and shall be fined not less than ten dollars ($10.00) nor more than three hundred dollars ($300.00)."

The statutes under which the appellant contends he is immune to prosecution in this case are §§ 43-1224.1 — 43-1224.2 (Supp. 1973) which read as follows:

"43-1224.1. When a person has been either acquitted or convicted, on the merits, of an offense against the United States or against another state or territory thereof, the acquittal or conviction is a bar to prosecution for an offense against this State, or any governmental subdivision thereof, when the two [2] offenses were committed in the same course of conduct and are of the same character.

43-1224.2. For purposes of this act [§§ 43-1224.1 — 43-1224.2] two [2] offenses are of the same character when the elements which must be proved to obtain a conviction of one offense are not substantially different from the elements which must be proved to obtain a conviction of the other. In determining whether such elements are not substantially different, the court shall compare the respective purposes of the laws defining the two [2] offenses, as such purposes relate to the particular course of conduct of the defendant.

(a) Differences attributable solely to the fact that the defendant's conduct affected, in the same manner, the person or property of two [2] or more individuals, and

(b) Differences consisting of elements necessary merely to establish subject matter jurisdiction, shall not be considered in deciding whether the two [2] offenses are of the same character."

We are of the opinion, and so hold in this case, that the crime for which Journey was charged in Arkansas and the one for which he was tried and acquitted in the United States District Court of Missouri, were not offenses of the same character within the meaning of the above sections of the statutes. In the United States District Court Mr. Journey was charged, tried and acquitted of transporting or causing to be transported, stolen jewelry valued in excess of $5,000 across a state line in violation of federal law. Under the state information involved on this appeal he was simply charged with possession of the stolen property. He was charged with transportation in one case and possession in the other, of course, scienter was an element in both cases.

Sections 43-1224.1 and 43-1224.2, *supra*, are so loosely drawn they invite the argument in any case of acquittal or conviction in one state or in federal court that such acquittal or conviction would preclude the prosecution for any *related* offense or offenses involving the same subject matter in this state. We are unable to read such broad application into the statutory provisions. If such effect were to be given §§ 43-1224.1 and 43-1224.2 of the Arkansas statutes, there is no end to the extent the statute could be applied. A conviction or acquittal in federal court for transporting a female across a state line for purposes of prostitution would preclude prosecution under state law for engaging in prostitution on either side of the state line. As to the federal court trial in the case at bar, it was necessary to not only prove that Journey transported the jewelry across the state line under the charge for which he was tried in federal court, but it was necessary to prove that the jewelry so transported was worth $5,000.

No one questions the constitutional right of an accused to not twice be placed in jeopardy or given double punishment for the same offense, but we simply do not view the case at bar as that kind of case. The appellant cites, and relies heavily on, 22 C.J.S. § 285 where the "same transaction test" is discussed as it applies to double jeopardy. In this same section of C.J.S. we find the following language:

> "[T]here are many adjudications to the effect that, if two offenses grow out of the same transaction, and such offenses are severable and distinct and one is not included in the other, a prosecution for one will not bar a prosecution for the other. Thus a single act may be an offense against two statutes, or a single statute and the common law, and if the statute or the common law requires proof of an additional fact which the other does not, an acquittal or a conviction under one does not exempt accused from prosecution and punishment under the other."

We deem it unnecessary to attempt distinguishing all of the cases cited by the appellant, and we deem it unwise to attempt laying down or adopting a "same transaction rule" or any other rule of law, that would control in any case

regardless of the circumstances and facts in that case. In the case at bar guilty knowledge, actual transportation across state lines and $5,000 in value were all necessary elements of the crime charged in the federal indictment, under which the appellant was tried and acquitted.

Now, had the appellant been convicted rather than acquitted under the federal indictment, perhaps it could have been more logically argued that he also possessed the stolen goods as he transported them in interstate commerce because transportation might logically include possession, but certainly a charge of unlawful possession does not include transportation. It would appear, moreover, that one might "cause to be transported" in interstate commerce, stolen goods he had never possessed or even seen. Under the appellant's theory and argument in this case, if the appellant had been acquitted of the federal charge simply on the basis that the value of the stolen jewelry amounted to $4,000 rather than the required $5,000, then the appellant would have been immune to prosecution for the possession of the stolen property in Arkansas regardless of whether he transported it or did not transport it in interstate commerce.

The judgment is affirmed.

BYRD, J., dissents.

SECURITY SAVINGS & LOAN ASSOCIATION *v.* CENTRAL ARKANSAS SAVINGS & LOAN ASSOCIATION and ARKANSAS SAVINGS AND LOAN ASSOCIATION BOARD

74-356 521 S.W. 2d 220

Opinion delivered April 14, 1975

Smith, Williams, Friday, Eldredge and Clark, by: *Hermann Ivester*, for appellant.

Lester and Schults, by: *Edward Lester*, for appellees.

CONLEY BYRD, Justice. Following the remand of this case to the Arkansas Savings and Loan Association Board pursuant to our decision in *Arkansas Savings & Loan Ass'n Board* v. *Central Arkansas Savings & Loan Ass'n*, 256 Ark. 864, 510 S.W. 2d 872 (1974), the Arkansas Savings and Loan Association Board again sustained the protest of appellant Security Savings & Loan Association by denying Central Arkansas Savings & Loan Association's application for a charter. Before the order denying the application had been served upon the parties, appellant's counsel picked up a copy of the order at the Board's office and, notwithstanding that his protest had been sustained, filed an appeal in the Circuit Court of Pulaski County. Thereafter appellee, Central Arkansas Savings and Loan Association, filed an appeal in the Circuit Court of Faulkner County. The Circuit Court of Pulaski County upon motion transferred the appeal pending therein to the Circuit Court of Faulkner County. From that order appellant brings this appeal which we dismiss for the reasons stated in *Arkansas Savings & Loan Ass'n Board* v. *Corning Savings & Loan Ass'n*, 252 Ark. 264, 478 S.W. 2d 431 (1972).

Appeal dismissed.

The STATE DEPARTMENT of PUBLIC WELFARE et al *v.* Lula Mae Stracner LIPE, as mother and next friend of Michael Stracner, a minor

74-357 521 S.W. 2d 526

Opinion delivered April 21, 1975

Monroe L. Bethea, for appellants.

R. W. Laster, for appellee.

GEORGE ROSE SMITH, Justice. This is a petition for a writ of habeas corpus filed by the appellee, Lula Mae Stracner Lipe, as the mother and next friend of Michael Stracner, a minor born January 26, 1956. The defendants are the State Department of Public Welfare and the Arkansas Children's Colony Board, the latter now designated as the Arkansas Board of Mental Retardation. Ark. Stat. Ann. § 59-1003 (Repl. 1971). The petition alleges that Michael is unlawfully detained in custody at the Children's Colony, in Conway.

The petition was filed in the Pulaski Circuit Court and was presented to Judge William J. Kirby. Judge Kirby issued a writ of habeas, directed to the above named defendants and returnable to himself. The defendants objected to the proceedings, on the ground that the writ should have been made returnable to the circuit court of Faulkner county, where Michael is detained. The trial court overruled that objection and ultimately entered a final order finding that Michael had been improperly committed to the Children's Colony. The order directed that Michael be released "to the custody of Lula Mae Stracner Lipe, mother and next friend."

The defendants were right in their objection to the court's jurisdiction. The Pulaski circuit court had jurisdiction to issue the writ, it is true; but that jurisdiction did not rest, as the appellee argues, upon the statute fixing Pulaski county as the venue for actions against State officers. Ark. Stat. Ann. § 27-603 (Repl. 1962). Instead, the court's jurisdiction was proper under the statute which provides that the Supreme, circuit, or chancery court's power to issue writs of habeas corpus shall be coextensive with the State. Ark. Stat. Ann. § 34-1702 (Repl. 1962). In *State* v. *Ballard*, 209 Ark. 397, 190 S.W. 2d 522 (1945), we relied upon that statute in sustaining the Independence chancery court's authority to issue the writ, even though it was directed to the custodian of a person in Saline county.

The question here, however, is where the writ should have been made returnable. The statute provides that the writ is to be directed "to the person in whose custody the prisoner is detained, and made returnable . . . before the Supreme, circuit or chancery judges of the county in which it

may be served." Ark. Stat. Ann. § 34-1710. Hence the controlling question is the identity of "the person in whose custody the prisoner is detained."

We construe the statute to mean the person, usually an officer of some sort, having physical custody of the prisoner. "Habeas corpus," literally translated, means, "You have the body." In the few cases in which the issue has arisen, the courts have stressed physical custody in determining venue. *Gibson* v. *Wood*, 209 Ga. 535, 74 S.E. 2d 456 (1953); *McBurnett* v. *Warren*, 208 Ga. 225, 66 S.E. 2d 49 (1951); *Love* v. *Love*, 188 Kan. 185, 360 P. 2d 1061 (1961); *Logan* v. *Rankin*, 230 Miss. 749, 94 So. 2d 330 (1957).

Our statutes seem to be based upon that point of view, which has obvious practical advantages. The person having custody of the prisoner may be designated merely by the name of his office, if any. § 34-1711. Service is to be on the person to whom the writ is directed, "or, in his absence from the place where the prisoner is confined, on the person having him in immediate custody." § 34-1713. The language just quoted suggests that the person to whom the writ is directed will ordinarily be found at "the place where the prisoner is confined." Neither the officers of the State Department of Public Welfare nor the members of the Board of Mental Retardation (who are appointed by Congressional districts, § 59-1004) would ordinarily be found at the Children's Colony, in Conway. We conclude that the Superintendent of the Arkansas Children's Colony, a position created by statute, §§ 59-1101 and 59-1113, best fits the statutory designation of the person in whose custody Michael is detained. It may be observed that the same approach was followed by the litigants in the *Ballard* case, *supra*, where the writ was directed to the Superintendent of the Training School for Girls, which fixed the venue in Saline county.

It is appropriate for us to add, in the hope of avoiding needless litigation, that this habeas corpus proceeding is *not* one for the determination of custodial rights as between Michael's parents. It simply tests the legality of his detention at the Children's Colony. The issue of custody has been repeatedly before the Pope chancery court, where it originally

arose in the parents' divorce case brought in 1967, when Michael was 11. If the Faulkner circuit court finds the Colony's detention to be illegal, custody will be determined by the prior orders of the Pope chancery court. Under our law the circuit court is not the proper forum for the determination of child custody, which often gives rise to litigation extending over many years, as conditions change. That jurisdiction is vested in the chancery courts.

Reversed and remanded for further proceedings.

Ark MONROE III, Insurance Comn'r. of THE STATE OF ARKANSAS *v.* INSURANCE SERVICES OFFICE OF ARK.

74-283 522 S.W. 2d 428

Opinion delivered April 21, 1975
[Rehearing denied May 27, 1975.]

William H. L. Woodyard III, S. Doak Foster and *Allan W. Horne,* for appellant.

Wright, Lindsey & Jennings, for appellee.

LYLE BROWN, Justice. This is an appeal by the Arkansas Insurance Commissioner (commissioner) from an order of the Pulaski Circuit Court reversing an order of the commissioner requiring Insurance Services Office of Arkansas (ISO) to reduce automobile insurance rates by specified percentages. (ISO is not an insurer. It is a statistical rating and advisory organization, or rating bureau for property and casualty lines of insurance. It gathers statistics from and files on behalf of its member-subscriber companies.) The trial court held that the commissioner has no statutory authority to reduce rates with the exception of fire insurance rates. The commissioner contends that he is charged with the responsibility of regulating private passenger automobile insurance rates "to the end that they shall not be excessive, inadequate or unfairly discriminatory". Ark. Stat. Ann. § 66-3101 (Repl. 1966). The commissioner further contends that the mechanisms to be used to enforce the aforesaid responsibility are incorporated in Ark. Stat. Ann. §§ 66-3110, 66-3111, which he says requires the insurer or rating organization to file rates with the commissioner for prior approval. The commissioner also cites Ark. Stat. Ann. § 66-3112 (Repl. 1966) which he says provides for subsequent review of a filing previously approved.

> Section 66-3101 provides: "The purpose of this chapter is to promote the public welfare by regulating insurance rates to the end that they shall not be excessive, inadequate or unfairly discriminatory, and to authorize and regulate cooperative action among insurers in rate making and in other matters within the scope of this chapter. Nothing in this chapter is intended:
>
> (1) To prohibit or discourage reasonable competition,

or

(2) Prohibit or encourage, except to the extent necessary to accomplish the aforementioned purpose, uniformity in insurance rates, rating systems, rating plans or practices. This chapter shall be liberally interpreted to carry into effect the provisions of this section."

The other two sections cited by the commissioner provide the procedure to be taken once there is a filing for proposed rates. Those sections are 66-3110 and 66-3111, and read as follows:

66-3110. (1) The Commissioner shall review filings as soon as reasonably possible after they have been made in order to determine whether they meet the requirements of this chapter.

(2) Subject to the exceptions specified in subsections (3) and (4) of this section, each filing shall be on file for a waiting period of fifteen (15) days before it becomes effective, which period may be extended by the Commissioner for an additional period not to exceed fifteen (15) days if he gives written notice within such waiting period to the insurer or rating organization which made the filing that he needs such additional time for the consideration of such filing. Upon written application by such insurer or rating organization, the Commissioner may authorize a filing which he has reviewed to become effective before the expiration of the waiting period or any extension thereof. A filing shall be deemed to meet the requirements of this chapter unless disapproved by the Commissioner within the waiting period or any extension thereof.

(3) Specific inland marine rates on risks specially rated by a rating organization shall become effective when filed and shall be deemed to meet the requirements of this chapter until such time as the Commissioner reviews the filing and so long thereafter as the filing remains in effect.

(4) Any special filing with respect to a surety or guaranty bond required by law or by court or executive order or by order, rule or regulation of a public body, not covered by a previous filing, shall become effective when filed and shall be deemed to meet the requirements of this chapter until such time as the Commissioner reviews the filing and so long thereafter as the filing remains in effect.

66-3111. (1) If within the waiting period or any extension thereof as provided in section 243 (2) [§ 66-3110(2)], the Commissioner finds that a filing does not meet the requirements of this chapter, he shall send to the insurer or rating organization which made such filing, written notice of disapproval of such filing specifying therein in what respects he finds the filing fails to meet the requirements of this chapter and stating that such filing shall not become effective.

(2) If within thirty (30) days after a specific inland marine rate on a risk specially rated by a rating organization subject to section 243 (3) [§66-3110(3)] has become effective, or if within thirty (30) days after a special surety or guaranty filing subject to section 243 (4) [§66-3110(4)] has become effective, the Commissioner finds that such filing does not meet the requirements of this chapter, he shall send to the insurer or rating organization which made such filing written notice of disapproval of such filing specifying therein in what respects he finds that such filing fails to meet the requirements of this chapter and stating when, within a reasonable period thereafter, such filing shall be deemed no longer effective. The disapproval shall not affect any contract made or issued prior to the expiration of the period set forth in the notice.

We agree with the trial court that there is nothing in the recited three sections which gives the commissioner the power to fix a specified rate. In addition to the fact that no such specific authority is given, we think it is highly persuasive that the insurance code specifically provides that the commissioner may reduce fire rates but does not designate

such authority for any other field of insurance. See Ark. Stat. Ann. § 66-3106 (Repl. 1966) which gives the commissioner the authority to adjust fire insurance rates.

There are two cases which are fairly well in point and which hold as we do. The first case is a 1975 Oklahoma case, *Insurance Services Office* v. *State Board,* 530 P. 2d 1359. Our chapter on insurance rates and rating organizations appears to be very similar to the statutes under which Oklahoma operates. The principal question in that case was the same as here, namely, the power of the Board of Insurance of Oklahoma to fix casualty insurance rates. The Oklahoma court said:

> The Board does not have rate making or rate fixing powers and authority as to casualty insurance and all forms of vehicle insurance on risks or operations in this state. The Board does have authority to disapprove, during the waiting period, a filing; or order the discontinuance of the use of a rate in effect after investigation, proper hearing with notice and a determination in the rate is not in accordance with the terms of the Act.
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> * * * *
>
> It seems admitted that in the Casualty Rating Act, the legislature did not specifically grant to the Board rate fixing authority. The Board argues, however, that because the legislature prescribed guidelines and framework within which rates should be considered neither inadequate or excessive the power to fix rates was thereby created impliedly in the Board. Such argument overlooks the specific provisions in the Act which provide the method by which the Board shall proceed to apply such guidelines. The existence of guidelines is the legislatively delegated authority upon which the Board acts when it disapproves or suspends a rate. The existence in the Act of specific authority to disapprove a proposed rate or to suspend from continuing effectiveness an existing one excludes any implication of an additional power in the Board to fix a rate itself as it has attempted to do in this proceeding. The legislature in-

tended what was expressed in the Act and nothing more.

The State of Wisconsin has a law the substance of which is no different from the substance of our own statute. *Fire Insurance Rating Bureau* v. *Rogan, Commissioner*, 4 Wis. 2d 558 (1958) was a case adjudicating the proposition that under insurance regulatory statutes such as we have, the Commissioner of Insurance in Wisconsin has no authority whatever to promulgate, prescribe, or fix insurance rates. In that case the parties, i.e., The Rating Bureau and The Commissioner of Insurance agreed both with the circuit court and the Supreme Court in Wisconsin that the statute did "not give the commissioner authority to establish rates". In addition, the Supreme Court of Wisconsin stated that it could not "find in the statute any authority for this court to determine rates or the percentages to be used for any of the factors necessary to determine a fair and reasonable rate".

Our holding does not prevent the commissioner, when he specifies the respects in which he finds that a rate filing fails to meet statutory requirement, from stating the effect of those factors on the rates filed, both as to manner and extent.

Affirmed.

MATTHEWS COMPANY *v.* REYNOLDS-SELZ-FULKERSON, INC.

74-363 522 S.W. 2d 425

Opinion delivered April 21, 1975

[Rehearing denied May 27, 1975.]

Stubblefield & Matthews, for appellant.

House, Holmes & Jewell, for appellee.

LYLE BROWN, Justice. This appeal is from a judgment in the lower court based on the jury verdict for $6,000 in favor of appellee against appellant for a real estate commission claimed on a lease by the Bonanza Steak House as lessee from appellant as lessor of a restaurant site in Jacksonville. For reversal appellant contends the verdict is not sustained by the evidence, the court erred in refusing two instructions, and it was error to permit testimony about the fair value of appellant's services.

We shall abstract the facts in the light most favorable to the verdict of the jury and the judgment of the trial court. Robert Vogel, a licensed real estate salesman for appellee, met in Jacksonville with Jim Manning, president of the corporation that operates Bonanza Steak Houses, for the pur-

pose of showing Manning property which he thought might be suitable for the location of a steak house. Mr. Manning decided that the site was not desirable. Robert Vogel then indicated that he knew of another location in the Wal-Mart Shopping Center about two blocks away. The two men proceeded to that site and spent a short time looking at the property and discussing its desirability as a potentially good location. Robert Vogel offered to find out who the owner was and get back in contact with Mr. Manning. In accordance with Mr. Manning's request that he do so, Robert Vogel called Wal-Mart Store and found that the site was owned by appellant, Matthews Company. Mr. Vogel called Jim Matthews of the Matthews Company and asked him if the property was available for lease, and if he would receive a commission in the event that he provided the lessee for the location. Mr. Matthews stated that his company would pay a commission. Later that day, Robert Vogel and Mr. Matthews met at the site to discuss the proposed transaction. Mr. Vogel asked Mr. Matthews again if the Matthews Company would pay a commission. Mr. Matthews again indicated that they would. Mr. Matthews then inquired as to the name of the prospective lessee, and when he determined that it was Bonanza Steak House, he told Mr. Vogel that the Matthews Company had dealt with Bonanza Steak House in the past and that he would not pay appellee a commission for the transaction. Mr. Vogel then called Mr. Manning and told him that the owner of the property was the Matthews Company. Mr. Manning then indicated that he had dealt with the Matthews Company on several other leases and would be able to deal with it directly in perfecting the lease.

Subsequently a lease agreement was consummated between the Matthews Company and Bonanza Steak House for the Jacksonville location. A steak house was built at the site and went into operation. Appellant Matthews Company continued to refuse to pay a commission on the lease and appellee then asked the lessee of the property if he would be willing to pay a part of the commission. Lessee agreed to pay one-half of the proposed commission, one-half being figured at $6,000. That amount of money is being paid over a twenty-year period at $25.00 per month.

The amount asked for as against Matthews Company, being $6,000, was based on a quantum meruit basis since there is no contention that a definite fee was arrived at between the parties. There was testimony by competent real estate men that $12,000 would be a fair, full commission. The jury rendered a verdict in favor of appellee for the full amount of the commission claimed against appellant.

The first point for reversal is that the verdict is not sustained by the evidence. Without repeating the evidence just stated, and without recounting evidence favoring the point, we deem it sufficient to say that under the testimony offered by Vogel there was a meeting of the minds to the effect that Mr. Vogel would represent the Matthews Company in procuring a prospective lessee. It was only after Mr. Vogel revealed the name of his prospect that Mr. Matthews attempted to withdraw from the agreement. The jury was fully and fairly instructed on the prerequisites for recovery of the fee. It was told that the appellee had the burden of proving: (1) that Matthews Company agreed to let Mr. Vogel show the property for the purpose of leasing same; (2) that Matthews Company agreed to pay plaintiff for its services; (3) that plaintiff's services were the procuring or efficient cause of the transaction; (4) that the lessee was ready, willing and able to perform, and that plaintiff performed all his duties honestly and in good faith.

The second point for reversal is that the court erred in refusing appellant's requested instruction No. 3, which reads as follows:

> As a defense to the commission claimed by plaintiff, defendant (appellant) contends that Robert Vogel was acting for Bonanza Steak House without the knowledge of James Matthews or Matthews Company. You are instructed that under the law a real estate broker or real estate salesman who attempts to act for both lessor and lessee with respect to a proposed lease without the knowledge of both parties for whom he attempts to act, forfeits all rights to any commission; and, in this case if you find from the evidence that Robert Vogel was attempting to so act for both the proposed lessee and the

> proposed lessor (defendant), then your verdict should be for defendant.

We find no error in refusing to give the instruction. Mr. Vogel started out to obtain a site for Bonanza; however, he never at anytime sought a commission from Bonanza until after Matthews refused to pay the commission and after the deal was consummated. When Matthews refused to pay a commission it was at that time that Mr. Vogel tried to salvage a commission by asking Bonanza if it would pay him a commission. Bonanza voluntarily agreed to pay one-half the commission in order to maintain good relations. Mr. Vogel was not at anytime trying to collect a double commission; in fact he sued on the basis that one-half of his commission had been paid and he was seeking the other one-half from Matthews.

Appellant's third point for reversal is that the court erred in refusing requested instruction No. 4, which reads as follows:

> As a defense to the commission claimed by plaintiff, defendant contends that Matthews Company was first contacted about the proposed lease after Robert Vogel had been informed to the effect that the representative of Bonanza Steak House could deal direct with Matthews Company without any assistance from a real estate salesman; and, if you find from the evidence that Robert Vogel was told by a representative of Bonanza Steak House to the effect that no help was needed from a real estate salesman before he talked to James Matthews about the matter, then your verdict should be for defendant.

As we view the instruction it is binding; also it does not comport with this court's per curiam order handed down when AMI (1) was published.

Appellant's final point for reversal is that the court erred in permitting testimony about the value of appellee's services. Over the objections of appellant the court permitted testimony of the accepted standard for reasonable compensation in the Little Rock area for brokerage services rendered.

We find no merit in the point.

This court was faced with the same problem in *Hodges* v. *Bayley*, 102 Ark. 200, 143 S.W. 92 (1912). There we said: "We think there was some testimony proving that defendant listed his property for sale with the plaintiff and employed him to secure a purchaser for his stock of goods, and that plaintiff was the procuring cause of the sale thereof which defendant consummated with Thornton; and there was also evidence showing that the amount of the commission recovered was a reasonable and customary compensation for like service rendered in making such sales."

Appellant argues that Mr. Vogel's activities respecting the project were very scant, indicating he did not earn the commission claimed. It is true Mr. Vogel spent very little time with the venture, but the fact remains that he brought the parties together and the lease was consummated, whereupon he was entitled to his brokerage. *Walthour* v. *Finley*, 237 Ark. 106, 372 S.W. 2d 390 (1963).

The judgment is affirmed.

BYRD, J., not participating

FOGLEMAN, J., concurs

JOHN A. FOGLEMAN, Justice, concurring. I concur. The only valid reason, however, for refusal of the instruction on dual agency, is that, under the evidence, Vogel was not vested with authority to exercise any discretion on behalf of either the buyer or the seller. He was merely a middleman who brought the parties together. 3 Am. Jur. 2d 620, Agency § 255; 12 Am. Jur. 2d 912, 914, Brokers § 171, 173; 3 CJS 149, Agency § 339; Annot, 14 ALR 464, 472.

TRAVELERS INDEMNITY COMPANY *v.* Ark MONROE, III, INSURANCE COMMISSIONER of The STATE of Arkansas

74-326 522 S.W. 2d 431

Opinion delivered April 21, 1975
[Rehearing denied May 27, 1975.]

Wright, Lindsey & Jennings, for appellant.

William H. L. Woodyard III, S. Doak Foster and *Allan W. Horne*, for appellee.

JOHN A. FOGLEMAN, Justice. In this case, the Insurance Commissioner, after holding a hearing relative to previously approved rate filings of The Travelers Indemnity Company for voluntary private passenger automobile coverages of bodily injury and property damage liability, medical payments and physical damage, purportedly acting pursuant to Ark. Stat. Ann. §§ 66-3107, 66-3112 (Repl. 1966) and other provisions of the Arkansas Insurance Code and Ark. Stat. Ann. § 5-708, 709 (Supp. 1973) and other provisions of the

Arkansas Administrative Procedure Act, issued his order directing reduction of the rate of Travelers voluntary private passenger automobile coverages of bodily injury and property damage liability and medical payments by 17% and physical damage by 17.7% effective May 1, 1974. Upon review, the circuit court held that the commissioner had the authority to make the order, but found no substantial evidence to support the commissioner's order, even though he did find a preponderance of substantial evidence to justify a premium rate reduction of 10%, and entered judgment accordingly.

The judgment in this case must be reversed for the same reason that we today affirm the judgment of the circuit court in *Monroe* v. *Insurance Services Office of Ark.*, 257 Ark. 1018 522 S.W. 2d 428 (1975). In view of this reversal, we feel that it is appropriate that we decide another question raised on cross-appeal. The trial court held that its judicial review was governed by Ark. Stat. Ann. § 66-3134 (Repl. 1966) and not by Ark. Stat. Ann. § 5-713 (Supp. 1973). Under the circumstances prevailing here, we agree with the circuit judge.

After the Insurance Commissioner's order was entered, Travelers filed a petition for review in the Circuit Court of Pulaski County, alleging that its motion for appeal had been filed with the appellee, and a transcript of the proceeding filed with the Clerk of the Circuit Court, but appellee had asserted that the exclusive procedure for judicial review was prescribed by Ark. Stat. Ann. § 5-713. Appellant then stated that this petition was filed without conceding that appellee was correct in his contention. The record sustains appellant's allegations.

We reject appellee's argument on this point without hesitation. He contends that § 66-3134, a section of the Insurance Code enacted in 1959 is in irreconcilable conflict with the Administrative Procedure Act [Ark. Stat. Ann. § 5-701 et seq (Supp. 1973)] enacted in 1967, and thereby repealed. However desirable this result might be, without considering the effect of a general act on a special act or of a special act on a general one, the legislative intent is clear to us. The plain words of the Administrative Procedure Act in Ark. Stat. Ann. § 5-713, covering judicial review of an ad-

judication by an agency subject to the act, are, "Nothing in this Section shall be construed to limit other means of review provided by law." If words have not lost their meaning, this sentence means exactly what it says and appellant was entirely within its rights when it sought judicial review under the appropriate Insurance Code Section. In *Arkansas Savings & Loan Assn. Bd.* v. *Corning Savings & Loan Assn.*, 252 Ark. 264, 478 S.W. 2d 431, the circuit court from which the appeal from action of the board was taken had held that the Arkansas Administrative Procedure Act supplemented but did not repeal Ark. Stat. Ann. § 67-1811 (Repl. 1966), governing appeals from the action of that board. We said there that the Administrative Procedure Act provided an alternate appellate procedure and jurisdiction, and did not repeal § 67-1811.

The judgment is reversed on appeal and affirmed on cross-appeal.

S. R. DUMAS, Individually and as
A Representative of all Taxpayers of
Union County *v.* Carlton JERRY
County Judge, et al

74-354 521 S.W. 2d 539

Opinion delivered April 21, 1975

Brown, Compton & Prewett, by: *William I. Prewett,* for appellant.

Beryl Anthony Jr., for appellee Carlton Jerry; *Mahony* and *Yocum,* for appellee El Dorado Ind. Dev. Corp. and *Shackleford, Shackleford* and *Phillips,* for appellee Grace Smith. *Amicus Curiae Herschel H. Friday* for State Ind. Dev. Dept.

JOHN A. FOGLEMAN, Justice. The only question presented on this appeal is the applicability of Ark. Stat. Ann. § 17-304 et seq (Repl. 1968) to a lease, with option to purchase, of property deeded to Union County, Arkansas. We hold that these sections do not apply under the circumstances and affirm the decree of the chancery court.

American Oil Company owned approximately 450 acres of land in Union county upon which it operated a refinery. It decided to close that refinery and sought to make a donation of all of the real property and some personal property in order that it might be used to help alleviate the impact of the loss of more than 280 jobs and several million dollars in annual payroll which would result from the closing. After numerous conferences and negotiations, the company decided to give the property to Union county. On December 21, 1971 an official of the company wrote County Judge Carlton Jerry a

letter stating the intention of the company to donate the property to Union county for expansion of its industrial development program. Again on March 29 the company advised by letter that specific property was to be donated to the county for its industrial development program.

An instrument denominated "Trust Agreement" was executed on August 17, 1971 appointing the El Dorado Industrial Development Corporation (EIDC) as agent for the county to make negotiations for, and accept donations, to the use and benefit of Union County, for industrial purposes. In the preamble, reference was made to the proposed donation by American Oil Company to be used solely for industrial development and expansion purposes. EIDC was authorized, subject to final approval by the Union county court, to accept donations in the name of Union county to be used for industrial purposes and to manage, develop, redevelop, sell or exchange, the property and to take other such action required to utilize it for industrial purposes. It was specifically provided that title to all property so accepted should vest in Union county.

By deed dated July 20, 1973, American Oil Company conveyed the land, with buildings thereon, and some personal property to Union county. No restriction on the use of the property was expressed in the deed.

On August 1, 1973 the county and EIDC leased approximately 150 acres of the property to Grace M. Smith for a primary term of seven years at an annual rental of $40,000. The lease referred to the authority of EIDC conferred by the Trust Agreement. It contained an option for renewal of the lease for three successive seven year terms and an option to purchase the property for $800,000 after the expiration of the primary term. No restriction as to use of the property was contained in the lease.

Mrs. Smith entered into possession of the property and commenced efforts to obtain industrial development of the property.

Appellant S. R. Dumas filed this taxpayers' action to set

aside the lease agreement and option to purchase, contending that it was void and invalid for failure to comply with Ark. Stat. Ann. §§ 17-304-309 (Repl. 1968). After trial, the chancery court entered its decree dismissing the complaint of appellant and quieting and confirming the title of Grace Smith under the lease against any claims of appellant, individually and as a representative of the taxpayers of the county.

The letters to the county judge relating to the donation of the property had pointed out that the property would be conveyed by a quitclaim deed only and that the county's acceptance of the donations would be contingent upon receipt of proper deeds and abstracts. The property was conveyed by a quitclaim deed.

The lease agreement was submitted to the county court of Union county and approved by formal order spread on the records of the court. The county judge joined in the execution of the lease on behalf of Union county. Prior to his execution of the lease he did not enter any order directing the county assessor to cause the property to be appraised as required by Ark. Stat. Ann. § 17-305 and did not give notice of the lease agreement by publication in a newspaper and did not require or receive any sealed bids under the provisions of Ark. Stat. Ann. § 17-308. Under the provisions of Ark. Stat. Ann. § 17-309, any sale or conveyance of real or personal property belonging to any county not made pursuant to the terms of the act (Act 193 of 1945), is null and void and any taxpayer may bring an action for the use and benefit of the county to cancel any such sale.

Mrs. Smith is the sole proprietress of Benton Iron & Metal Co. She had purchased some equipment from American Oil Company and testified that she was interested in the lease in order to save some of this equipment and promote industry. She testified that she had entered into a contract with Interstate Development Consultants to assist her in deciding what types of industries should be located on the property. She had advertised in the Wall Street Journal, the El Dorado Daily News and the Camden News in efforts to obtain new industry for the area. She had leased 45 fuel tanks

on the property to 15 industrial concerns and had leased portions of the property to industrial employers. She was conducting negotiations with others. She testified that she would not lease any portion of the property to anyone for anythng other than industrial purposes.

We agree with appellees and the trial court that the sections of the statute relied upon by appellant do not apply under the existing circumstances. As we view the transaction, it was made pursuant to Ark. Stat. Ann. § 9-504 et seq (Act 404 of 1955) [Repl. 1956] and Ark. Stat. Ann. § 13-1601 et seq (Act 9 of the Extraordinary Session of 1960) [Repl. 1968]. The first act authorized the formation of the commissions like EIDC and conferred power upon them to act for and on behalf of the counties in order to effectuate industrial development. The county was authorized by Ark. Stat. Ann. § 13-1602 (Repl. 1968), being § 2 of Act 9 of 1960, to own, acquire, sell, lease, contract concerning, or otherwise deal in or dispose of any land, buildings, or facilities of any and every nature whatever that could be used in securing or developing industry within or near the county. Under that act the word "sell", insofar as pertinent here, means to sell for such price, in such manner and upon such terms as the county shall determine, including private or public sale, for cash or credit payable in a lump sum or in installments over such period as the county shall determine. Ark. Stat. Ann. § 13-1612 (e) [Repl. 1968]. Under the same act, "lease" means to lease for such rentals for such period or periods and upon such terms and conditions as the county shall determine, including the granting of such renewal or extension options for such rentals, for such period or periods and upon such terms and conditions as the county shall determine and the granting of such purchase options for such prices and upon such terms and conditions as the county shall determine. Ark. Stat. Ann. § 13-1612 (f) [Supp. 1973].

The provisions of the act of 1960 above referred to are in irreconcilable conflict with Act 193 of 1945 (Ark. Stat. Ann. § 17-304 et seq). Since the act of 1960 was the later of the two statutes, these provisions operate as a repeal of the earlier act in cases coming within the purview of the later act. This construction can hardly be questioned in view of § 2 of Act 208 of

1971 [Ark. Stat. Ann. § 13-1615 (Supp. 1973).] It reads:

> 13-1615. Liberal construction — Compliance with other laws. — Act No. 9 [§§ 13-1601 - 13-1614] of the First Extraordinary Session of the State of Arkansas for the year 1960, approved January 21, 1960, as amended hereby, shall be liberally construed to accomplish the intent and purposes thereof and shall be the sole authority required for the accomplishment of such purposes. To this end, it shall not be necessary to comply with general provisions of other laws dealing with public facilities, their acquisition, construction, leasing, encumbering or disposition. [Acts 1971, No. 208, § 2, p. 463].

The decree is affirmed.

Jesse FERGUSON *v.* STATE of Arkansas

CR 74-165 521 S.W. 2d 546

Opinion delivered April 21, 1975

Lady and *Webb*, by: *Kelley Webb*, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Jack T. Lassiter*, Asst., for appellee.

J. FRED JONES, Justice. The appellant Jesse Ferguson, along with one Robert E. Foshee, was charged by information filed by the prosecuting attorney, with the crime of "Armed Robbery committed as follows, to-wit: That the said Defendant(s) did on or about the 24th day of May, 1973, in the District of Poinsett County, Arkansas, unlawfully, violently, feloniously, by force and intimidation, and by use and employment of a firearm, namely a rifle, take from the person of one Ralph Morgan the sum of $250 in currency. . . ."

At a jury trial the appellant was found guilty and his punishment fixed at a term of four years in the Arkansas Penitentiary on the charge of robbery, with an additional two and one-half years added for the use of a firearm. The trial court entered judgment accordingly with the two and one-half years to run consecutively to the four years.

The appellant did not appeal from the judgment so entered but on January 15,1974, he filed an ex parte petition for post-conviction relief under the Criminal Procedure Rule No. 1. He alleged in his petition that his conviction in connection with the use of a firearm was invalid because he was not informed of that part of the charge by indictment, warrant, or otherwise, and was not aware that he was to be tried "for the weapon charge in addition to the charge of armed robbery." The appellant also contended that "armed robbery" is not a criminal offense provided by law or statute, and that his con-

viction of armed robbery and also using a firearm in the commission of a felony, placed him in double jeopardy in violation of his constitutional rights. The trial court denied the appellant's petition for relief under findings of fact recited by the trial court as follows:

> "1. On the 10th day of October, 1973, the petitioner, after a trial was found guilty by a jury of Armed Robbery and guilty of Commission of a Robbery with a Firearm and his punishment was set at four years in the State Penitentiary for Robbery and two and one-half years for Commission of a Robbery with a Firearm. The court entered judgment on said verdict and sentenced petitioner to a term of six and one-half years, said four year sentence and two and one-half sentence to run consecutively and petitioner was committed to the Department of Correction for the State of Arkansas. An appeal was not prosecuted. Throughout these proceedings, petitioner was represented by Michael Everett, Attorney, of Marked Tree, Arkansas, appointed counsel.
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> 2. On the 15th day of January, 1974, petitioner filed a petition herein seeking post-conviction relief, alleging that he was not informed by indictment or a warrant that he was to be tried for the weapon charge in addition to the charge of Armed Robbery; that said charge is not provided by law or statute; that said charge placed petitioner twice in jeopardy; that said charge represents an attempt by the prosecution to enhance the punishment and the finding and sentence is otherwise subject to collateral attack because the evidence does not substantiate the verdict or the sentence."

On appeal to this court the appellant has designated the points he relies on for reversal as follows:

> "Petitioner was not informed by indictment, warrant or otherwise aware that he was to be tried for the weapon charge in addition to the charge of armed robbery.
>
> The aforementioned charge is not provided by law or statute.

> The aforementioned charge placed the petitioner twice in jeopardy.
>
> The aforementioned charge represents an attempt by the prosecution to enhance the punishment received for being found guilty of armed robbery.
>
> The finding and sentence is otherwise subject to collateral attack because the evidence does not substantiate the verdict or the sentence."

The appellant's first point was answered adversely to his contention in our recent case of *Haynie* v. *State*, 257 Ark. 542, 518 S.W. 2d 492 (1975), and we find no merit to this contention. The appellant's other points are likewise without merit. The crime of robbery is defined in Ark. Stat. Ann. § 41-3601 (Repl. 1964) as:

> ". . . the felonious and violent taking of any goods, money or other valuable thing from the person of another by force or intimidation; the manner of the force or the mode of intimidation is not material, further than it may show the intent of the offender."

"Robbery" and "armed robbery" are not designated by statute as separate crimes in Arkansas but we hold, that the word "armed" preceding the word "robbery," as used in the information in the case at bar, was simply descriptive of the nature of the force or intimidation allegedly employed and, as further explained in the information, by use of the words "by use and employment of a firearm, namely a rifle. . . ." The proper time to object to the form of an information or indictment is at the arraignment or call of the indictment for trial. Ark. Stat. Ann. § 43-1206 (Repl. 1964); *Johnson* v. *State*, 223 Ark. 929, 270 S.W. 2d 907. We find no merit to appellant's points two, three and four.

As to the appellant's last point, Ralph Morgan, the robbery victim, testified as to the intimidation by the robber in carrying a rifle under his right arm and waving it at him (the victim) when he (the robber) demanded the money. A nine year old boy, who was also an eyewitness to the robbery,

testified as to the use of a rifle in the commission of the crime.

The judgment is affirmed.

BROWN and FOGLEMAN, JJ., concur; BYRD, J., dissents.

JOHN A. FOGLEMAN, Justice, concurring. I concur because not a single point raised by appellant is cognizable under Criminal Procedure Rule 1. There were effective procedures available to appellant in his trial and on direct appeal, for consideration of every question raised by him. No showing is made that he was in any way prevented from raising them. There is no imperative to provide an additional collateral review. *Houser* v. *United States*, 508 F. 2d 509 (8th Cir., 1974). Rule 1 is not a substitute for a direct appeal. Questions of sufficiency of the evidence and errors of law or fact must be raised on direct appeal. Defects in and sufficiency of an indictment or information are not cognizable in the absence of a showing of exceptional circumstances, where the questions raised are of great importance, the need for remedy apparent and the offense charged was one over which the sentencing court was manifestly without jurisdiction. The double jeopardy clause also falls in the category of pretrial matters not ordinarily cognizable. Insufficiency of the evidence is clearly not a proper basis for a collateral attack. See *Houser* v. *United States*, supra.

I am authorized to state that Mr. Justice Brown joins in this opinion.

CHEROKEE CARPET MILLS, INC. *v.* MANLY JAIL WORKS, Inc.

74-343 521 S.W. 2d 528

Opinion delivered April 21, 1975

Mays and Landers, for appellant.

Arnold, Arnold & Lavender, Ltd., for appellee.

CONLEY BYRD, Justice. The sole issue on this appeal is whether a contract with appellee, Manly Jail Works, Inc.,(1) to design and construct a 12,122 gallon water tank for use in the carpet plant of appellant, Cherokee Carpet Mills, Inc., is subject to the 5 year statute of limitations set forth in Ark. Stat. Ann. § 37-237 (Supp. 1973). That statute provides:

> "No action in contract (whether oral or written, sealed or unsealed) to recover damages caused by any deficiency in the design, planning, supervision or observation of construction or the construction and repair of any improvement to real property or for injury to property, real or personal, caused by such deficiency, shall be brought against any person performing or furnishing the design, planning, supervision or observation of construction or the construction or repair of such improvement more than five (5) years after substantial completion of same."

Upon a demurrer to the compalint as amended, the trial

(1)Westrock Mechanical Contractors, Inc., has gone into bankruptcy and the cause has not been revived in the name of the trustee in bankruptcy.

court held the statute applicable and dismissed the cause of action. We agree with the trial court.

The compaint alleges that appellee, pursuant to a contract attached to the complaint, manufactured the tank and shipped it to appellant's plant at Lewisville, Arkansas, on or about March 1, 1967, and that upon arrival the tank was installed in appellant's plant by Westrock Mechanical Contractors, Inc. That while using the tank in the operation of the plant, under the conditions set forth in the contract, on May 25, 1970, the tank ruptured causing the dyes contained therein to be sprayed into other parts of the plant and resulting in the damages prayed for. The specific allegation as to appellee was as follows:

> "That the rupture of said baffle or wall within the storage tank and the resulting rupture in the exterior of the tank were caused by the failure of the defendant, Manly Jail Works, Inc., to perform its agreement as contained in Exhibit "A" attached hereto with the plaintiff in that said tank was improperly designed, improperly manufactured and otherwise deficient to be operated under the conditions and specifications set forth in the contract between the plaintiff and the defendant, Manly Jail Works, Inc., as contained in Exhibit "A" attached hereto; . . ."

The contract attached to the complaint shows an order for the tank containing three different compartments with mixing motors and turbines and with internal pipe and couplings in the tank wall. The tank was to be shop tested at 55 PSI for a working pressure of 27 PSI.

Thereafter appellant filed an amendment to its complaint wherein it was alleged:

> "THAT said storage tank was subsequently manufactured by the Defendant, MANLY JAIL WORKS INC., and shipped from the plant of said Defendant to the plaint of the Plaintiff at Lewisville, Arkansas, on or about March 1, 1967; that upon the arrival of said tank at the plant of the Plaintiff, it was

> placed upon a cradle in the plant of the Plaintiff by the Defendant, WESTROCK MECHANICAL CONTRACTORS, INC.; that said tank was not bolted or otherwise attached to the cradle or any other part of the building or real estate of the Plaintiff, but was interconnected with other parts of the machinery and equipment of the Plaintiff; that said tank was, at the time of installation and has been ever since a part of the machinery and equipment of the Plaintiff. . . ."

The appellant both here, and in the trial court, contends that the issue of whether the storage tank was an improvement to real property, within the meaning of Ark. Stat. Ann. § 37-237 (Supp. 1973), *supra,* is a factual question. In doing so appellant places much stress upon the allegation that "said tank was not bolted or otherwise attached to the cradle or any other part of the building or real estate of the plaintiff." Appellant's emphasis, however, ignore that part of the amended complaint which admits that the tank . . . "was interconnected with other parts of the machinery and equipment of the plaintiff; that said tank was, at the time of installation and has been ever since a part of the machinery and equipment of the plaintiff." In *Alwes* v. *Richheimer,* 185 Ark. 535, 47 S.W. 2d 1084 (1932), the issue was whether the furniture and fixtures in a theater went with a mortgage to the real estate or a mortgage on personalty. In holding that it was an appurtenance to the real estate and after pointing out that the furniture and fixtures were a part of the improvements in the building for the purpose for which it was constructed, we said: "the tendency of modern decisions, both English and American, 'is against the common-law doctrine that mode of annexation is the criterion, whether slight and temporary, or immovable and permanent, and in favor of declaring all things to be fixtures which are attached to the realty with a view to the purposes for which it is held or employed.'" Appellant does not contend that its entire installation of machinery and equipment was not "an improvement to real property" and when we consider that the tank in question was put into position and interconnected with other parts of the machinery and equipment, we can think of no fact situation that would differentiate the design and fabrication of the tank from the design and installation of the other

machinery and equipment for purposes of preventing the statutory bar of Ark. Stat. Ann. § 37-237 (Supp. 1973), *supra.*

Affirmed.

FOGLEMAN and JONES, JJ., dissent.

JOHN A. FOGLEMAN, Justice, dissenting. This case was disposed of by the trial court on a demurrer asserting the statute of limitations. I cannot agree that there is no question of fact involved in determining the application of the pertinent statute of limitations in this case when we give appellant the benefit of every reasonable inference that may be drawn in the pleader's favor, as we must. See *McKim* v. *McLiney,* 250 Ark. 423, 465 S.W. 2d 911. Appellant concedes that the issue turns upon the question whether the installed storage tank was "an improvement to real property." This term has not been construed or defined in applying the statute involved here. We have determined in other cases what the term meant, but the meaning may vary, depending upon the relationship of the parties.

For example: In an attachment in a suit on a note, a defendant claimed that the note was given in consideration for a contract for the erection of valuable improvements upon the land upon which the attachment was levied, and for supplies. The alleged improvements were a portable steam engine, mill and cotton gin. The court ordered the steam engine and machinery attached to be sold as personal property under the levy. It had been purchased from the plaintiffs by a partnership of Maddox & Toms, the defendants in the action. The engine furnished the motive power for a gin and even though it was constructed so it could be readily moved from place to place, it had never been moved after it was put upon the property. It rested upon sills, under a rough plank shed which protected it from the weather. It might be moved without substantial damage to it or the freehold. The machinery was not attached to the soil. A shed was erected over the machinery. The question was whether the note was an obligation for the erection of improvements upon real property claimed to be exempt as the homestead of one of the partners, who was a tenant in common with his two sisters.

The court said:

> The remaining question is whether the note, sued on, is an "obligation contracted for the erection of improvements" on the land in question, within the meaning of the third section of the 12th article of the Constitution? The engine, etc., for which the note was in part given, was purchased of appellants, by Maddox & Toms, as partners, and placed on the premises as a motive power to the gin, etc., to be used in their partnership planting business. Maddox had no interest in the land. As between him and Toms, it did not become part of the realty, but remained personalty, and was subject to their partnership debts. Toms was only a tenant in common with his sisters, and they could not have claimed that the portable engine, placed on the land by him and his partner, for purposes connected with their planting business, became part of the realty. If Toms had been the sole owner of the land, and purchased the engine and placed it on the premises for his own purposes, and the controversy had arisen between him and a vendee to whom he had sold the land, there might be a question whether it was not a fixture, and passed with, and as part of the realty. 1 Wash. on R. Prop., top pages, 16, 17.
>
> Upon the facts of this case, the engine, etc., was surely not an *improvement* erected on the property within the meaning of the clause of the Constitution in question. As held by the court below it was no permanent betterment of the property.

Greenwood & Son v. *Maddox & Toms*, 27 Ark. 648.

In *Bemis* v. *First National Bank*, 63 Ark. 625, 40 S.W. 127, the question presented was whether a complete sawmill and planing mill outfit and attached machinery consisting of five boilers, two engines, a sawmill with saw, shafting, pulleys, belting, fixtures, a planing machine, etc. were real property or personal property as between an attaching creditor and the holder of a vendor's lien on the real estate on which the mill was located. All were attached to the buildings on the

grounds in the usual way. In holding that this property was real estate subject to the vendor's lien, this court then said:

> ****The difficulty, in any case, is in determining whether a piece of property, where movable, and yet attached, is the one or the other species of property; and the general rule has never been changed, but more particularly explained in modern times. Thus, while a building and things fastened for use in it are prima facie real estate, because they answer the general definition of the common law, yet many circumstances are liable to intervene by which the classification of these articles coming under the head of "fixtures" may become personal property. In *Choate* v. *Kimball,* 56 Ark. 55, 19 S.W. 108, this court applied the following rules, taken from the authorities, and generally recognized as proper explanations of the general rule, to wit: (1) "Real or constructive annexation of the article in question to the realty." (2) "Appropriation or adaption to the use or purpose of that part of the realty with which it is connected." (3) "The intention of the party making the annexation to make the article a permanent accession to the freehold; this intention being inferred from the nature of the article affixed, the relation and situation of the party making the annexation, and the policy of the law in relation thereto, the structure and mode of annexation, and the purpose or use for which the annexation has been made." It is unnecessary to discuss the first two definitions, since, for all practical purposes of this case, they are comprehended in the third statement, and of this Ewell, in his work on Fixtures (page 22), says: "Of these three tests the clear tendency of modern authority seems to be to give pre-eminence to the question of intention to make the article a permanent accession to the freehold, and the others [the first and second statements] seem to derive their chief value as evidence of such intention." In the case of *Choate* v. *Kimball,* supra, this court said: "Without making a detailed recital of the facts in this case, it may be stated that the annexation was sufficient to meet the requirements of the first test; but that the articles could be removed without any injury to the freehold, or any material injury to

themselves, and that the articles were appropriate and adapted to the use of the realty with which they were connected, but that they were equally appropriate and adapted to the use of other sawmills. The articles may or may not have been fixtures within the first and second tests, and whether they were or were not must be determined by an application of the third." The same, in substance, may be said of the machinery and necessary appliances of the mills in question, and of any other sawmill; and in making this statement we need not assent to or dissent from the statement that it is material whether the articles are so attached as that they may be detached without injury to the freehold or to themselves, for the mere manner in which the articles are attached may not so much evidence the intention of making the annexation permanent or temporary as an intention to provide the more conveniently for mere possible changes. Applying the third test to the facts in that case, this court held the articles to be personal property, but solely on evidence to the effect, as stated in the opinion, that it was the custom in the locality to regard and treat all such as personal property, and that the mortgage seemed to express a reference to the existence of this custom ***** On the contrary, the evidence shows that this mill site had peculiar adaptation and advantages as such, and had been long in use for that purpose, and that it is the custom to regard sites of this character as permanent, and all the machinery attached to the buildings thereon as a part of the realty. ***** The corresponding language in the deed from Coy to Blinn is: "Now, therefore, be it known that I, L. M. Coy, receiver, in consideration of three thousand seven hundred and fifty dollars, *** do hereby grant, bargain, and sell unto the said Horace Blinn, and unto his heirs and assigns, forever, the following described lands: ***; together with all the mills, machinery, tools, fixtures, appurtenances pertaining to the same. To have and to hold the same unto the said Horace Blinn, and unto his heirs and assigns, forever." This means substantially (according to our view of it) the same as the expression, "and all the improvements thereon," - a phrase of such common use in our Western country to denote whatever

> has the character of a physical fixture at the time, and is generally comprehended in the words "appurtenances," "hereditaments," etc., and in this case made to come under the last designation expressly in the habendum clause.

This case involving the question, as the court put it, of improvements on land, is clearly indicative that fact questions as to the intention of the parties do exist and that evidence of custom may be admissible in deciding the question.

In holding that electric light fixtures in a theater constituted an improvement to the land under the mechanics and materialmen's lien statute, this court turned its decision upon the intention of the lessee to make them a permanent part of the building, emphasizing the fact that they were so installed as to be incorporated into the building and became a component part of it, with the intention that they remain until they wore out. Other factors considered were their essentiality to the successful operation of the theater, their having been designed for that use, and their reasonable necessity for the purpose for which they were placed in the building. *O'Neill* v. *Lyric Amusement Co.*, 119 Ark. 454, 178 S.W. 406.

In holding that the trial court correctly decided that a wagon scales apparatus consisting of a platform mounted over a concrete-lined pit, with a rod running into a house through a small hole in the floor became a part of the realty as between the vendor of the real estate and one who claimed under an unrecorded agreement with the vendor authorizing removal of the scales, we called attention to the fact that removal of the scales would leave an unsightly and dangerous hole on the premises and removal of the rod would leave a hole in the floor of the house. The importance of the manner of attachment to the building was emphasized in the opinion. *Waldo Fertilizer Works, Inc.* v. *Dickens*, 206 Ark. 747, 177 S.W. 2d 398.

In *Dent* v. *Bowers*, 166 Ark. 418, 265 S.W. 636, we considered the question whether a filling station, consisting of an underground tank and a gasoline pump attached thereto, on and under the street and sidewalk adjoining a lot on which a

garage building was situated, was a fixture which passed by deed to the purchaser of the lot as against the claim of ownership by a lessee who purchased from a former tenant. The trial court held in favor of the lessee. We reversed, holding that there was a clear preponderance of evidence showing that the filling station was a fixture, giving consideration to its character and use and the resulting presumption, *in the absence of proof*, that the owner had annexed the filling station as a permanent accession to his land.

In *Evans* v. *Argenta Building & Loan Assn.*, 180 Ark. 654, 22 S.W. 2d 377, the litigation was between the mortgagee in a mortgage on a house and lot and the seller of certain plumbing fixtures installed in the house under a contract with the owner by which the seller retained title. We said:

> Here the testimony shows that, under the conditional sale whereby the title was reserved, the company installed certain lines of pipe by which pure water might be furnished and sewerage connections afforded, and there was also put in place in the bathroom a "closet combination, consisting of bowl, tank and seat." The testimony is to the effect that these articles were attached to the floor and walls with screws and might be removed without material damage to the building or the premises, but the testimony also shows that to remove the pipe would leave holes in the floor and walls of the building and would require the excavation of the premises adjacent to the house, as the pipe had been placed in the ground. This latter work would disfigure the building and damage it, as well as the ground adjacent to it, and the right to remove the pipe does not exist. We perceive no reason, however, why the closet combination, consisting of the bowl, tank, and seat, may not be removed as their removal will cause no material damage to the property.

Greenwood, O'Neill, Dickens, Dent and *Evans* were considered authoritative in *DePriest* v. *Peikert*, 211 Ark. 460, 200 S.W. 2d 804. The property involved there was a "tourist camp." The lessor sought cancellation of a lease of the property, alleging a breach, and sought to enjoin the lessee

from removing a heating plant and waterworks system. The lessor relied upon a clause in the lease providing that all improvements on the buildings or lands made by lessees should become a part of the realty and remain on the lands. We said:

> In the case at bar the water pipes and gas pipes, as well as the gas tank, have been laid underground, and the pipes have been conducted into the buildings through small holes. To take up the pipes and gas tank would necessitate digging up of soil covering them. The removal of the pipes from the buildings would inevitably inflict some damage on these structures.
>
> We conclude that, as to the water and gas distribution lines and the gas tank, these articles were so affixed to the real estate as to become "improvements" within the meaning of this word as used in the lease and that appellees therefore do not have the right to remove same.
>
> A different situation as to the water pump, motor and water tank is shown. This machinery is fastened by bolts to a concrete foundation and may be removed readily and without any damage to the realty. It did not under the circumstances shown become an improvement to a building or to the land as the terms were used in the contract.

In *Bache, Recvr.* v. *Central Coal & Coke Co.*, 127 Ark. 397, 192 S.W. 225, we held that the question whether a tipple for removal of coal from a mine was a removable trade fixture or a part of the realty was for the jury. There was testimony that the tipple was an essential part of the machinery in the mine and connected with it, that essential machinery was supported by the tipple, and that this machinery and tipple constituted one connected unit necessary in the operation of the coal mine. There was also evidence that the tipple was so erected that it could be taken down and rebuilt.

Not too long ago, we held that light fixtures, carpeting, heating and air-conditioning equipment and display cases installed by a tenant for his own use and benefit could be

removed by him, even though the removal left a bare exposed wall in the same condition he found it, emphasizing the fact that the tenant did not install these "trade fixtures" to enrich the freehold, the great latitude and indulgence accorded by the courts to a tenant's claims in that regard, and the great significance of the test of removability based upon the intention of the party making the annexation and his situation and relation to the owner of the soil. *Sparkman* v. *Etter,* 249 Ark. 93, 458 S.W. 2d 129. See also, *Arkansas Cold Storage & Ice Co.* v. *Fulbright,* 171 Ark. 552, 285 S.W. 12. The importance of the intention of the improvement was emphasized in *Romich* v. *Kempner Bros. Realty Co.,* 192 Ark. 454, 92 S.W. 2d 215 and *W. B. Thompson & Co.* v. *Lewis,* 120 Ark. 252, 179 S.W. 343. It is notable that it is recognized that the manner of attachment and the removability of machinery are circumstances to be considered in arriving at the intention of the parties.

Among other cases holding or recognizing that there was a question of fact are: *British & American Mortgage Co.* v. *Scott,* 70 Ark. 230, 65 S.W. 936; *Kearbey* v. *Douglas,* 215 Ark. 523, 221 S.W. 2d 426; *Hoing* v. *River Valley Gas Co.,* 196 Ark. 1165, 121 S.W. 513.

I do not consider *Alwes* v. *Richheimer,* 185 Ark. 535, 47 S.W. 2d 1084, the case cited in the majority opinion, to be contrary to my position or the cases herein cited or to mandate the affirmance of the sustaining of the demurrer in this case. The concluding paragraphs in that case read:

> Applying these principles, we think the articles enumerated above are fixtures because, not only are they attached to the building, but are used and are useful in connection with the operation of the building as a theater or moving picture show, the only purpose to which it is adapted.
>
> We therefore agree with the trial court that said articles after being placed in the theater building and attached thereto became fixtures, lost their identity as chattels, and passed under the first and second mortgages without special enumeration, and were subject to foreclosure and sale as a part of the realty.

The bar of a statute of limitations cannot be raised on demurrer unless the complaint affirmatively shows upon its face not only that sufficient time has elapsed to bar the action, but that there are no facts or grounds that would avoid or take the case out of the operation of the statute. *Gibson* v. *Gibson,* 244 Ark. 327, 424 S.W. 2d 871; *State, Use Glover* v. *McIlroy,* 196 Ark. 63, 116 S.W. 2d 601; *Rogers* v. *Ogburn,* 116 Ark. 233, 172 S.W. 867; *Hutchinson* v. *Hutchinson,* 34 Ark. 164.

Since the allegations relating to the manner of attachment and the purposes and use of the storage tank do not conclude the matter or foreclose an inquiry into the basic facts in that regard and the intention of the parties shown by the circumstances, I would reverse the judgment.

I am authorized to state that Mr. Justice Jones joins in this dissent.

PIONEER FINANCE COMPANY *v.* Nancy MURCHISON

74-362 521 S.W. 2d 524

Opinion delivered April 21, 1975

Sam Goodkin, for appellant.

Harry A. Foltz, for appellee.

Jim Guy Tucker, Atty. Gen., by: *Lonnie A. Powers,* Dep. Atty. Gen., *Amicus Curiae.*

CONLEY BYRD, Justice. At issue here is the validity of Acts 1953, No. 559 [Ark. Stat. Ann. §§ 67-1401 et seq (Repl. 1966)]. That Act makes it unlawful for any nonresident person, partnership or corporation to "engage in the business of lending money in the State of Arkansas by means of advertising over the radio, through the mails or by any other means of advertising" unless the nonresident posts a bond in the amount of $5,000, designates an agent for service and files a notice with the State Bank Department of an intention to engage in the business of lending money. Section 5 provides that any loan made either under the act or contrary thereto "shall be held to be an Arkansas Contract" and Section 6 makes null and void any contract made contrary to the Act.

The facts giving rise to this litigation were stipulated. Appellee, Nancy Murchison, a resident of Arkansas, went across the state line to appellant's office in Arkoma, Oklahoma, and borrowed a stipulated sum of money. Since that time she has made no payments thereon and is in default. The loan arrangement is valid under the laws of Oklahoma. Appellant, Pioneer Finance Company, is an Oklahoma Corporation engaged in the business of lending money and as such does considerable advertising in the Fort Smith, Arkansas newspapers, Southwestern Bell Telephone Directory, etc.

The trial court held the Oklahoma loan contract void under Acts 1953, No. 559, and rendered judgment for appellee. Hence this appeal.

As can be seen from the foregoing recitations, the Act here in question imposes burdens upon nonresident lenders that are not applied to resident lenders.

Appellee recognizes that the transaction here involved is controlled by the commerce clause of the United States Constitution but relies upon *Head* v. *New Mexico Board,* 374 U.S. 424, 83 S. Ct. 1759, 10 L. Ed. 2d 983 (1963), as making this a permissible police regulation relating to the health, life and safety of the citizens of the State of Arkansas. In this connection appellee points to the annotation of the *Head* case appearing at 10 L. Ed. 2d 1388 as follows:

> "Although it was suggested in some early commerce clause cases that any burden imposed upon interstate commerce by a state or municipality was unconstitutional, or that any "direct" or "substantial" burden on interstate commerce was unconstitutional, the currently accepted view is that a state or municipality, in regulating advertising, may constitutionally impose a burden on interstate commerce if there is (1) a sufficient local interest in the matter regulated, and a reasonable exercise of the 'police power,' (2) no discrimination against interstate commerce, and (3) no disruption of required uniformity as to regulation of interstate commerce.
>
> Thus, in upholding advertising regulations the courts have often emphasized that (1) there was a substantial local interest in the matter regulated, and the 'police power' to regulate such matters as those affecting health, safety, and morals was reasonably exercised; (2) there was no discrimination against nonresidents or against interstate commerce; and (3) there was no disruption of required uniformity. On the other hand, where advertising regulations have been considered unconstitutional as applied to interstate commerce, it has been insufficient local interest in the matter regulated, or that there was interference with an area of interstate commerce which, if regulated at all, required uniformity of regulation."

Appellee to get around the nondiscrimination requirement then argues:

> "Applying the second part of the test to the instant case, there is no *discrimination* against interstate commerce because in effect this statute is simply making it impossible for a foreign lender who solicits loans from Arkansas residents by advertising to lend money at a higher interest rate than 10% and still enforce its contracts, just as Arkansas lenders are prohibited from doing. Whether a state unconstitutionally discriminates against commerce is to be determined, not by the ostensible reach of its language, but by its practical operation."

In this argument appellee erroneously assumes that the prohibition set forth in Acts 1953, No. 559, is limited to contracts in excess of 10% interest per annum. As we read the Act it would void a non interest bearing contract.

Having demonstrated that the Act discriminates against interstate commerce, it follows that we must hold that it is invalid. Consequently, we need not reach the other arguments made with respect to the invalidity of the Act.

Reversed and remanded with direction to enter judgment according to the stipulated facts.

JOHN A. FOGLEMAN, Justice, concurring. I concur in the result. The first issue raised on this appeal questioned the applicability of Act 559 of 1953 [Ark. Stat. Ann. § 67-1401 - 1406 (Repl. 1966)]. The appellant does not have a place of business in Arkansas. It makes loans to Arkansas residents who come to apply for them at its offices in Arkoma and Sallisaw, Oklahoma. Appellee came to appellant's place of business on September 24, 1973, and borrowed a sum of money and executed a promissory note and a security agreement. Act 559 makes it unlawful for a nonresident person, partnership, firm or corporation to engage in the business of lending money in the State of Arkansas by means of advertising without complying with the act. Ark. Stat. Ann. § 67-1401. It also provides that any such person, partnership, firm or corporation engaged in the business of lending money in the State of Arkansas by means of advertising shall be considered doing business in this state. Ark. Stat. Ann. § 67-1402. The engaging in the business of lending or attempting to *lend money in the State of Arkansas* without complying with the act is a misdemeanor. Ark. Stat. Ann. § 67-1404. It makes null and void any contract made contrary to the provisions of the act. Ark. Stat. Ann. § 67-1406. The loan was not made in Arkansas. The act is clearly not applicable in this case.

This being the case, there is no reason or justification for treatment of the constitutional issue. For more than 75 years this court had said that it would not and should not consider constitutional questions unless the answers were so necessary to a decision in the case that it could not otherwise be decid-

ed. We said so as late as 1972 in *Board of Equalization* v. *Evelyn Hills Shopping Center,* 251 Ark. 1055, 476 S.W.2d 211. The court discovered an exception theretofore non-existent in Arkansas in *Wood* v. *Goodson,* 253 Ark. 196, 485 S.W. 2d 213. That exception "is where the settlement of the controversy involves a matter of public importance." I don't know what this means, and I doubt that my brethren do. It seems to me that it will lead to ad hoc, case by case, decisions as to whether a question is of sufficient "public importance" to justify the court in exercising its power to construe the constitutions of Arkansas and the United States. It will inevitably produce whimsical and inconsistent determinations dependent upon current personnel of the court and its collective mood of the moment - something the judiciary should abhor as an impediment to the successful operation of a constitutional, tripartite government, and the rule of law.

Judicial restraint should be greatest when the judicial department is called upon, as it is here, to strike down a statute adopted by the legislative department, the primary policy making branch in our system of government and the repository of all powers of government not reserved to the people or assigned to another government or department of government.

I can only reiterate the protest I have registered in such cases as *Grimmett* v. *State,* 251 Ark. 270-A, 476 S.W. 2d 217; *Wood* v. *Goodson,* supra; *GAC Trans-World Acceptance Corp.* v. *Jaynes Enterprises, Inc.,* 255 Ark. 752, 502 S.W. 2d 651.

In *Wood* v. *Goodson,* supra, we were called upon to strike down a judicial act, not a legislative one, as we are here. I submit that the public importance of the decision here is far less than was the case in Board of *Equalization* v. *Evelyn Hills Shopping Center,* supra, and in many other cases where this court has properly avoided the opportunity to exercise its powers to decide constitutional questions, particularly where doing so results in striking down a solemn enactment of a coordinate, coequal department of government.

If the loan had been made *in* Arkansas we would not have been presented with the constitutional question in this

case. The loan would have been challenged as usurious. At least, we would have the matter before us in a different factual context.

Sonny Carl MUNN *v.* STATE of Arkansas

CR 75-5 521 S.W. 2d 535

Opinion delivered April 21, 1975

John Lineberger and *John Barry Baker*, for appellant.

Jim Guy Tucker, Atty. Gen., by: *Robert A. Newcomb*, Asst. Atty. Gen., for appellee.

FRANK HOLT, Justice. This case arose from a head on collision in which two people were killed. A jury convicted appellant on two counts of involuntary manslaughter, Ark. Stat. Ann. § 41-2209 (Repl. 1964), and assessed his punishment at two years on each count in the State Department of Correction. Appellant first asserts for reversal of the judgment that the deputy clerk and the court improperly commented upon appellant's right to remain silent. We must agree as to the comment by the court.

After the jurors were selected and sworn, the following discussion occurred:

> THE COURT: All of the witnesses in this case, please stand and be sworn. Defendant is now in jeopardy.
>
> (A deputy clerk, Mrs. Shipman, asks that the defendant be sworn, along with witnesses in the case.)
>
> MR. LINEBERGER: I think we have the right to have him sworn at a later time.

> THE COURT: Sure. Sure. He doesn't have to take the stand at all if he doesn't want to.

Appellant objected and asked for a mistrial which was refused.

In *Russell* v. *State,* 240 Ark. 97, 398 S.W. 2d 213 (1966), we said:

> If the accused is to have the unfettered right to testify or not to testify he should have a correlative right to say whether or not his silence should be singled out for the jury's attention.

In *Mosby* v. *State,* 249 Ark. 17, 457 S.W. 2d 836 (1970), the trial court commented during voir dire that the jury would be instructed at the close of the trial. There the court said "[O]ne of the instructions will be concerning the situation that the defendant did testify and in the event he didn't testify concerning that situation." In holding this constituted prejudicial error, we said:

> Based upon the record before us, we cannot say whether the remarks of the court upon voir dire were invited or not. So, in that state of the record, the fact that the trial court brought appellant's silence or non-silence as a witness to the jury's attention during voir dire rather than during final instructions is of no consequence. The appellant's 'correlative right to say whether or not his silence should be singled out' was infringed upon just the same. The prerogative of so alerting the jury was exclusively within the option of the appellant.

In the case at bar, the appellant's right to testify or not to was brought to the jury's attention by the court. That unfettered right belongs to appellant. The state argues that *Russell* and *Mosby* are inapplicable because the court's remark was invited by appellant's attorney. We cannot agree. His attorney was merely stating correctly that the appellant had "the right" to be sworn later.

Appellant next asserts that the trial court erred in allow-

ing an excused witness to be recalled to the stand. Pursuant to Ark. Stat. Ann. § 43-2021 (Repl. 1964), both parties invoked the "rule." The court then excluded the witnesses from the courtroom. A policeman testified for the state. He was excused by the state "to return to his duties." However, unknown to the parties, he remained in the courtroom and heard other testimony before his presence was observed. Over appellant's objection, the officer was recalled by the state and gave additional testimony which rehabilitated his earlier testimony.

The appellant relies on our recent cases. *Reynolds* v. *State,* 254 Ark. 1007, 497 S.W. 2d 275 (1973); and *Vaughn* v. *State,* 252 Ark. 505, 479 S.W. 2d 873 (1972). The appellee responds that it was discretionary with the court in permitting the witness to testify again upon recall. *Clubb* v. *State,* 230 Ark. 688, 326 S.W. 2d 816 (1959); and *Harris* v. *State,* 171 Ark. 658, 285 S.W. 367 (1926). Suffice it to say that the witness' presence in the courtroom after testifying is not likely to occur again upon a retrial.

Appellant next asserts that the court erred in permitting an investigating officer to give his opinion as to the direction the two vehicles were traveling when they collided. There was no eyewitness to the accident. A state policeman, who investigated approximately five accidents a week for eleven years, observed the skid marks and the resting places of the vehicles involved. When asked "[W]hat did you physically observe, officer," he responded that appellant's "vehicle was traveling toward Fayetteville." In the circumstances, we cannot agree that this experienced officer's testimony, based upon his observation of the physical evidence at the scene, was speculative and invaded the province of the jury with respect to a factual issue.

Appellant next asserts that the trial court erred in allowing testimony about appellant's blood analysis. Appellant's contention is that a proper chain of custody was not proven. The blood sample was taken, sealed and labeled by a lab technician in the presence of a state police officer. The sample remained in the officer's custody until it was delivered to Lt. Karl Martens of the Springdale Police Department. Martens

testified that he put the sample in the refrigerator and stayed in the room until he made the analysis. After completion of the analysis, the vial was placed in an unlocked storage cabinet. There is no evidence of any tampering with the vial. Any access to it by others, in the circumstances, would bear only upon the credibility or weight of the evidence.

Appellant contends that the blood sample was drawn at a doctor's request and, therefore, the doctor-patient privilege prevails. Ark. Stat. Ann. § 28-607 (Supp. 1973); and *Ragsdale* v. *State*, 245 Ark. 296, 432 S.W. 2d 11 (1968). The lab technician testified that the blood sample was taken by him at a doctor's request. However, the investigating officer disputed this and testified that it was done only at his direction and in his presence. Furthermore, there is absolutely no evidence that the sample was taken for purposes of medical treatment. We find no merit in this contention.

Appellant also asserts that the state failed to prove that the blood test was performed according to methods approved by the Arkansas State Board of Health and Ark. Stat. Ann. § 75-1046 (b) and § 75-1031.1 (c) (Supp. 1973). There is evidence of substantial compliance with the Health Department rules and pertinent statutes. A qualified lab technician drew the sample. Pursuant to Arkansas State Department of Health rules (AP-210), he cleansed the skin with a non-alcoholic solution. The sample was placed into a container with an anticoagulent and sealed pursuant to AP-213. The technician, who was familiar with these rules, labeled the vial as to the time it was drawn, the date and appellant's name. AP-213. Pursuant to AP-215, the officer, who requested the sample, observed the extraction in order to testify as to authenticity. Lt. Martens refrigerated the sample when he obtained possession. AP-214. He is a certified operator and used a certified gas chromatograph for the analysis, a method approved by AP-315.

AP-210 requires that the sample be collected within two hours of the alleged offense. In this case, the most accurate testimony as to the time of the accident was 9:30 p.m. However, the victims were not administered to in the emergency room of the hospital until 11:30 p.m. The blood

sample was drawn from appellant about 12:40 a.m. Lt. Martens testified on cross-examination that the longer one waits to run the blood alcohol test the percentage of alcohol decreases. Certainly, appellee has shown substantial complience and no prejudicial error is demonstrated.

Finally, appellant asserts that the trial court erred in overruling appellant's motion for a directed verdict. In *Burks* v. *State*, 255 Ark. 23, 498 S.W. 2d 336 (1973), we reiterated our well established rule:

> . . . . 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.

Shortly before the accident, a witness observed appellant at a liquor store. To him, appellant acted drunk. "I told the man that I didn't think that he was able to drive, and he told me to worry about my own business." The liquor store is between the site of the accident and Prarie Grove. The state policeman observed the physical evidence, as previously indicated, and testified appellant was traveling toward Fayetteville. Another witness, on cross-examination, testified that appellant told him he was on his way to Springdale, which is in the Fayetteville direction. To travel toward Fayetteville, the proper lane of travel would be the right lane. The accident, a head on crash, occurred on the left side of the highway near the shoulder. In the other car were two people, who lived at Prairie Grove, and were pronounced dead on arrival at the hospital. The weight of alcohol in appellant's blood was 0.16 percent, which is above the level considered to be a presumption that a person is intoxicated. Ark. Stat. Ann. § 75-1031.1 (a) (3) (Supp. 1973). The appellant was found within a few minutes following the accident unconscious and alone in his car which was on fire. The impact was so terrific that it left broken glass, debris and oil where it occurred. It appears from the exhibits that both cars were completely demolished. One witness testified that it took him approximately five minutes to extricate the appellant from his car.

It must be said that a jury could infer that the appellant

was alone and driving toward Fayetteville. In *Abbott* v. *State*, 256 Ark. 558, 508 S.W. 2d 733 (1974), we said:

> . . . . the question whether circumstantial evidence excludes every reasonable hypothesis other than an accused's guilt is usually for the jury, and no greater degree of proof is required where the evidence is circumstantial. (Citing cases.) It is only when circumstantial evidence leaves the jury, in determining guilt, solely to speculation and in conjecture that we hold it insufficient as a matter of law. (Citing cases.) In testing its sufficiency, we must view it in the light most favorable to the state.

We are of the view the evidence is not insubstantial as a matter of law and that it constituted a factual issue for the jury's determination.

Reversed and remanded for the error indicated.

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